

MORRIS NICHOLS  
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# THE PUBLIC BENEFIT CORPORATION GUIDEBOOK

UNDERSTANDING AND  
OPTIMIZING DELAWARE'S  
BENEFIT CORPORATION  
GOVERNANCE MODEL

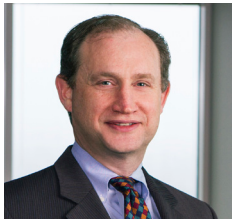
FREDERICK H. ALEXANDER

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## PREFACE

The benefit corporation model has emerged in the last decade, having been adopted in a majority of U.S. states, and by over 3,000 corporations. This new governance model broadens the perspective of traditional corporate law by incorporating concepts of purpose, accountability and transparency with respect to all corporate stakeholders, not just stockholders. Delaware, the corporate domicile of most U.S. public companies, adopted legislation authorizing the creation of Delaware public benefit corporations in 2013, and since then, hundreds of PBCs have been formed in Delaware.

PBCs have a critical role to play in the twenty-first century economy. The PBC Guidebook is the first comprehensive treatment of Delaware's new provisions. Author Frederick Alexander, Head of Legal Policy at B Lab, draws upon decades of practice as a Delaware corporate transactional lawyer to offer an explanation of the operation of the statute and practical advice for those using it.



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### **The Public Benefit Corporation Guidebook**

Understanding and Optimizing Delaware's Benefit Corporation Governance Model

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# INTRODUCTION

## *How This Book Came to Be*

Many readers of this book will be familiar with traditional corporations and the law that governs them, and may wonder why Delaware, the center of US corporate law for the last century, would introduce a new corporate governance model. They may be reading this book to discover the “why” of Delaware public benefit corporation law as much as the “how.” In light of that, I thought it might be helpful to tell a bit of my own history with the changes to the Delaware statute.

I have spent 26 years in private practice, advising clients on Delaware corporate law issues. As a partner in the transaction group of a leading Delaware law firm, I have worked on preferred stock financings, IPOs, mergers, hostile takeovers, proxy contests, corporate governance and fiduciary issues. My practice addressed anything in the lifecycle of a corporation that involved the relationship between stockholders, directors, officers and corporations. There was a great deal of complexity, but that complexity, for the most part, arose not from a profusion of laws and regulation, but rather from the multiplicity of situations in which some fairly simple rules and principles were to be applied: directors are elected by stockholders, and, once elected, have the full authority to manage the corporation. That authority is subject to the board’s fiduciary duties of care and loyalty: the directors must prudently and unselfishly manage the corporation to create a financial return for stockholders.

Of course, there are a few other rules (how the director elections work, and what charters and bylaws can include, etc.), but that basic structure—stockholder-elected directors manage the corporation, but must do so carefully and loyally for the financial benefit of the stockholders—underlies nearly every question that comes up in corporate law disputes. This paradigm is often called the “stockholder primacy” model, and it drove much of the advice I gave.

Thus, in my practice it was critical to help directors understand the primacy of stockholder value, particularly in M&A situations. While corporations could certainly be good employers and valuable resources to the community, that was not their *raison d’être*—corporate law was about creating value for the stockholders, who owned the corporation, and who elected its managers to oversee their investment.

For corporate lawyers, these were simple, non-ideological facts. The corporate form was a brilliant legal technology that allowed entities to raise large sums of money from disaggregated investors, who could diversify their investments across many such entities, allowing many corporations to take risks and create value. The underlying ethos was that investors were willing to risk their capital with these complete strangers because they knew that there was a system in place to protect them: elected directors who were obligated to be loyal to stockholders.

A few years ago, when I was chairing the bar committee (the Council”) that recommends changes to the Delaware General Corporation Law (the “DGCL”), we were approached by B Lab, a non-profit organization that wants to provide corporations with a broader remit, so that they have a purpose of creating value for all of their stakeholders, not just stockholders. B Lab certifies companies as being good corporate citizens (like a Fair Trade mark for corporations). B Lab has requirements for certification: first, the company must meet a strict standard of social and environmental performance; second, the company must have a corporate governance model that mandates good corporate citizenship. For corporations, however, that second aspect violates the stockholder primacy model central to traditional corporate law, and B Lab was lobbying state legislatures to adopt a statute they had drafted called the Model Benefit Corporation Law (the “MBCL”). The MBCL contains a number of provisions that require corporations to follow a broader fiduciary model. When a state adopts the MBCL or similar statutory provisions, corporations created under that state’s general corporation law can opt into the new provisions, and become “benefit corporations.”



In Delaware, the Council's immediate reaction to B Lab was far from positive. The corporate bar was very comfortable with the way that corporate law worked, and recognized the tremendous value the corporate form had produced over time. Even corporate lawyers who believed that corporate behavior with respect to social and environmental issues was a concern, and who believed that the profit motive could encourage behavior that damaged the public interest, generally did not think those issues should be addressed by changing corporate law. Instead, there was consensus that those issues could be better addressed with laws and regulations that protected society and the environment. There was also a consensus that trying to add those concepts into a corporate governance model would be untenable, and would enhance board discretion too broadly, providing management with a tool that could be abused in hostile takeover situations.

However, the Council was encouraged by the Governor and the Secretary of State to undertake a review of the concept, particularly in light of Delaware's national leadership in corporate law, and the growing interest in the benefit corporation movement. With the assistance of B Lab, members of the Council met with entrepreneurs and investors who championed the concept. As a result of this process, the Council determined that Delaware ought to offer the option of mission-aligned governance to corporations. In 2013, Delaware adopted a statute that allows corporations to opt into a structure where the duties of directors extend beyond stockholders to include all stakeholders. As discussed in Chapter Two, however, Delaware's statute has some significant differences from the MBCL, and also uses slightly different terminology, so that corporations using the Delaware version are called "public benefit corporations," and sometimes referred to as "PBCs." In this book, I will try to use the term "PBC" when referring specifically to Delaware entities, and "benefit corporations" when referring to the general concept. As of this writing, a total of 32 United States jurisdictions and Italy provide some form of benefit corporation legislation.

I wanted to write this book because I suspect that many corporate lawyers are still where the Council was when first approached by B Lab – suspicious that this is not a very good idea, and maybe thinking "if it ain't broke . . ." I want to share some of my thought process in moving from being first a strong skeptic, to one of the drafters of the PBC statute, and finally, to Head of Legal Policy at B Lab.

First, I re-examined corporate theory as we studied B Lab's proposal. One idea that struck me came from Lynn Stout, a law professor at Cornell, who wrote an important book called *The Shareholder Value Myth*.<sup>1</sup> In that work, she notes that if a human being were to operate under the rule of always maximizing value for herself, no matter what the cost would be to others, we would consider such a person a psychopath. The question is then whether we want corporations to operate on the psychopathic principle: do we really want the directors to be required by their fiduciary duties to include child labor in their supply chain, or to heap costs on future generations, whenever they determine that such actions are legal, and will increase stockholder value? For most of us, the question answers itself.

Another work I found significant was the book *Firm Commitment*,<sup>2</sup> written by Colin Mayer, a finance professor at Oxford. Mayer convincingly shows that the destruction of trust created by the value maximization principle has the paradoxical effect of destroying value for the value maximizing entity. He argues that when any third party deals with a corporation bound by traditional fiduciary principles (think employees, customers, communities), the third party knows that any commitment the corporation makes is contingent on either legal compulsion (a contract right) or the commitment continuing to create value for stockholders. This contingency creates antagonism and overly legalistic relationships that deter the creation of durable long term value with trusted partners.

A third concept that was important in my thinking was the idea of the universal owner. Large institutional owners, like pension funds and mutual funds, end up owning most of the market in order to be sufficiently diversified. Small asset owners (like my 401(k)) would be wise to have the same diversification. The returns of such universal owners are hurt by a corporate law regime that actively encourages the managers of a huge portion of our economy to load negative externalities onto the system if it "creates value" for their individual stockholders. Hermes Investment Management,

a well-known UK pension advisor, articulates this idea in its ownership principles:

Most investors are widely diversified; therefore it makes little sense for them to support activity by one company which is damaging to overall economic activity. . . . It makes little sense for pension funds to support commercial activity which creates an equal or greater cost to society by robbing Peter to pay Paul.

Yet traditional corporate law *requires* corporations owned by Peter to rob Paul.

All of this led me to believe that there is good reason to provide an option where corporations can be managed with the good of all stakeholders in mind, rather than simply focusing on financial returns to stockholders. Hopefully, by making room for such corporations, Delaware's statute can create opportunities for entrepreneurs and investors interested in corporations that operate in a responsible and sustainable manner, thus creating market pressure for more businesses to do the same.

I remain convinced that the for-profit corporation remains the best vehicle for raising and allocating capital (other than for certain public goods that remain the responsibility of government and NGOs). However, given the challenges that our planet and society face, I also believe we must look for a way to allow that vehicle to operate with a recognition of the interdependence of our complex globe, and the responsibility that follows. The benefit corporation provides such a path.

### *Who Is This Book For?*

This book was written primarily for the practicing lawyer—whether in private practice or in-house. Business lawyers, depending on their area of practice, have more or less knowledge of corporate law. Recognizing that, I have tried to include some basic law and theory around fiduciary issues, so that those who are less familiar can read this book and understand the differences between traditional corporate law and benefit corporation law.

The book is intended to neutralize some of the fear factor in advising entrepreneurs and managers who are interested in pursuing this model. If you have used traditional corporations for a long time, there is a natural tendency to think that forming a benefit corporation creates too many unknowns and complications. If this book is successful, it will not be because it convinces the reader that every corporation should be a benefit corporation—it will be because the reader comes away believing that if the form fits a clients' needs, she can comfortably help them move forward in forming a benefit corporation, helping to draft a specific purpose, creating some operating guidelines, and helping them to report periodically as required by the applicable statute.

I also hope this book will develop a non-lawyer audience, although it occasionally lapses into legalese (occupational hazard). I have tried to lay out the principles and policy arguments in a way that does not assume a background in the relevant legal principles. That said, some of the issues that come up when moving to benefit corporation status—like mergers and appraisal rights—do call for consulting with experienced counsel.

### *How This Book Is Structured*

Chapter One explains the basic relationship between directors and stockholders, what the directors' duties to stockholders are, and how courts assess whether they have been satisfied.

Chapters Two and Three outline the law of PBCs, and this may be where you want to begin if you just want to get to the “important stuff.” Chapter Two focuses on the Delaware PBC statute. For convenience, Appendix 8 includes the text of the entire statute. Chapter Three analyzes how the standards of review applied by courts to traditional corporations (discussed in Chapter One) will likely apply to PBCs.

Chapter Four includes some advice about how to operate as a PBC—how to engage in the necessary balancing among various constituencies, with a particular focus on change in control situations.

Chapter Five deals with a precursor to benefit corporation law—the constituency statute. The law of constituency statutes may provide guidance to benefit corporations and their advisors.

Chapter Six provides an alternative to PBCs in Delaware. It is a short chapter reminding the reader that a similar fiduciary model can be achieved in a limited liability company (or limited partnership) by amending the operating agreement to modify fiduciary duties.

Finally, the book includes a number of appendices, which are intended to allow you to use this as a handbook. The appendices include forms, a copy of the statute, quick reference guides as to when the Delaware PBC statute requires a high vote or appraisal rights, and other materials.

### *Who I Want to Thank*

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## **CHAPTER ONE: Fiduciary Duties for Traditional Delaware Corporations: Enforcing Stockholder Primacy**

### **READER’S GUIDE:**

Chapter One describes the current State of Delaware law for traditional corporations. It is important background for understanding the significance of Delaware’s Public Benefit Corporation Statute. Readers who are familiar with the current state of the law may wish to go directly to Chapter Two.

Under traditional corporate law, it is a bedrock principle that directors manage the corporation. Understanding this principle, as well as the duties that govern the directors, is critical to understanding the “problem” that the benefit corporation is designed to address. This chapter is intended to present the relevant law for traditional corporations,

including some areas of dispute that are particularly relevant when considering benefit corporations.

## **KEY CONCEPT:**

In traditional corporations, directors manage the corporation for the benefit of stockholders.

### **I. For whom is the corporation managed?**

The most important distinction between traditional corporate governance and benefit corporation governance is corporate purpose. Should directors manage the corporation solely for the benefit of stockholders, or must they consider other stakeholders, as well? This question has been the subject of academic debate for many years: the “ownership” and “enterprise” models of the firm best encapsulate the competing visions of corporate purpose.<sup>3</sup> Under the ownership model, the stockholders are considered the owners of the corporation and look to the directors to manage their assets.<sup>4</sup> This ownership concept leads to the stockholder primacy governance model. In contrast, the enterprise model of the firm views the corporation as an institution that serves multiple constituencies.<sup>5</sup> The enterprise model posits that because the corporation is created by the state, corporations should advance the public welfare.<sup>6</sup> The attributes granted to the corporation by the state—such as the ability to enter into contracts, to limit the liability of investors, and to have unlimited duration—are extremely advantageous to the corporation, which should correspondingly serve the interests of the state.<sup>7</sup> Each model is discussed in more detail below.

#### **A. The Ownership Model**

The quintessential case cited in support of the ownership model is *Dodge v. Ford Motor Co.*,<sup>8</sup> decided by the Michigan Supreme Court in 1919. In *Dodge*, the corporation stopped paying dividends to stockholders in order to produce less expensive products and to increase employee wages.<sup>9</sup> In determining that the stockholders were entitled to the payment of dividends, the court clearly articulated the ownership model:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.<sup>10</sup>

Thus, the corporation has a single “end”: to maximize value for its owners—the stockholders—within the bounds of law.

The ownership model has been linked in academic literature to the “agency theory,” which views the corporation as nothing more than a legal fiction that facilitates complex transactions, and which views directors as agents for stockholders, who, as the residual risk bearers in the firm, are most in need of protection.<sup>11</sup> Former Chancellor Allen explains that under the agency model of the corporation, stakeholders other than stockholders, such as employees or creditors, can enter into contracts with the corporation in return for things like salaries or agreed-upon interest payments.<sup>12</sup> These stakeholders, however, do not bear the same risk as the stockholder, who is not entitled to a fixed return like a salary or an interest payment, but rather is entitled to what, if anything, remains after these and other commitments are fulfilled.<sup>13</sup> Thus the stockholders, as the residual risk bearers, can be understood as having “contracted for a promise to maximize long-run profits of the firm, which in turn maximizes the value of their stock.”<sup>14</sup>

## **B. The Enterprise Model**

In contrast, the enterprise model of the firm views the corporation as having a social function.<sup>15</sup> Thus, directors should consider not only stockholder returns, but all other constituencies that have a stake in the corporation such as its employees, its debtholders, the environment, and the community.<sup>16</sup> It is up to the board of directors to balance these competing interests. Lynn Stout is perhaps the most well-known and articulate contemporary proponent of the enterprise model within the legal academic community: in a piece co-authored with Margaret Blair, she described the Board's obligation to the broad community:

Thus, the primary job of the board of directors of a public corporation is not to act as agents who ruthlessly pursue shareholders' interests at the expense of employees, creditors, or other team members. Rather, the directors are trustees for the corporation itself—mediating hierarchs whose job is to balance team members' competing interests in a fashion that keeps everyone happy enough that the productive coalition stays together.”<sup>17</sup>

In the mid-twentieth century, the enterprise theory held sway, at least in popular culture:

The job of management is to maintain an equitable and working balance among the claims of various directly affected interest groups . . . stockholders, employees, customers and the public at large. Business managers are gaining professional status partly because they see in their work the basic responsibility [to the public].<sup>18</sup>

Or, as *Time Magazine* put it, business leaders were “willing to judge their actions, not only from profit and loss” in their financial statements, “but of profit and loss to the community.”<sup>19</sup>

### **IMPORTANT CONTEXT:**

In the **mid-twentieth century**, corporate governance was more focused on **stakeholder values** than on **stockholder primacy**.

One significant criticism of the enterprise model is that it is simply unworkable. The concern is that there is no good way to balance the profusion of stakeholder interests, so that the model leaves directors with no guidance (and also with great room to abuse their authority, since there is no good way to measure their fidelity). Economist Michael Jensen articulates this objection:

Any organization must have a single-valued objective as a precursor to purposeful or rational behavior. . . . It is logically impossible to maximize in more than one dimension at the same time. Thus, telling a manager to maximize current profits, market share, future growth profits, and anything else one pleases will leave that manager with no way to make a reasoned decision.<sup>20</sup>

Others refute this claim by reference to the multi-faceted nature of general decision-making.<sup>21</sup>

## **C. Delaware Follows the Ownership Model**

Delaware case law has established that corporations exist primarily to generate long-term stockholder value,<sup>22</sup> even though Delaware’s corporate purpose statute broadly states that a corporation may undertake “any lawful business or purpose.”<sup>23</sup> Accordingly, corporate law in Delaware has focused on the maximization of stockholder wealth as the primary indicator of whether directors are complying with their fiduciary duties.<sup>24</sup> When there is no “long run” for a corporation—as in a sale context—Delaware courts will look at immediate stockholder wealth maximization as the sole objective for directors.<sup>25</sup>

*eBay Domestic Holdings, Inc. v. Newmark*<sup>26</sup> is a clear example of the Delaware focus on stockholder wealth maximization, even outside the sale context. In *eBay*, the directors of Craigslist’s employed defensive measures to prevent or, alternatively, slow eBay’s ability to take control of Craigslist.<sup>27</sup> In defending their actions, the Craigslist board argued that the defensive measures were put in place not for economic reasons, but to protect the company’s social values and community-centered culture.<sup>28</sup> The court found that this motivation was inappropriate, and in doing so, clearly embraced the ownership theory:

The corporate form in which craigslist operates . . . is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. [Craigslist’s directors] opted to form craigslist, Inc. as a for-profit Delaware corporation and voluntarily accepted millions of dollars from eBay as part of a transaction whereby eBay became a stockholder. *Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders.* The “Inc.” after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders—no matter whether those stockholders are individuals of modest means or a corporate titan of online commerce. . . . Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors’ fiduciary duty under Delaware law.<sup>29</sup>

The *eBay* case underlines the fact that corporations operate for the benefit of their stockholders, and, for that reason, directors must perform their duties with the primary focus of increasing stockholder wealth.

In his academic writings, the Chief Justice of the Delaware Supreme Court has adopted a reading of the Delaware case law consistent with the stockholder primacy model and has summarized it with the following proposition:

[T]he object of the corporation is to produce profits for the stockholders and . . . the social beliefs of the manager, no more than their own financial interests, cannot be their end in managing the corporation.<sup>30</sup>

## KEY CONCEPT:

Delaware cases have chosen the **ownership model**, and therefore apply the doctrine of **stockholder primacy**. This means all board decisions must ultimately be intended to create **value for stockholders**.



## D. The Status of Non-Investor Constituencies in the Traditional Corporation

Absent the unconcealed motives in *eBay*, however, directors retain substantial discretion in deciding how to best achieve long-term stockholder wealth maximization under the business judgment rule, discussed below.<sup>31</sup> For example, the Delaware courts have stated that directors may consider other constituencies, but only if such considerations coincide with the maximization of long-term stockholder value.<sup>32</sup> Some argue that Delaware case law—specifically *Unocal v. Mesa Petroleum Co.* — has explicitly recognized the considerations of nonstockholder interests. While *Unocal* acknowledged the “basic principle that corporate directors have a fiduciary duty to act in the best interests of the corporation’s stockholders,”<sup>33</sup> the court also recognized the consideration of other concerns when facing a hostile takeover including “the impact on ‘constituencies’ other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally).”<sup>34</sup> Stout notes that “the court opined that the corporate board had a ‘fundamental duty and obligation to protect the corporate enterprise, which includes stockholders,’ a formulation that clearly implies the two are not identical.”<sup>35</sup> However, others persuasively parry that the decisions in *Revlon* and *eBay* explicitly reject any such interpretation.<sup>36</sup> Chief Justice of the Delaware Supreme Court, Leo Strine, Jr., lends credence to the latter interpretation through an anecdote from the *Revlon* oral arguments:

[T]he Revlon directors argued that it was proper for them to consider the interests of [other constituencies] under the Supreme Court’s recent ruling in *Unocal*. . . . [T]he lawyer who argued for the directors, A. Gilchrist Sparks, III, indicated that this argument was quickly dispensed with by the Justices at oral argument, when Justice Moore said in words or substance that *Unocal* did not mean that.<sup>37</sup>

Instead, the Delaware Supreme Court has held that the rights of other constituencies such as creditors, employees, and the community, are limited to the protections offered by statutory, contractual, and common law rights.<sup>38</sup>

Consistent with view that other constituencies may be considered, but only when they correlate with stockholder interests, Delaware courts have interpreted the express power to make corporate donations for “charitable, scientific or educational purposes,”<sup>39</sup> as being limited to the principle that such gifts must benefit the stockholders in the long run. According to *Theodora Holding Corp. v. Henderson*:

It is accordingly obvious, in my opinion, that the relatively small loss of immediate income otherwise payable to plaintiff and the corporate defendant’s other stockholders, had it not been for the gift in question, is far out-weighted by the overall benefits flowing from the placing of such gift in channels where it serves to benefit those in need of philanthropic or educational support, thus providing justification for large private holdings, thereby benefiting [stockholders] in the long run.<sup>40</sup>

Thus, the Delaware courts have made it clear that other constituencies may be considered, but only when their interests align with the long-term wealth maximization of the corporation’s stockholders. As *Theodora* makes clear, however, the tie to stockholder value may be quite tenuous.

### KEY CONCEPT:

The business judgment rule gives directors of traditional corporations **broad discretion** to consider **stakeholder interests**, but those interests must ultimately relate to **stockholder value**.

## E. Multiple Investor Constituencies

In addition to common stockholders, preferred stockholders and creditors may have direct investments in a corporation. These constituencies often have interests that conflict with those of the common stockholders, because they may receive different rewards from the corporation's success, and may suffer different levels of loss in the case of poor performance. For groups other than common stockholders, the protections offered by Delaware law are limited when a corporation remains solvent. In some respects, the limited obligations of directors towards the holders of preferred stock and debt are analogous to the directors limited obligations to stakeholders under traditional corporate law. This analogy may serve to highlight the weakness of a governance model that insists on favoring one constituency over all others.

### 1. Directors Cannot Protect Idiosyncratic Common Stockholder Goals

Even common stockholders may have goals other than maximizing share value. For example, a controlling stockholder may have a preference for a transaction that promises liquidity, which could create a conflicting interest.<sup>41</sup> Nevertheless, courts have noted that a controlling stockholder's desire for liquidity rarely creates a "disabling conflict of interest" when all stockholders receive the same pro rata consideration in a transaction.<sup>42</sup> In addition to liquidity concerns, a controlling stockholder could favor a transaction for tax or other idiosyncratic reasons.<sup>43</sup> Such an idiosyncratic reason might include a desire to promote the interests of another stockholder in the corporation, regardless of any connection to stockholder value, or an interest in preserving the environment or the local community. Supporting such an interest could constitute "consciously failing" to act on behalf of stockholders and thus "bad faith."<sup>44</sup> Directors with, or beholden to a stockholder with, unique interests (whether financial or otherwise) may not receive the benefit of the business judgment rule<sup>45</sup> if the court believes that they are acting in pursuit of those interests.<sup>46</sup>

### 2. Fiduciary Duties to Creditors and Preferred Stockholders are Limited

Traditionally, creditors are "afforded protection through contractual agreements, fraud and fraudulent conveyance law, implied covenants of good faith and fair dealing, bankruptcy law, general commercial law and other sources of creditor rights."<sup>47</sup> Therefore, the general rule is that directors do not owe creditors duties beyond the relevant contractual terms and commercial law, such as fraudulent transfer statutes.<sup>48</sup> Creditors have attempted to impress fiduciary duties upon directors when a corporation is in the "zone of insolvency," but the Delaware courts have rejected such arguments.<sup>49</sup> When a corporation is insolvent, however, its creditors take the place of the stockholders as the residual beneficiaries of any increase in value of the corporation.<sup>50</sup> The corporation's insolvency "makes the creditors the principal constituency injured by any fiduciary breaches that diminish the firm's value."<sup>51</sup> The Delaware Supreme Court has recognized a creditor's ability to bring a derivative claim against a corporation for a breach of fiduciary duty when the corporation is insolvent, but has expressly rejected any direct claims against a corporation by individual creditors for breach of fiduciary duty.<sup>52</sup>

Similar to creditors, the rights of preferred stockholders are generally contractual in nature.<sup>53</sup> However, the corporation may owe fiduciary duties to preferred stockholders when the right claimed is shared equally with the common stockholders.<sup>54</sup> When the interests of the common and preferred stockholders diverge, "the directors generally must 'prefer the interests of common stock—as the good faith judgment of the board sees them to be—to the interests created by the special rights, preferences, *etc.*, of preferred stock.'"<sup>55</sup> The Delaware courts have also suggested that preferred stockholders may be owed certain fiduciary duties when the preferred stockholders have no contractual protection.<sup>56</sup>

The recent cases, such as *Trados* and *LC Masterfund*, suggest that directors have a fiduciary duty to common stockholders that requires them to take actions (such as engaging in high risk transactions) that benefit common



stockholders over creditors or stockholders with preferences, even where the actions do not create the most value for the enterprise as a whole. In contrast, earlier case law suggested that directors should ignore the risk profiles of particular investors when the company was near insolvency, and take actions that created the most value for the enterprise to avoid inefficiency decisions.<sup>57</sup> The evolution of the cases toward a single constituency (the common stockholder, as residual risk-bearer), with a single goal (high share value) mirrors the modern focus in traditional corporations on the fiduciary obligation to stockholders to the exclusion of all other stakeholders. From a holistic perspective, each of these narrow focal points can lead to similarly inefficient outcomes. Benefit corporation directors may be able to weigh the interests of all investors in their decision processes.

## II. Director Duties and Standards of Review

In thinking through the governance function of benefit corporations, it is important to have a grounding in the basic duties that directors have under traditional corporate law. These duties will also be applied to benefit corporations. As discussed in the prior section, directors' duties run to stockholders. Those duties include the duties of care and loyalty.<sup>58</sup> First, the duty of care requires the directors of a corporation to act on an informed basis.<sup>59</sup> In order to find a breach of the duty of care, the court must find that the directors failed to act in a deliberate, fully informed manner.<sup>60</sup> Second, the duty of loyalty requires directors to focus on the best interests of stockholders, rather than their own interests.<sup>61</sup> The duty of loyalty includes a requirement to act in good faith.<sup>62</sup> Thus, a plaintiff may question a director's loyalty by alleging that the director herself had a conflict of interest, or was influenced by someone who did.<sup>63</sup>

Standards of review establish the role of a court in determining whether board action is consistent with fiduciary obligations.<sup>64</sup> Delaware courts generally use a three-tiered standard of review when analyzing the actions taken by the board of a for-profit corporation. These three standards include (1) the business judgment rule, (2) the entire fairness standard, and (3) the "intermediate" or "enhanced" scrutiny standard. Determining which standard of review to apply is a fact-specific inquiry.<sup>65</sup>

In deciding what standard to apply, a court will determine if the directors were disinterested and independent, in which case the business judgment rule will apply, giving great deference to the decisions of the directors. In the absence of such independence—where the board has conflicts of interest—a very strict standard of review will apply: entire fairness. In intermediate situations, where structural conflicts are inherent—such as company sales and hostile takeovers—an intermediate standard of review will apply.

Those standards, as applied to traditional corporations, are discussed in more detail below. These standards will be applied to benefit corporations as well, and it is important to understand the underpinnings of the standards, as their application to benefit corporations may require certain modifications.

### A. The Business Judgment Rule

#### KEY CONCEPT:

The **Business Judgment Rule** gives directors a **large amount of discretion** in deciding how to create stockholder value. This discretion allows directors to give significant consideration to stakeholder interests, **but there are limits**.

The most lenient level of scrutiny is the business judgment rule. Courts will ordinarily defer to the judgment of the board absent unusual circumstances, such as a conflict of interest, bad faith, or gross inattention.<sup>66</sup> The business

judgment rule provides that a decision by a board of directors will not be interfered with by the courts, even if the decision appears to have been unwise or to have caused loss to the corporation or its stockholders, so long as the board is independent and informed, and acts in good faith. Thus, ordinary board decisions are generally tested under the business judgment rule.<sup>67</sup> However, in order to determine whether a transaction is entitled to the business judgment rule, the court will undertake “a threshold review of the objective financial interests of the board whose decision is under attack (*i.e.*, independence), a review of the board’s subjective motivation (*i.e.*, good faith), and an objective review of the process by which it reached the decision under review (*i.e.*, due care).<sup>68</sup> Once it is established that a board is entitled to review under the business judgment rule, its decisions are reviewed not for reasonableness, but for rationality.<sup>69</sup> Under this standard, a decision will not be disturbed by the court so long as the decision may be “attributed to any rational business purpose.”<sup>70</sup>

Thus, although directors are required to pursue value maximization for the corporation’s stockholders, the business judgment rule affords directors wide leeway in deciding how to accomplish this goal. With the substantial deference afforded to their business decisions, directors are able to sacrifice short-term corporate profits and provide benefits to other stakeholders so long as these actions serve a stockholder value maximization strategy, even if that strategy is long-term, and does not immediately maximize share value.<sup>71</sup> For example, a board may legitimately decide to increase employee salaries based on their judgment that such an action will promote the long-term productivity of the company, despite the fact that the action will temporarily decrease the corporation’s short-term profits, and (perhaps) consequently lower the company’s stock price.<sup>72</sup>

Some commentators have suggested that the business judgment rule is so broad that it essentially eviscerates the stockholder primacy view of governance inherent in the ownership model.<sup>73</sup> It is very likely the case that many directors do, in some instances, consider interests of stakeholders without directly tying that consideration to stockholder value. Moreover, it is also true that, if challenged in litigation, such decisions may be fairly easy to defend as related to long-term stockholder value, regardless of actual incentives. This circumstance does not, however, suggest that no change in the law is needed to permit directors to serve all stakeholders. First, there may be stakeholder benefits that cannot be linked to stockholder value, no matter how long-term. Moreover, those linkages do not apply to sales of the company, where all value is immediate. Finally, such arguments conflate the standard of conduct with the standard of review, and are not applicable in enhanced scrutiny or entire fairness cases, where most litigation occurs.

## **B. The Entire Fairness Standard**

While the deferential business judgment rule applies when there is no conflict of interest, the onerous entire fairness standard applies where the directors (or controlling stockholder) have an economic interest that materially conflicts with the interests of the minority stockholders.<sup>74</sup> Entire fairness applies where a majority of the board of directors is interested in a transaction.<sup>75</sup> If the entire fairness test applies, the directors must demonstrate that the transaction is entirely fair—as to both price and process<sup>76</sup>—to the corporation and its stockholders.<sup>77</sup> In establishing that a transaction was entirely fair, a board must show more than an honest belief that the transaction was fair; instead, “the transaction itself must be objectively fair, independent of the board’s beliefs.”<sup>78</sup> Thus, unlike transactions governed by the business judgment rule, conflict transactions receive close judicial scrutiny if challenged.

## **C. Intermediate Standards of Review**

Individuals involved in the governance of benefit corporations should have a good understanding of the intermediate standard, because its application to benefit corporations may be particularly significant.<sup>79</sup> Courts apply an intermediate standard of review when a board takes defensive actions, or when the corporation undergoes a change in control. In such situations, even if there is not a traditional conflict, there may be subtle pressures that undermine the integrity

of the board's process, so courts have found that heightened initial scrutiny of such situations is appropriate, even though the onerous entire fairness test is not applied.<sup>80</sup> Generally, when enhanced scrutiny applies, the defendants "bear the burden of persuasion to show that their motivations were proper and not selfish" and that "their actions were reasonable in relation to their legitimate objective."<sup>81</sup>

### 1. *Revlon* Standard: Changes in Control

Under the *Revlon* standard, the courts have imposed a heightened standard on directors approving a change in control transaction.<sup>82</sup> When there is a change in control, directors must show that they acted to obtain the best value reasonably available for stockholders.<sup>83</sup> This measured scrutiny of director decisions is grounded in the fact that, in a change of control situation, a corporation's stockholders have no long-term future, and, therefore only short-term wealth maximization of the stockholders may be considered.<sup>84</sup> Because stakeholder interests do survive such a transaction, it will be important to consider how the intermediate *Revlon* test might be applied to a change in control of a benefit corporation. This question is addressed in Part III. A. of Chapter Three, below.

#### **KEY CONCEPT:**

Under **traditional corporate law**, when a corporation is **sold**, directors cannot consider the interests of stakeholders: they must **sell to the highest bidder**.

### 2. The *Unocal/Unitrin* Standard: Defensive Actions

The intermediate standard of judicial review also applies when a board unilaterally (*i.e.*, without stockholder approval) adopts measures to defend against a threatened acquisition of control. Board action in such circumstances is subject to the *Unocal*<sup>85</sup> enhanced scrutiny standard, which was clarified and expanded upon by the Delaware Supreme Court in *Unitrin*.<sup>86</sup> A threatened acquisition of control may include a hostile takeover, a proxy contest, or other situation where the directors take action that might appear to interfere with the ability of stockholders to freely sell their shares or exercise their voting power.<sup>87</sup> *Unocal* scrutiny may also apply if a board adopts defensive measures to ensure the success of a merger, whether or not *Revlon* would apply.<sup>88</sup> The *Unocal* standard requires the board to demonstrate that it had reasonable grounds for believing that a danger to corporate policy and effectiveness existed<sup>89</sup> and that the defensive action taken was reasonable in relation to the threat posed.<sup>90</sup> A defensive measure will be found disproportionate if it is either coercive<sup>91</sup> or preclusive,<sup>92</sup> or if it falls outside a range of reasonable responses.<sup>93</sup>

As discussed above, directors may consider other stakeholders when responding to a threat. However, consideration of other stakeholders is permitted only if it relates to stockholder interest: "while concern for various corporate constituencies is proper when addressing a takeover threat, that principle is limited by the requirement that there be some rationally related benefit accruing to the stockholders."<sup>94</sup> Accordingly, when determining whether to take defensive measures against a hostile takeover attempt, directors may consider the interests of other constituencies, but only as they are "rationally related" to value for stockholders, and only where *Revlon* duties are not also applicable.

#### **KEY CONCEPTS:**

Under traditional corporate law, directors may take reasonable actions to defend against takeovers, but only to protect stockholder interests, not the interests of other stakeholders.

## D. Standards Specifically Applicable to the Exercise of the Stockholder Franchise

The Delaware courts have applied strict standards to situations where the stockholder voting rights are threatened by board action. These standards may have particular significance for stockholders of benefit corporations: such stockholders may look to franchise rights as more significant than in traditional corporations, given that the directors' fiduciary obligations to stockholders may in some sense be diluted by the broad stakeholder mandate in the benefit corporation statute. As an example of the strict standards applied to protect voting rights, the courts have held that when directors' primary purpose is to prevent the effectiveness of a vote, the Board must show a "compelling justification" for taking such action in order for the action to be upheld.<sup>95</sup> This "*Blasius*" standard expands on the Delaware Supreme Court's holding in *Schnell v. Chris Craft Industries, Inc.*<sup>96</sup> In *Schnell*, the Court held that even though advancing the company's meeting date was in compliance with the relevant statute and the company's bylaws, the Court would not uphold the action that was taken for the purpose of obstructing stockholders in the exercise of their voting rights.<sup>97</sup> In both cases, the emphasis is on protecting stockholder voting rights.<sup>98</sup>

The *Blasius* standard, however, is rarely applied:

[W]hen the matter to be voted on does not touch on issues of directorial control, courts will apply the exacting *Blasius* standard sparingly, and only in circumstances in which self-interested or faithless fiduciaries act to deprive stockholders of a full and fair opportunity to participate in the matter and to thwart what appears to be the will of a majority of the stockholders.<sup>99</sup>

Instead, the more flexible *Unocal* standard is applied when a board takes defensive action that interferes with the stockholders' franchise rights. In *Yucaipa Am. All. Fund II, L.P. v. Riggio*, then-Vice Chancellor Strine reviewed the adoption of a stockholder rights plan (or a "poison pill") under the *Unocal* standard of review, but noted that:<sup>100</sup>

[I]f a board can meet its burden under *Unocal* to show that a rights plan is not unreasonable in the sense that its trigger is at such a reasonable threshold that the owner of a bloc up to the trigger level can effectively run a proxy contest, the pill would not work the type of disenfranchisement that both invokes *Blasius* review and almost invariably signals a ruling for the plaintiff.<sup>101</sup>

The Delaware Court of Chancery has more recently noted the overlap of the *Unocal/Unitrin* and *Blasius* standards of review in *Third Point LLC v. Ruprecht*.

## CHAPTER TWO: The PBC Statute

### I. Prelude: The Benefit Corporation Movement

A growing number of investors and entrepreneurs have become uncomfortable with the stockholder primacy model discussed in Chapter One. One response was to adopt "constituency statutes," which allow, but do not require, directors to consider the interests of stakeholders. These provisions are discussed in detail in Chapter Five. As discussed in Chapter Five, constituency statutes do not fully address the concerns created by stockholder primacy. By contrast, benefit corporation legislation is designed to more fully address those concerns by requiring a change in corporate purpose and increased accountability and transparency with respect to stakeholder concerns. Beginning in 2010, United States jurisdictions began to adopt legislation implementing the benefit corporation. This legislation generally followed the MBCL drafted on behalf of B Lab, a non-profit corporation that supports business infrastructure enabling for-profit corporations to create positive social value.<sup>102</sup> Like constituency statutes, the MBCL allowed directors to

consider the interests of all stakeholders.

### **KEY CONCEPT:**

Benefit corporation statutes provide an **option** that allows corporations to elect to have a broad corporate **purpose** that includes pursuing stakeholder interests, and imposes higher standards of **accountability** and **transparency** as to such purpose.

Unlike most constituency statutes, benefit corporation legislation is “opt-in,” so that a corporation must voluntarily elect to take on the form.<sup>103</sup> Once a corporation elects to be a benefit corporation, however, consideration of non-stockholder interests is mandatory.<sup>104</sup> This mandatory structure provides a clear and durable governance scheme that addresses the concerns of all stakeholders.<sup>105</sup> Importantly, because benefit corporation statutes are “opt-in,” and require supermajority votes for conversions, stockholders are not forced to accept the broader purpose.<sup>106</sup> Additionally, the MBCL creates accountability for stakeholder interests: non-stockholder interests are *always* to be considered in director decision making.<sup>107</sup> This will prevent directors from relying on consideration of the interests of stakeholders solely when such interests are congruent with management interests (as is possible under constituency statutes). In addition, benefit corporation statutes require transparency,<sup>108</sup> so that stockholders are aware of whether a corporation is consistently addressing stakeholder issues.

## **II. Delaware PBC Statute**

### **APPENDIX ALERT:**

A copy of Delaware’s Public Benefit Corporation provisions are included as Appendix 8.

On August 1, 2013, Delaware adopted a new subchapter XV of the DGCL (the “PBCS”) authorizing the creation of a new form of entity, the Public Benefit Corporation or PBC. The PBCS is intended to address the same issues as the MBCL, and is similar in fundamental ways. Some differences are noted in the text, and set forth in Appendix 5.

### **APPENDIX ALERT / PRACTICE POINT:**

A Quick Guide to the steps necessary to become a PBC are included as Appendix 1.

#### **A. Responsible and Sustainable Management: The Balancing Obligation**

The statute begins by establishing that the purpose of the legislation is to create responsible corporate governance: a PBC is “intended to operate in a responsible and sustainable manner.”<sup>109</sup> While this provision is couched in precatory language, the statute goes on to mandate *how* the company is to be managed in a manner that addresses the concerns of a broad range of stakeholders. Specifically, the company must balance three considerations: (1) the stockholders pecuniary interests, (2) the best interests of those materially affected by the corporation’s conduct, and (3) the specific public benefit or public benefits identified in its certificate of incorporation.<sup>110</sup>

This mandate expressly rejects the stockholder primacy model by elevating stakeholder interests to a level of importance equal to that of stockholders. The statute then specifically imposes on directors the obligation to conduct a balancing in the management of the corporation.<sup>111</sup> While directors of a traditional Delaware corporation *must* act for the purpose of maximizing the economic wealth of stockholders, and *may* consider socially beneficial actions only to further that end,<sup>112</sup> directors of a public benefit corporation *must* balance the interests of stakeholders other than stockholders as ends in themselves.<sup>113</sup>

### **KEY CONCEPT:**

Delaware PBCs must balance (1) **stockholder interests**, (2) broad **stakeholder interests**, and (3) **the specific interest or interests** listed in its certificate of incorporation.

## **B. Requiring a Specific Public Benefit**

Each Delaware PBC must also choose one or more specific public benefits.<sup>114</sup> A public benefit is defined as “a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests” other than the pecuniary interests of the stockholders.<sup>115</sup> A PBC may choose to promote any public benefit, so long as that benefit fits within the broad parameters of the statute.<sup>116</sup> However, the Delaware statute does require the directors to balance the pecuniary interests of the stockholders, the specific public benefit or benefits identified in the certificate of incorporation, *and* the best interests of those materially affected by the corporation’s conduct. This third requirement incorporates a concept that is equivalent to the “general public benefit” that must be pursued under the MBCL.<sup>117</sup>

### **PRACTICE POINT:**

When choosing a **specific purpose**, a corporation should be careful to choose a provision that is **sufficiently specific** to satisfy the statute, but **sufficiently broad** so as to limit the need for charter amendments.

The statute does not delineate a level of required specificity, but corporations should pick a specific benefit that is more restricted than a restatement of the general benefit that the statute requires. This specificity will ensure that corporations receive all the protections provided under the public benefit corporation provisions. It is also a best practice to provide a purpose that is broad enough to limit the need for future amendments to the specific purpose. Thus, for example, if a company’s specific public purpose involves ensuring that school children receive nutritious meals, it may be best to refer to that generic but specific purpose, rather than articulating the specific means by which the company currently achieves that purpose since, as the company scales and evolves, its method for providing nutritious meals may also change.

## **APPENDIX ALERT**

Appendix 9 contains a comprehensive list of specific benefit purposes.

## **C. Corporate Name; Providing Notice to Investors**



Notice must be provided to the public that the corporation is organized as a public benefit corporation. Such notice is achieved by including a statement that the corporation is a PBC in the heading of its certificate of incorporation, and by identifying within its statement of purpose the specific public benefits to be promoted by the corporation.<sup>118</sup> The statute originally required that the name of the company include the words “public benefit corporation,” the abbreviation “P.B.C.,” or the letters “PBC,” but this designation is no longer required if the company follows other procedural requirements to provide notice.<sup>119</sup> Under the current statute, a company may, but is not required to, include the public benefit corporation identifier within its corporate name.<sup>120</sup> However, if the company chooses not to include such an identifier, the corporation must, prior to issuing shares of stock, provide notice to investors that the corporation is a PBC, unless the issuance is pursuant to an offering registered under the Securities Act of 1933 or if, at the time of issuance, the corporation has a class of securities registered under the Securities Exchange Act of 1934.<sup>121</sup> In addition, even though the company name is no longer required to contain a “PBC” identifier, investors still receive notice that the company is organized as a public benefit corporation through the requirement that the corporation’s stock certificates indicate that it is a public benefit corporation.<sup>122</sup>

### **PRACTICE POINT:**

**Stock certificates** of PBCs must indicate that the corporation is a PBC.

### **PRACTICE POINT:**

**Private placements** of stock of PBCs that do not have securities registered under the 1934 Act must **include notice that the corporation is a PBC**, unless the corporation’s name itself provides such notice.

## **D. Duties of Directors**

### **1. Interest Balancing**

The board of directors is responsible for directing the business and affairs of a PBC.<sup>123</sup> However, unlike directors of traditional Delaware corporations, directors of PBCs are required to balance the interests of stockholders with the best interests of stakeholders materially affected by the corporation, and the corporation’s identified public benefit or benefits.<sup>124</sup> Therefore, the directors of a PBC have a statutory duty to consider interests other than maximizing economic value for the stockholders of the corporation, and the directors must manage the corporation in a way that balances all of the relevant interests.<sup>125</sup> This is an enormous advantage for a company wishing to promote publicly beneficial objectives while remaining a for-profit entity. Prior to the enactment of the PBCS, directors were provided some leeway as to social responsibility under the business judgment rule,<sup>126</sup> but were required to act for the ultimate purpose of maximizing the value of the enterprise. Moreover, in corporate sale situations, they were required to act for the sole purpose of maximizing stockholder value in the short term.<sup>127</sup> Under the PBC model, directors not only may, but *must* balance the interests of stakeholders other than stockholders in both sale and non-sale situations.<sup>128</sup>

However, the statute does not mandate the outcome of director decisions; compliance with the procedural process outlined in the statute protects the director’s decisions.<sup>129</sup> This is critical to the efficient operation of the statute. As with constituency statutes, the board is permitted to make substantive decisions based on stakeholder outcomes. Moreover, unlike these statutes, stockholders have the ability to *require* that directors take such stakeholder concerns into account. However, this last requirement is largely procedural; as long as the directors act in good faith, the courts are not authorized to judicially reject their balancing decisions. This is an important distinction between the PBCS and

the MBCL, which specifically authorizes substantive challenges to decisions that affect stakeholders.<sup>130</sup>

One way to conceptualize the three part balancing test is to think of it as imposing a mandate that directors balance the goals of (i) providing a competitive return to stockholders, (ii) having a net positive impact on society and the environment, and (iii) creating a net positive impact with respect to the benefits specified in the corporate charter. While balancing interests (i) and (ii) might theoretically address policy concerns animating the adoption of the PBCS, it appears that the drafters may have believed that interest (ii) was so broad as to limit accountability. In contrast, it will be more difficult for directors to avoid addressing benefits specified within the corporate charter so that interest (iii) becomes an important component to ensuring that the PBCS achieves its purpose of creating responsible corporations.

## 2. Statutory Business Judgment Rule

The PBCS expressly provides that the business judgment rule applies to all disinterested balancing decisions. Thus, if a stockholder initiates a derivative suit against the directors for failing to balance the three categories of interests recognized in the PBCS, the directors will be presumed to have satisfied their fiduciary duties if they are informed and disinterested, and if the balancing decision has a rational purpose.<sup>131</sup> The Delaware statute specifically provides, “[W]ith respect to a decision implicating the balance requirement . . . [a director] will be deemed to satisfy such director’s fiduciary duties to stockholders and to the corporation if such director’s decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.”<sup>132</sup> This language codifies the application of the business judgment rule to board balancing decisions. “Rationality” is a concept in Delaware corporate jurisprudence that marks “the outer limit of the business judgment rule.”<sup>133</sup> Irrational decision-making has been explained by the Delaware Supreme Court as making a decision “that no [ ] person of ordinary, sound judgment” would undertake.<sup>134</sup> Some practitioners have noted the distinction between the obligation to “balance” in the PBCS with the obligation to “consider” in the MBCL, and question whether the former term implies that at least some weight must be given to each factor. This interpretation is likely correct, but may make little practical difference in light of Delaware’s codification of the business judgment rule.

## 3. Absence of Beneficiary of Duty

The PBCS is carefully drafted to make it clear that the obligation of balancing does not create new types of interests. Thus, the statute provides that the directors of a PBC do not owe a statutory duty to “any person” on account of that person’s interest in a public benefit identified in the company’s certificate of incorporation.<sup>135</sup> However, in order to maintain accountability for PBCs, stockholders are permitted to bring claims that directors failed to balance stockholder and public benefit interests correctly.<sup>136</sup>

## E. Reports

PBCs must provide stockholders a report assessing the corporation’s promotion of its stated public benefit or benefits.<sup>137</sup> The PBCS requires that the corporation provide such a report every other year.<sup>138</sup> The report must describe the board’s goals and standards with respect to stakeholders; specifically the report must include:

- (1) the objectives the board has established to promote the best interests of stakeholders and the public benefit or benefits outlined in the certificate of incorporation;
- (2) the standards the board has adopted to measure the corporation’s progress in promoting those interests and benefits;



- (3) objective factual information based on the standards the board has chosen regarding the corporation's success in meeting those objectives; and
- (4) an assessment of the corporation's success in meeting the objectives and in promoting those interests and the public benefit or benefits the corporation seeks to achieve.<sup>139</sup>

The PBCS requires only that the biennial report be provided to the company's stockholders – it does not require the report be made public.<sup>140</sup> The PBCS is more flexible than the MBCL with respect to reporting. The MBCL requires that the report be made annually, that it be made public, and that it use a “third-party standard.”<sup>141</sup> Nonetheless, if a Delaware PBC chooses, it may include in its governing documents a provision that mandates the corporation to provide a report more frequently than biennially; that mandates the report be made available to the public; and/or that requires the corporation to use a third-party standard in connection with, or attain third-party certification of, the promotion of its stated public benefit(s) and best interests of those materially affected by the corporation's conduct.<sup>142</sup>

### KEY CONCEPT:

A PBC must provide a **benefit report** to its stockholder **at least once every two years**. The report must include the company's **benefit objectives, standards** to measure progress towards those objectives, **factual information** based on those standards, and an **assessment** of success as to the benefit objectives.

## F. Accountability: Derivative Suits

### 1. Stockholder Derivative Suits Available

As noted above, the balancing requirement imposed by the PBCS does not create a duty to third parties. However, the statute does specifically allow a stockholder to bring a derivative action on the behalf of the corporation itself for a failure to balance.<sup>143</sup> Such a lawsuit is the sole mechanism for enforcement of the balancing requirement.<sup>144</sup> There is, however, a minimum requirement for stockholders wishing to sue for violation of the directors' balancing duties.<sup>145</sup> In order to bring such a derivative suit, plaintiff stockholders must own, individually or collectively, at least 2% of the corporation's outstanding shares or, if the corporation's shares are publicly traded on a national securities exchange such as the New York Stock Exchange or NASDAQ, shares equaling at least \$2,000,000 in market value.<sup>146</sup>

As suggested above,<sup>147</sup> it would appear that a suit for failure to balance would need to allege that the directors simply failed to pursue one of the three interests (or perhaps engaged in a level of pursuit so weak as to constitute “conscious disregard” of that interest). Thus, a plaintiff could allege that the directors were no longer pursuing stockholder return, were no longer trying to have a positive impact with respect to the corporation's specified purposes, or were no longer attempting to act in the best interests of everyone affected by its conduct. Alternatively, a plaintiff might allege that despite pursuit of all three goals, the board engaged in a trade-off that no rational person would engage in. As discussed in the next section, any such plaintiff would, absent a traditional conflict of interest, have to seek injunctive relief rather than monetary damages.

### 2. Director Liability

The risk of personal liability for PBC directors in lawsuits challenging board balancing decisions is mitigated by

Section 365(c), which allows PBCs to eliminate monetary liability for certain breaches of fiduciary duty.<sup>148</sup> Section 102(b)(7) permits any corporation to eliminate liability of directors for breaching their duty of care.<sup>149</sup> The PBCS extends the authority for exculpation to include disinterested directors making balancing decisions under Section 365(c). This extension can be accomplished through a charter provision that provides that balancing decisions are neither breaches of loyalty nor considered “not in good faith.”

### **PRACTICE POINT:**

All PBCs should consider adopting a **charter provision protecting directors from liability for balancing decisions**. Appendix 2 includes an example of such a provision.

Thus, unless they are receiving a personal benefit, directors protected by exculpation provisions will only be liable for balancing decisions if they are “interested.” Under traditional Delaware law, a director is “interested” if “there are factors weighing upon his exercise of judgment with respect to that decision which conflict or are inconsistent with the concept of a single, uncompromised loyalty to the corporate interest.”<sup>150</sup> Self-dealing transactions where the director has a personal financial stake in the outcome fall within the ambit of interested transactions.<sup>151</sup> A director is also interested if the director receives a special material benefit from a transaction that is unavailable to other stockholders.<sup>152</sup>

Accordingly, while Section 365(b) provides that a director of a public benefit corporation satisfies his or her fiduciary duties if the director’s judgment is, among other things, disinterested, Section 365(c)’s authorization of a protective provision in the corporation’s certificate of incorporation provides further security to directors of public benefit corporations in making balancing decisions. Based on the scope of Delaware’s protective provisions, self-dealing remains the likely focus of derivative challenges and it is likely that the Court of Chancery will focus on whether directors’ decisions were disinterested.<sup>153</sup> Although the scope of director obligations is expanded under Section 365 to include the effect of decisions on stakeholders, the statute remains stockholder centric in many respects—no new beneficiaries are created,<sup>154</sup> and only stockholders may bring lawsuits. Thus, the definition of “interested” should not change. In particular, the ownership of stock by a director should continue to be evidence of her alignment with the corporation, rather than creating a disabling interest.<sup>155</sup> This conclusion is reinforced by the requirement that plaintiffs own a material amount of stock before being permitted to challenge a balancing decision.

### **3. Subsidiary PBCs and the Potential for Double Derivative Suits**

While the PBCS provides for additional or different requirements for PBCs, it also expressly states that PBCs are “subject in all respects to the [remaining] provisions of [the DGCL].”<sup>156</sup> This leaves open the possibility that various traditional corporate law concepts will be applicable in the PBC context, including the double derivative stockholder suit.

A standard derivative suit involves “a shareholder bring[ing] a lawsuit asserting a claim belonging to a corporate entity in which the shareholder owns shares.”<sup>157</sup> A double derivative suit is brought by a stockholder of a parent corporation seeking enforcement of a claim belonging to a wholly-owned or majority controlled subsidiary corporation of that parent.<sup>158</sup> Like a standard derivative suit, the stockholders initiating a double derivative suit must either (i) first make a demand on the parent corporation to take action to address or rectify the problematic conduct or circumstances or (ii) allege in the complaint for its double derivative action that demand would be futile because the parent’s board could not properly exercise its independent and disinterested business judgment in responding to a demand.<sup>159</sup>

Under Delaware law, directors of a wholly-owned traditional corporation are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders. However, directors of the wholly-owned PBC would also have a statutory obligation to balance the interests of all stakeholders, including the corporation's specific public benefit or public benefits.<sup>160</sup> Thus, it is possible that a stockholder of a traditional parent corporation could bring a double derivative suit to hold subsidiary PBC directors accountable to their public benefit purpose (provided, of course, that the stockholder satisfied the demand requirements described above). The Delaware public benefit corporation statute only expressly allows for stockholders owning at least 2% of the outstanding shares of the benefit corporation to bring a derivative action on behalf of the corporation.<sup>161</sup> This requirement is a means of ensuring that only stockholders with an appreciable ownership would be able to bring legal action against a corporation to enforce the public benefit purpose. The possibility of a double derivative suit could be seen as a circumvention of this statutory protection. However, the test set forth by the Supreme Court in *Lambrecht* may make pursuit of such a claim largely impracticable.

## **G. Supermajority Stockholder Votes**

### **APPENDIX ALERT:**

Appendix 7 lists all of the circumstances that the PBC statute requires a **two-thirds stockholder vote**.

#### **1. Supermajority Vote Required to Opt in, Opt out or Change Purpose**

While a company may choose to incorporate as a PBC from the outset,<sup>162</sup> a traditional corporation must obtain approval from at least two-thirds (66 2/3%) of the outstanding stock of the corporation entitled to vote thereon to effectuate a transition to a PBC.<sup>163</sup> This enhanced voting requirement provides more protection than the simple majority vote generally required to effect a merger or amendment to the certificate of incorporation of a traditional corporation.<sup>164</sup> The same high vote applies for mergers of traditional corporations if their stockholders are to receive stock in a benefit corporation.<sup>165</sup>

The original PBCS required a traditional corporation wishing to become a public benefit corporation to obtain the approval of at least 90% of the outstanding shares of each class of stock, whether voting or nonvoting.<sup>166</sup> The amendment lowering the vote to the current two-thirds approval requirement (which became effective in August of 2015) reflected a concern that the difficulty of obtaining such a high vote would preclude use of the statute.<sup>167</sup> The two-thirds approval requirement, while still a supermajority vote, increases the ability of traditional Delaware corporations to become PBCs and for PBCs to enter into acquisition transactions with other entities. Even with the lowered vote requirement, the fiduciary duties of directors provide protection to converting or acquired corporation stockholders, because the directors of the traditional corporation must still conclude the transaction in question is in the best interest of the stockholders.<sup>168</sup>

Once an entity is organized as a PBC, there is also a supermajority approval requirement for the corporation to opt out, or to amend its certificate of incorporation to change its stated public benefit purpose.<sup>169</sup> Approval of two-thirds of the outstanding shares of stock entitled to vote is required to amend or delete the provision in the certificate of incorporation identifying specific public benefits or requiring more specific reporting requirements, or to effectuate a merger resulting in the public benefit corporation losing its public benefit status and changing its stated public benefits.<sup>170</sup> The vote requirement to opt out of the PBC form or to amend the corporation's stated public benefit purpose mirrors Section 363(a)'s requirements for opting into such corporate form.<sup>171</sup>

## 2. Mergers and Acquisitions

A change in status for stockholders generally triggers a supermajority vote under Section 363. Thus, if stockholders of a traditional Delaware corporation are going to receive stock of a PBC in a merger, they will be entitled to a two-thirds vote.<sup>172</sup> This provision is applicable even if the shares received are in a non-Delaware entity, as long as the entity is a benefit corporation “or similar entity.”<sup>173</sup>

Likewise, a PBC effectuating a merger or consolidation with a non-public benefit corporation requires the approval of two-thirds of the outstanding stock of the corporation entitled to vote thereon if

as a result of the merger or consolidation, the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or other equity interests in a domestic or foreign corporation that is not a public benefit corporation or similar entity and the certificate of incorporation (or similar governing instrument) of which does not contain the identical provisions identifying the public benefit or public benefits pursuant to § 362(a) of this title [providing that a public benefit corporation must identify one or more specific public benefits in its certificate of incorporation] or imposing requirements pursuant to § 366(c) [providing that a public benefit corporation may call for more stringent reporting requirements in its certificate of incorporation or bylaws] of this title.<sup>174</sup>

Thus, a stock-for-stock merger in which stockholders were taken out of the benefit corporation structure would require a two-thirds vote. On the other hand, a cash-out merger in which the target remained a benefit corporation would not require such a vote. A cash-out merger in which the target benefit corporation loses its benefit status would trigger the high vote if it is considered a merger in which the shares of that corporation “become” shares of a non-benefit corporation.

## H. Appraisal Rights

### APPENDIX ALERT:

Appendix 3 provides a Quick Guide to appraisal. Appendix 6 includes a list of situations in which the PBC statute creates appraisal rights for stockholders.

If a corporation amends its charter to become a PBC (or to change its purpose if it is already a PBC), its stockholders are granted appraisal rights. These rights are extended only to stockholders who do not vote in favor of the amendment. Similarly, appraisal rights are granted to stockholders of traditional corporations who receive PBC stock in a merger.

However, the statute places limits on when stockholders are entitled to seek appraisal. Appraisal is generally not available if the stock is listed on a national securities exchange or widely held.<sup>175</sup> This “market-out exception” provides that stockholders are entitled to appraisal rights only if the stock is (i) not listed on a national securities exchange and (ii) not held of record by more than 2,000 holders.<sup>176</sup> But, there is an exception to the market-out exception that reinstates appraisal rights if the corporation enters into a merger or consolidation that requires stockholders to accept for their stock anything other than publicly traded shares.<sup>177</sup> This exception mirrors the market-out exception of DGCL Section 262, which governs appraisal rights for mergers of traditional Delaware corporations.<sup>178</sup>

If a stockholder pursues appraisal, Section 262 requires the Court of Chancery to make an independent determination of the fair value of the shares as a going concern.<sup>179</sup> Appraisal rights have been granted, analyzed, and refined by the Court of Chancery in transactions by and between traditional Delaware corporations, and these transactions provide an indication of how such a valuation might occur in the public benefit corporation context.<sup>180</sup>

The corporation must provide stockholders entitled to appraisal with notice of their rights, the applicable statutory language granting those rights, and some instructions informing the stockholders how to request appraisal.<sup>181</sup> The disclosure provided to stockholders by the corporation must disclose all material facts relevant to the stockholder's decision whether to seek appraisal.<sup>182</sup> The Delaware Courts have adopted the meaning of materiality used under federal securities law: "a fact is considered material if there is a 'substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'"<sup>183</sup> If the stockholder decides to seek appraisal, the stockholder must then timely demand appraisal of the shares.<sup>184</sup>

The appraisal statute states that a "stockholder . . . shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholders shares of stock."<sup>185</sup> In traditional corporations, the statute is intended to "fully compensate shareholders for whatever their loss may be, subject only to the narrow limitation that one cannot take speculative effects of the merger into account."<sup>186</sup> Under Delaware law, fair value is determined as of the effective date of the merger<sup>187</sup> and the corporation is valued as a going concern.<sup>188</sup> While the court considers "all relevant factors" to determine fair value,<sup>189</sup> the court weighs heavily the value reached by a discounted cash flow analysis, which attempts to estimate all future cash flows discounted to present value.<sup>190</sup> A discounted cash flow valuation consists of: (1) estimating the corporation's cash flow stream during a set projection period; (2) estimating a "residual" or "terminal" value of the corporation as of the end of the projected period; and (3) discounting those results to present value as of the merger date to arrive at a fair value of the corporation.<sup>191</sup>

The PBCS does not address how PBC status might affect valuation in an appraisal proceeding. The authors of one article suggest several approaches that a court might take.<sup>192</sup> First, a court might simply award a petitioner the value of the shares in light of the manner in which the corporation is currently being managed, thus "essentially reduc[ing] the appraised value to the extent that the public benefit negatively affected earnings."<sup>193</sup> Alternatively, the court could try and add back such lost value. This could be accomplished in two different manners. First, the court could determine the costs of pursuing public benefits, and factor those into its analysis, essentially recalculating the value of the PBC if it were not pursuing the benefit.<sup>194</sup> Alternatively, the authors suggest a court might try to value the public benefit being provided, and add that to the value of the corporation.<sup>195</sup> Ultimately, the authors conclude that it is the first method, awarding the pecuniary value of the corporation in light of the benefits it is providing, that is most likely to prevail: awarding additional value "would lead to an undesirable windfall and violate the appraisal mandate by awarding stockholders more than their 'proportionate interest in a going concern.'"<sup>196</sup>

### **III. Could a Traditional Corporation Adopt Stakeholder Values Without Becoming a PBC?**

Although stockholder wealth maximization is the default law for Delaware corporations, there are no statutes that explicitly forbid a corporation from altering the duties of directors so that they are not bound to act solely in the interests of stockholders. Accordingly, potential users of the PBC provisions might question whether they could modify directors' fiduciary duties to include duties to stakeholders by "private ordering," that is, by simply writing such provisions into a corporation's charter without becoming a benefit corporation. Indeed, some scholars have posited that fiduciary duties to stockholders may be contracted away via the articles of incorporation.<sup>197</sup> However, as discussed below, there would be substantial uncertainty around the enforceability of such a provision.

## **A. The Statutory Framework**

Delaware law has various statutes that enable corporations to modify the default corporation rules.<sup>198</sup> In addition, there are specific provisions in the DGCL that permit the structure of fiduciary law applicable to a corporation to be modified. Specifically, Section 102(b)(7) permits a Delaware corporation to limit the personal liability for certain fiduciary duty breaches,<sup>199</sup> and Section 122(17) permits a corporation to limit the effect of the “corporate opportunity doctrine.” (The corporate opportunity doctrine is a subset of the duty of loyalty that limits the ability of a fiduciary to take advantage of business opportunities that are deemed to belong to the corporation.)<sup>200</sup> Furthermore, Delaware statutes applying to non-corporate entities expressly permit broad modifications of fiduciary duty.<sup>201</sup> Finally, Section 102(b)(1) expressly permits a company’s certificate of incorporation to contain “[a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders . . . if such provisions are not contrary to the laws of this State.”<sup>202</sup>

## **B. Statute Does Not Authorize Private Ordering of Fiduciary Duties**

The viability of altering fiduciary duties through a provision in the articles of incorporation adopted pursuant to Section 102(b)(1) would likely be a question whether such a provision were “contrary to the laws of this state.”<sup>203</sup> This phrase has been interpreted as encompassing the Delaware corporate common law as well as statutory law.<sup>204</sup> However, the Delaware Court of Chancery has held that it may strike down a provision in the articles of incorporation only if it “contravenes Delaware public policy.”<sup>205</sup> Therefore, it seems likely that if litigation arose concerning a corporation’s alteration of fiduciary duties in its certificate of incorporation, the Delaware courts would have to determine whether the common law precedents such as *eBay* and *Revlon* represent the type of public policy that cannot be overridden under Section 102(b)(1).

It seems likely that such a provision would be considered contrary to public policy, and thus contrary to Delaware law and precluded under Section 102(b)(1). The fundamental nature of the duty that directors owe to stockholders, as well as the fact that the legislature has thought it necessary to authorize certain fiduciary duty modification in both the DGCL and the statutes governing limited partnerships and limited liability companies support this conclusion. Indeed, in one Chancery Court case, the court specifically found that Section 102(b)(7), by negative implication, precluded charter provisions that limited director liability for breaching the duty of loyalty by usurping corporate opportunities.<sup>206</sup> The case was decided after the adoption of Section 102(b)(7), which allows charter provisions that limit liability for breach of the duty of care, but not for breaches of the duty of loyalty, and before the adoption of Section 122(17), which authorizes limitations on liability for one category of loyalty claims: usurpation of corporate opportunities.

In addition, some scholars have posited that fiduciary principles stand separate from contract principles, and serve as a protective measure for stockholders who have no bargained-for contractual rights in the corporation.<sup>207</sup> This line of reasoning suggests that fiduciary duties should not be subject to contractual defeasance. Other commentators have pointed out that despite the benefits of flexible corporate statutes, too much flexibility may be counterproductive.<sup>208</sup> A final argument against permitting a corporation to limit directors’ fiduciary duties in the same manner permitted by the Delaware benefit corporation statute is that such an interpretation would allow corporations to amend their charters to make the changes contemplated by the PBCS by simple majority vote, and without triggering appraisal rights. This would allow corporations to easily evade the statutory protections that the legislature thought were necessary in connection with such changes.<sup>209</sup>



## **CHAPTER THREE: Standards of Review Applicable to PBCs**

### **READING GUIDE:**

Chapter One includes a general description of board duties and judicial standards of review for traditional corporations. This chapter discusses how those standards may apply to PBCs.

The PBCS eliminates the requirement that directors of for-profit Delaware corporations focus solely on stockholder value in lieu of any public benefit.<sup>210</sup> Instead, directors of PBCs must balance three factors: the interests of the stockholders, the interests of those affected by the corporation's conduct, and the public benefit or benefits identified in the charter.<sup>211</sup> This chapter discusses how the Delaware standards of review will likely function in accordance with this altered value proposition for PBCs.

### **I. Business Judgment Rule**

The purpose of the PBCS is to allow for-profit companies to “operate in a responsible and sustainable manner.”<sup>212</sup> In order to function sustainably, PBC directors have an obligation to balance the interests of the corporation's stockholders with the public benefits the corporation identified in its charter, as well as the interests of those materially affected by the corporation's conduct.<sup>213</sup>

The board's balancing of the interests of broad and specified public beneficiaries, alongside the interests of stockholders, is explicitly entitled to the protection of the business judgment rule.<sup>214</sup> Accordingly, the general operation of the business judgment rule to protect business decisions will remain intact under the PBCS. For example, while a PBC board's decision to enter a new line of business may include explicit consideration of social and environmental concerns, the decision will still be protected from judicial second-guessing by the broad parameters of the business judgment rule.<sup>215</sup>

Nevertheless, the board process should explicitly address the interests of those materially affected by its decision, as well as the impact of the decisions on the corporation's specific benefits in order to come within the ambit of the business judgment rule. In order to benefit from this continued protection, PBC directors should make a record of this balancing. Chapter Four provides guidelines for PBC directors to operate in accordance with their balancing obligations.<sup>216</sup>

### **PRACTICE POINT:**

In order to **preserve business judgment rule protections**, board processes for PBCs should **explicitly address stakeholder concerns**.

### **II. Entire Fairness**

#### **A. The Definition of “Interest” is Not Altered**

As with traditional Delaware corporations, PBCs directors' business decisions are not afforded the presumption of the business judgment rule if motivated by self-interest.<sup>217</sup> The entire fairness standard will continue to apply to decisions made by conflicted boards.<sup>218</sup>

Current Delaware case law defines an interested director as one who “will receive a personal financial benefit from a transaction that is not equally shared by the stockholders.”<sup>219</sup> Additionally, a director is interested in a transaction where the corporate decision “will have a materially detrimental impact on a director, but not on the corporation and the stockholders” because, in that situation, “a director cannot be expected to exercise his or her independent business judgment without being influenced by the adverse personal consequences resulting from the decision.”<sup>220</sup> Thus, a disinterested director who receives the presumption of the business judgment rule is one who “neither stands to benefit financially nor suffer materially from the [board’s] decision.”<sup>221</sup> Because the language found in the Delaware PBCs matches the language of the judicially created interested director standard, Delaware courts will likely interpret the phrase “disinterested” in the same manner under the PBCS.<sup>222</sup>

It is a well-settled principle of Delaware law that “a director who is also a shareholder of the corporation is more likely to have interests that are aligned with the other shareholders of that corporation.”<sup>223</sup> Thus, stock ownership will not generally cause a director (or a controlling stockholder) to be interested and lose the protection of the statutory business judgment or exculpation provisions. In other words, even though the directors' obligations are broader, they are still undertaken solely on behalf of the stockholders so that stock ownership, by itself, should not be viewed as creating a conflict, except in the very limited circumstance that it might under jurisprudence for traditional corporations.<sup>224</sup> This is reinforced by the fact that stockholders with significant levels of ownership are the only constituency that can enforce rights under the Delaware PBC statute.<sup>225</sup> Accordingly, it appears that the entire fairness test will apply to a PBC transaction to the same extent, and in the same circumstances, that it would apply to a transaction by a traditional corporation.

## **B. Application of Entire Fairness to a PBC**

### **KEY CONCEPT:**

Jurisprudence involving conflicts and entire fairness is not likely to change for PBCs, except that the remedies for violations of the duty of loyalty may extend to stakeholders other than stockholders.

As discussed in Chapter One, when a transaction is subject to the entire fairness test, that transaction must be fair to the company and its stockholders, both substantively and procedurally. Essentially, this test requires a court to determine that the conflicted directors or controlling stockholder did not use their or its position to extract an unfair amount of value, or to extract more value than they or it might have obtained in an arms-length transaction.

An examination of entire fairness involving a PBC is similarly likely to focus on any excess value received by the conflicted parties, and not on the allocation of value among the unconflicted parties and other stakeholders. For example, if a controlling stockholder were to “squeeze-out” minority stockholders in a merger in a manner that was not protected by the business judgment rule, a fairness proceeding would likely focus on whether the controller obtained the entity at too low a price. If the court did find that the price was too low, there could be a question of how to allocate damages—should they all go to stockholders, or should some value be allocated to other stakeholders? In a situation where the operation and management of a company was to continue, a court might determine that all value should go to stockholders. On the other hand, if the controller were eliminating the company's PBC status, and



perhaps planning on major changes that might affect the community and work force, it is possible that the relief could include some allocation of value to those stakeholders.

### **III. Intermediate Standards: *Revlon* and *Unocal***

#### **KEY CONCEPT:**

**Courts are likely to apply enhanced scrutiny (the *Unocal* and *Revlon* tests) to PBCs engaging in defensive actions or in change in control situations.**

The PBC provisions do not address the standard of review applicable in enhanced scrutiny situations. However, the expanded obligations of directors under Section 365 are closely related to those standards.<sup>226</sup> Under traditional corporate law, the *Revlon* standard mandates a value-maximizing process for stockholders,<sup>227</sup> while *Unocal* focuses on the reasonableness of defensive actions through a stockholder value lens.<sup>228</sup> Scholarship examining the result of expanding obligations under other constituency statutes (a precursor to the benefit corporation statutes, discussed in Chapter Five) has found that, for the most part, courts applying other constituency provisions have substituted the business judgment rule for enhanced scrutiny.<sup>229</sup> However, the intent of those statutes was largely focused on addressing hostile takeover and sale situations.<sup>230</sup>

In the case of PBCs, there does not appear to be any evidence that it was meant to affect any standard of review, except as explicitly set forth in the statute.<sup>231</sup> Moreover, the policy rationale behind the common law imposing enhanced scrutiny involves the concern that directors have inherent conflicts in defensive and change-in-control situations,<sup>232</sup> and it is clear that the legislature did not intend to alter the law with respect to conflicts. Thus, it appears likely that Delaware courts will apply enhanced scrutiny to both defensive and change-of-control situations in PBCs, although their approach will be modified appropriately to reflect the expanded obligation of directors to consider stakeholder interests.

#### **A. *Revlon***

Scholars have varying opinions on how *Revlon* will apply in a sale of a PBC or change of control, but all agree that the “Delaware statute changes the board’s duty in the sale of control context in a fundamental manner.”<sup>233</sup> Clearly, directors will no longer have a duty to achieve the highest value for stockholders.<sup>234</sup> Nevertheless, because change-of-control transactions present unique risks, the heightened scrutiny applicable to change-of-control transactions is likely to continue.<sup>235</sup> However, because PBC directors have an expanded duty to consider other constituencies, satisfaction of an enhanced reasonableness standard must be measured differently than adherence to the short-term stockholder maximization requirement for traditional Delaware corporations.

While traditional corporate law prohibits directors from considering any interest that fails to lead to monetary gain for stockholders, especially in a change-of-control setting, the PBCS expressly allows for PBC directors to consider all constituencies.<sup>236</sup> Thus, a PBC board will be required to balance a multitude of interests in a sale of the company.<sup>237</sup> Traditional directors already balance numerous stockholder considerations when financially valuing bids for a company and the PBCS adds to the considerations a PBC board should bear in mind when valuing bids.

A court may still require directors to show that they pursued a reasonable path toward maximizing collective value for all relevant constituencies—that is, the total value to be received by stockholders, stakeholders affected by the corporation’s operations and its specific beneficiaries. This may well involve an examination of the same issues

involved in traditional *Revlon* situations, such as market checks and deal protections. The goal, however – the maximization principle – will be broader. But assuming that the reasonableness test is met with respect to finding the best bids, a board's choice among bids that allocate value among stakeholders differently should not be subject to heightened scrutiny under Section 365(b), which mandates the application of the business judgment rule for all allocation decisions.<sup>238</sup>

However, if a board does allocate value to stakeholder interests, the court could apply a reasonableness test to the board's actual efforts to ensure that stakeholder value is achieved. For example, the court could focus on “the extent to which, once a sale of the company occurs, any meaningful, enforceable undertaking exists that assures the seller's board and stockholders that the public benefit will be achieved once the merger is accomplished.”<sup>239</sup> Thus, directors should understand that the courts may apply heightened scrutiny to efforts to ensure future achievement of post-merger public benefits.<sup>240</sup> Chapter Five offers guidance for PBC directors on ways to effectuate a sale of a PBC in compliance with their fiduciary duties.<sup>241</sup>

### EXAMPLE:

If a board declines to accept the highest bid because a **lower bid** is from a buyer that will treat the community and work force better, a court may require the directors to show that they took **reasonable measures** to ensure that the community and the workers would receive the **contemplated benefits**.

### B. *Unocal*

PBCs, like traditional Delaware corporations, can take defensive actions in response to a takeover threat.<sup>242</sup> These defensive tactics are likely to be evaluated against the same standard as traditional corporations, which require that the defensive measures be reasonable in relation to the threat posed.<sup>243</sup>

Significantly, however, traditional corporations can only deploy these devices to protect stockholders from a very specific threat: a situation that jeopardizes stockholder value.<sup>244</sup> In contrast, because a PBC board must account for a much broader range of considerations, the range of possible threats that can be addressed by defensive measures will be broader than in traditional corporations.<sup>245</sup> In that sense, directors will be given greater discretion to employ defensive devices in order to protect the company and its sustainable mission.<sup>246</sup> Additionally, because the threats PBCs face will be distinctly different than the financial threats traditional Delaware corporations often face, different defensive devices could be created or alterations could be made to common devices. For example, the triggering mechanism for a poison pill could be changed from the typical cap on the percentage of stock ownership to a non-financial concern. Nevertheless, any device deployed must still be reasonable in relation to the threat posed, even if the business judgment rule applies to the balancing of the stakeholders' interests.<sup>247</sup>

## IV. Franchise Rights

The Delaware courts are particularly solicitous of stockholders' voting rights, because they underpin the legitimacy of the directors' authority.<sup>248</sup> This dynamic is not changed by the PBCS—the directors are still elected by stockholders, and indeed, it is only stockholders who have the right to enforce the expanded obligations of directors.

It thus seems unlikely that being a PBC would have a material effect on the strict standards applied in litigation involving significant threats to the stockholder franchise.<sup>249</sup> That said, there are many situations where franchise

concerns are addressed under *Unocal's* reasonable test,<sup>250</sup> and in such a situation, consideration of the interest of stakeholders may have increased legitimacy.

It would seem clear, however, that PBC directors cannot act with the “primary purpose of preventing or impeding” a stockholder vote.<sup>251</sup> Thus, even if the board conducts a balancing of interests in accordance with their fiduciary duties, if the board does anything to purposefully disenfranchise the stockholders, they must offer a compelling justification.<sup>252</sup> Moreover, even where the vote is not “thwarted” some commentators have suggested that courts may, under *Unocal*, take an especially hard look at board actions affecting the franchise in the context of PBC, because of the subjective nature of the board’s balancing task:

...it could be argued that since the balancing required for PBCs is inherently subjective, the shareholders’ vote on a merger (expressing their judgment on the balance) is as, if not more, important than the directors’ decision. Thus there should be little or no hindrance to the stockholders of a PBC making the ultimate balancing decision by their votes on a proposed merger.<sup>253</sup>

## **CHAPTER FOUR: Guidance for PBCs**

### **I. Procedures**

The best starting point for directors to address PBC balancing obligations is adherence to the transparency requirements for PBCs. The PBCS imposes an unambiguous reporting requirement.<sup>254</sup> The statute requires the corporation to distribute a report to its stockholders that includes goals, objectives, standards, and an assessment (the “benefit report”).<sup>255</sup> The benefit report must be produced at least once every two years if the corporation has not adopted a provision requiring a more frequent report.<sup>256</sup>

To comply with these obligations, the board needs to determine who is materially affected by the corporation’s business, develop and maintain criteria for balancing both the interests of those so effected, as well as any specific benefit identified in the corporation’s charter, and measure progress against those criteria. Though not required, B Lab recommends that a PBC board adopts one or more third party standards to more effectively monitor its actions and progress.<sup>257</sup> The exercise of maintaining a credible reporting function will require a balancing exercise and maintenance of some record of that balancing. Below are additional recommendations of procedures a PBC board may adopt to ensure it is properly balancing the required interests.<sup>258</sup>

#### **A. Establish Committee**

A committee may be designated with responsibility for public benefit issues. Research suggests firms that adopt effective sustainability programs are more likely to form a separate board committee to address sustainability issues.<sup>259</sup> The board can delegate this responsibility to an existing committee, such as audit or governance, or create a new, stand-alone committee. The committee that is responsible for sustainability issues should include in its committee charter oversight of and/or recommendations with respect to: third party standards, if any; internally generated standards; choice of certifying body or bodies, if any; the benefit report; and sustainability objectives, standards, strategies, and policies.

#### **B. Management Role**

While the committee should oversee sustainability issues, management must substantially participate in various PBC objectives. Notably, management should draft the benefit report and report progress toward the PBC's impact objectives to the board. Additionally, management should make recommendations on the following subjects: third party standards and internally generated standards; certification issues; and sustainability objectives, standards, strategies, and policies.

### **C. Periodic Activity**

Certain activities should be conducted cyclically in accordance with the timing selected for production of the company's benefit report. Annually, sustainability objectives should be established and assessed. The committee should meet regularly and report to the board.<sup>260</sup> Periodic reports to the board from the committee will allow the board significant opportunity to balance the interests of those materially affected, the PBC's identified public benefits, and stockholders' pecuniary interests. Management and the committee should meet for an extended period of time, either annually or bi-annually, regarding these sustainability objectives. Finally, the board should approve the benefit report and its impact objectives.

### **D. Non-Periodic Activity**

Management and the committee should have different responsibilities with respect to issues that arise in a non-periodic fashion. Management can be charged with bringing significant sustainability issues to the board that come up out of cycle and that are not covered by policies, such as the effect of a strategic change or product change on workers or customers, or the environmental impacts of significant building projects. The committee should consider sustainability issues implicated by new developments, including whether to purchase renewable energy or obtain LEED certification for new buildings, or the effect of a transaction on workers' compensation or customer access. With respect to balancing decisions, the committee could make the decision or defer to the board if the particular inquiry is of great significance.<sup>261</sup> Regardless, the committee should report any and all decisions to the board to keep them apprised of the corporation's progress.

### **E. Process Issues**

Good corporate governance practices can help the board effectively comply with its balancing obligation.<sup>262</sup> Foremost, management's recommendations to the committee and the committee's recommendations to the board should be distributed well in advance of committee and board meetings in order to give directors adequate time to review.

As for meeting minutes, these should reflect sustainability issues discussed, resolution of those issues, and any direction given to the committee or management. Additionally, if a third party standard or internal standard has been adopted, materials and minutes should reflect consideration of how the standard maps to the interests of those affected by the corporation's conduct. Standard meeting procedure should include reviewing of internal checklists to determine whether other sustainability issues should be added; and providing redline copies where materials update other materials so changes are highlighted.<sup>263</sup>

## **II. Mergers and Acquisitions**

### **A. Supermajority Vote**

If the merger consideration for PBC stockholders is stock other than stock in a company with a public benefit provision that is identical to the original PBC's certificate of incorporation, the transaction must be approved by two-thirds of the outstanding shares of the benefit corporation.<sup>264</sup> Obtaining this approval is itself strong evidence of an appropriate balancing process, as the two-thirds voting requirement grants leverage to both stockholders and PBC directors.<sup>265</sup> Specifically, the necessary approval by two-thirds of the outstanding stock entitled to vote gives power “to socially responsible investors who vote their consciences to block transactions that do not accord with their expectations of responsible conduct [and] in turn gives the board leverage to actually consider other constituencies and the public interest when making decisions.”<sup>266</sup> Because of the importance of the stockholder vote to the balancing process, disclosure to stockholders should reflect the board's balancing considerations.

## **B. Documentation**

Merger agreements may have to address post-merger conduct because stockholders will want to preserve stakeholder values.<sup>267</sup> In some situations, agreements will need to be drafted to both assure that the continuation of the benefit provisions in the corporation's charter, and to assure continued implementation of the benefit principles.<sup>268</sup>

One technique to accomplish these goals would be to include a provision that specifically describes how the company will operate post-merger.<sup>269</sup> Still, companies will have to skillfully negotiate this point as buyers will generally oppose any post-merger constrictions on their business management. Note, however, that the more a PBC seller compromises on this point and offers the buyer greater flexibility as to how the company will operate post-merger, the more challenging the provision will be to enforce.<sup>270</sup> Another provision that would assist PBC sellers is one that authorizes injunctive relief to enforce mission-preserving provisions.<sup>271</sup> Furthermore, in order to resolve any potential standing issues, a provision could be included that expressly gives the sellers the ability to enforce the public benefit provisions.<sup>272</sup> Moreover, the contract could make certain stakeholders third party beneficiaries.<sup>273</sup>

There may be alternative means to provide benefits. For example, a benefit corporation being sold in a transaction that will result in a loss of jobs in a community might fund a trust to provide assistance to the community, including job training and local business development. Or a company may simply favor a buyer that has a strong reputation for operating in a responsible manner.

## **III. Board Composition**

Another method to ensure a PBC board's compliance with its balancing duty is to strategically select the board of directors.<sup>274</sup> Such diversity may provide a structure that naturally addresses multiple objectives within the deliberative process.<sup>275</sup> Thus, one or more directors with expertise in a particular stakeholder issue could be elected in an effort to introduce relevant interests into board discussions and prevent misunderstandings.<sup>276</sup> However, any such expert directors would continue to have the general duties of all directors.<sup>277</sup> It should be noted, however, that the PBCS does not have any requirement for a director with any specific obligations regarding the corporation's public benefit. In contrast, the MBCL does require, under certain circumstances, that a board include a “benefit director,” with specified duties.<sup>278</sup>

# **CHAPTER FIVE: Constituency Statutes: A Viable Alternative For Stakeholder Governance?**

## **I. Background**

Prior to the advent of benefit corporation legislation across the United States, many legislatures responded to the rise of stockholder primacy by adopting “constituency statutes.” These laws permit a board of directors to consider the interests of non-stockholders (the “constituencies”) in making certain decisions. States began adopting them just over thirty years ago,<sup>279</sup> and 33 states have now adopted a constituency statute (although not Delaware).<sup>280</sup> These statutes have not caused the expected increase in litigation,<sup>281</sup> significantly deterred institutional investment,<sup>282</sup> or affected stock values.<sup>283</sup>

This chapter examines the content of those statutes, as well as the treatment of the statutes in litigation and in the academic literature. The terms of the statutes should provide a useful contrast to the operative provisions of benefit corporation statutes, and the treatment by courts of constituency statutes may provide guidance as to the effect that courts will give to benefit corporation provisions.

## **READER’S GUIDE:**

Before benefit corporation legislation was conceived, many states (but not Delaware) attempted to address the concern with stockholder primacy by adopting constituency statutes. This chapter discusses those statutes and the case law interpreting them, because the law governing constituency statutes may have implications for benefit corporations.

## **II. Adoption of Constituency Statutes**

Constituency statutes represent attempts by legislatures to change the common law rule of stockholder primacy. Specifically, a constituency statute permits a board of directors to consider non-stockholder interests when making decisions, rather than focusing solely on the interests of stockholders.<sup>284</sup> Through this grant of authority, boards are given significant discretion to consider the interests of stakeholders, regardless of the relation of those interests to stockholder value.<sup>285</sup> Some jurisdictions also used their constituency statute to explicitly reject enhanced scrutiny in change-of-control transactions.<sup>286</sup> As a historical matter, adoption of constituency statutes was initiated in the 1980s as a tool for directors to use in fighting hostile takeovers.<sup>287</sup> Many were concerned that the real purpose of constituency provision was to protect incumbent management rather than stakeholders.<sup>288</sup> This concern was fueled by the fact that the provisions were generally permissive; that is, that there was no *requirement* to consider the interests of stakeholders.<sup>289</sup>

Each state’s constituency statute permits directors to consider one or more of the following non-stockholder interests:

- (1) Employees, customers, creditors, suppliers, and communities in which the corporation has facilities.
- (2) National and state economies and other community and societal considerations.
- (3) The long-term and short-term interests of the corporation and its stockholders.
- (4) The desirability of remaining independent and the resources, intent, conduct (past, stated and potential) of a person seeking to acquire control of the corporation.
- (5) The corporation’s officers.<sup>290</sup>

The statutes often are silent as to how a director may weigh these various considerations.<sup>291</sup> Some states, such as Indiana and Pennsylvania, explicitly state that no one interest may prevail in the directors' considerations.<sup>292</sup>

### **III. Operation of Constituency Statutes**

#### **A. Other Constituency Provisions Permit, But Do Not Require, Consideration of Stakeholder Interests**

Presently, all jurisdictions have permissive constituency statutes that *permit*, but do not *require*, directors to consider non-stockholder interests.<sup>293</sup> This is a critical distinction from benefit corporation statutes, which obligate boards to consider the interests of stakeholders in their decisions. Connecticut originally had a mandatory statute, which required director consideration of non-stockholder interests, but the statute was amended in 2010 to make it permissive.<sup>294</sup> Thus, corporations seeking a governance model that is conducive to social responsibility should recognize that incorporation in a jurisdiction with a constituency statute does not, in fact, create any responsibility or accountability to stakeholders—it only *decreases* responsibility to stockholders.<sup>295</sup>

For example, Indiana Code § 23-1-35-1(d) provides:

A director *may*, in considering the best interests of a corporation, consider the effects of any action on shareholders, employees, suppliers, and customers of the corporation, and communities in which offices or other facilities of the corporation are located, and any other factors the director considers pertinent.<sup>296</sup>

In contrast, when Connecticut first adopted its constituency provision in 1988, it required directors of corporations with registered securities to consider other constituencies in making decisions.<sup>297</sup> As enacted, the statute “impose[d] a strict obligation on directors,” mandating consideration of non-stockholder interests.<sup>298</sup> In 2010, Connecticut amended § 33-756(d), making it a permissive grant of authority that allows, but does not require, directors to consider other interests.<sup>299</sup>

Idaho has a hybrid form, mandating consideration of stockholder interests while permitting consideration of other constituencies.<sup>300</sup> Idaho Code §§ 30-1602, 30-1702 provides:

In discharging the duties of the position of director of an issuing public corporation, a director, in considering the best interests of the corporation, *shall* consider the long-term as well as the short-term interests of the corporation and its shareholders including the possibility that these interests may be best served by the continued independence of the corporation. In addition, a director *may* consider the interests of Idaho employees, suppliers, customers and communities in discharging his duties.<sup>301</sup>

#### **B. Uniform, Opt-In and Opt-Out Constituency Provisions**

Constituency statutes are typically uniform in application, reaching all corporations incorporated within a given jurisdiction.<sup>302</sup> One state, Pennsylvania, allows a company to opt out of its constituency statute.<sup>303</sup> A few states have opt-in statutes that permit a corporation to include a constituency provision in its articles of incorporation if it so chooses.<sup>304</sup> For example, Georgia's constituency statute permits a Georgia corporation to include a provision in its



articles of incorporation that allows its board of directors to consider constituencies other than stockholders when making decisions.<sup>305</sup>

### **KEY CONCEPT:**

**Most** constituency statutes apply to **all** corporations within a jurisdiction, and **permit**, but **do not require**, directors to consider stakeholder interests.

## **IV. Reaction to Constituency Statutes**

Although 33 United States jurisdictions adopted the constituency model, the reaction to the concept was not otherwise positive. Delaware, the primary jurisdiction for incorporation in the United States, did not adopt a constituency statute. Nor was such a provision included in the Model Business Corporation Act (the “MBCA”), an influential model corporation statute promulgated by the American Bar Association. In addition, many commentators questioned the motivation behind the provisions. Part C, below, discusses how benefit corporation law may address the concerns that led to a lack of acceptance of the constituency model.

### **A. The MBCA and Delaware Reject Constituency Provisions**

In 1990, the American Bar Association’s Committee on Corporate Laws considered amending the MBCA to include a constituency provision.<sup>306</sup> The Committee ultimately rejected such an amendment:

In conclusion, the Committee believes that other constituencies statutes are not an appropriate way to regulate corporate relationships or to respond to unwanted takeovers and that an expansive interpretation of the other constituencies statutes cast in the permissive mode is both unnecessary and unwise. Those statutes that merely empower directors to consider the interests of other constituencies are best taken as a legislative affirmation of what courts would be expected to hold, in the absence of a statute. Interpreting the statutes to have the same force as the express Indiana provision would accomplish a change in traditional corporate law so radical that it should be undertaken only after there has been extensive and broad-based deliberation on the effects of reshuffling of fundamental relationships among shareholders and other persons who may be affected by the affairs of an incorporated business.<sup>307</sup>

The Committee cited with approval Delaware’s case law that allows consideration of other interests when those interests are reasonably related to the long-term interests of stockholders, unless the decision concerns the sale of the company.<sup>308</sup> Overall, the Committee believed that constituency statutes “may have ramifications that go far beyond a simple enumeration of the other interests directors may recognize in discharging their duties.”<sup>309</sup>

Similarly, Delaware did not adopt constituency provisions. Although there is no legislative history explaining the absence of a change, it is likely that the members of the Delaware Bar responsible for drafting changes to the DGCL had the same concerns as the drafters of the MBCA. Moreover, at the height of the hostile takeover era that engendered constituency statute adoption, the law in Delaware was evolving rapidly, and, in the view of many, it was evolving toward an enterprise model, alleviating any need for a statutory change.<sup>310</sup> Equally important, because of the large number of public companies incorporated in Delaware, the effect of a mandatory change in director responsibility would be enormous. In that environment, it is likely the Delaware bar felt that changing the statute would do more harm than good.



## **B. Criticisms of Constituency Statutes**

Early on, constituency statutes were criticized for conflicting with the shareholder primacy norm.<sup>311</sup> As discussed in Chapter One, the stockholder primacy model views stockholders as the owners of the corporation, which is to be managed solely in their interests.<sup>312</sup> Anti-constituency scholars argued constituency statutes would destroy stockholder value:

Opponents' greatest fear is that constituency statutes will upset the shareholder primacy norm by changing the fiduciary duties that directors owe to shareholders. Specifically, they fear that constituency statutes allow constituency interests to compete with shareholder interests in corporate decision-making, thereby jeopardizing corporate profitability and shareholder value.<sup>313</sup>

The Committee on Corporate Laws based much of its criticism of constituency statutes on their apparent conflict with the shareholder primacy model. The Committee found that consideration of non-stockholder interests without relation to stockholder interests "would conflict with the directors' responsibility to shareholders and could undermine the effectiveness of the system that has made the corporation an efficient device for the creation of jobs and wealth,"<sup>314</sup> and that requiring directors to engage in this balancing of interests would likely yield poorer decisions.<sup>315</sup> The Committee emphasized that "courts have consistently avowed the legal primacy of shareholder interests when management and directors make decisions."<sup>316</sup>

Another related concern with constituency statutes was the lack of accountability and potential for director abuse at the expense of stockholders.<sup>317</sup> Since the statutes are generally permissive, directors may use the expanded considerations as they please in making decisions. Directors can easily justify any decision based on how they weigh the considerations, thus harming a plaintiff's ability to meaningfully challenge board action. One law professor posed the following hypothetical:

[W]hat if management simply uses the constituency provision to negotiate a better deal for itself without regard to the constituency at issue. For example, if a rust belt company is approached with an offer to go private at \$21, it could well respond, "I'm sorry, but at \$21, this deal is not good for our employees, the local community or the environment." Imagine the surprise of constituencies when at \$25, the board changes its mind, and takes the offer. In the end, the only constituency with standing is the shareholder community. Consequently, one shouldn't be surprised if/when directors use these statutes as little more than bargaining levers at the expense of the communities they were meant to protect.<sup>318</sup>

Commentators were concerned that because the courts will largely defer to the directors' determination whether to consider permitted constituency interests, there would be little accountability. Others have echoed concerns that these statutes serve to protect directors at the expense of stockholders and other constituencies.<sup>319</sup>

## **C. Benefit Corporation Laws May Be A Better Answer To Stockholder Primacy Than Constituency Statutes**

Those states that have adopted uniform constituency provisions have made a public policy decision to reject the stockholder primacy model for all corporations. In light of the modern view that corporate statutes should be "enabling," rather than prescriptive, this may be viewed as an unusual choice. However, the choice may be consistent

with the policy considerations that drive the enterprise model discussed in Chapter One. On this view, the privileges of corporate personality, perpetual existence, and limited liability should not be granted to an entity that will only act selfishly for the benefit of its stockholders, regardless of the effect on other stakeholders. However, if this is in fact the justification for the uniform application of many other constituency provisions, it seems inconsistent with the permissive nature of the provisions, since the corporation does not have any obligation or accountability for broad stakeholder interests. Public policymaking truly guided by the enterprise model should thus create corporate governance rules that include accountability for stakeholder interests, like Connecticut's original constituency statute, or like benefit corporation provisions.

The benefit corporation governance model would address concerns that constituency statutes lack accountability: under the benefit corporation model, directors must balance the interests of all stakeholders, and must be transparent about such balancing. However, even if a provision is mandatory, there may be significant policy objections if its operation is uniform, because a uniform statute mandates a change for all corporations from stockholder primacy to the enterprise model. A mandatory provision, in contrast to an enabling provision, may simply be too much for the markets, particularly in a jurisdiction such as Delaware, where thousands of publicly-traded companies are incorporated. An enabling provision, like Georgia's constituency provision or Delaware's benefit corporation statute, allows companies to test the enterprise model waters without mandating wholesale change in the public equity markets.

### KEY CONCEPT:

Unlike constituency statutes, **benefit corporation** statutes create a corporate governance model that includes **accountability** for both **stockholder** and **stakeholder interests**. In addition, because benefit corporation statutes require an **opt in**, stockholders have more **choice** in deciding whether to reject stockholder primacy.

## V. Constituency Statute Litigation

The Geczy Study identified forty-seven relevant cases in the thirty-year period from 1983 through 2013.<sup>320</sup> Examination of that case law should provide guidance for corporations opting into benefit corporation status because, although the statutory schemes have differences, they both reject the doctrine of stockholder primacy. The case law addresses constituency statutes from thirteen jurisdictions, and most cases occurred in the last fifteen years.<sup>321</sup> The study categorized cases into one of five categories (Positive, Neutral/Positive, Neutral, Neutral/Negative, Negative) based on the court's treatment of the constituency statute.<sup>322</sup> Forty of the cases involved claims for breach of fiduciary duty.<sup>323</sup>

Court enforcement was overall positive: of forty-seven cases, twenty-nine fell into the Positive and Neutral/Positive categories.<sup>324</sup> Seventeen of these cases recognized expanded director discretion,<sup>325</sup> and twelve recognized that there was no enforceable right for non-stockholders.<sup>326</sup> In Positive cases, the statute was a determining factor in the decision and the court recognized the legitimacy of stakeholder consideration, or declined to create enforcement rights in stakeholder constituents.<sup>327</sup> In Neutral/Positive cases, there was a substantive discussion that recognized the expanded scope of director decision-making or the limits on stakeholder rights, but such factors were not essential to the holding.<sup>328</sup> In Neutral cases, the court cited or referenced constituency statutes but did not include substantive discussions.<sup>329</sup> Only four out of the forty-seven cases were coded Neutral/Negative<sup>330</sup> and no cases fell under the Negative category.<sup>331</sup> In Neutral/Negative cases, the court addressed constituency statutes, but did not recognize expanded director authority or decline to apply *Revlon*, or declined to permit expanded discretion to situations affecting franchise rights.<sup>332</sup> "Negative" cases (of which there were none) would have declined to apply expanded

director authority where the reasoning would have been a factor in the holding.<sup>333</sup> These results suggest that benefit corporation statutes will be enforced, and provide directors with additional discretion, without creating rights in non-stockholders.

## **KEY CONCEPT:**

The courts have uniformly applied “other constituency” statutes as intended, giving directors more discretion to recognize stakeholder concerns, but not creating new rights for those stakeholders.

### **A. Expanded Interests for Directors to Consider**

Much of the case law recognized the expanded interests that directors could consider under constituency statutes. Frequently, constituency statutes were successfully invoked by directors seeking to uphold their decisions. Courts rarely found directors went too far in considering other constituencies, only finding an abuse of discretion when a decision conflicted with voting rights. Constituency provisions have not been successfully used offensively by plaintiffs claiming directors failed to consider non-stockholder constituents. However, the constituency statutes have not prevented stockholders from bringing claims that directors either completely ignored stockholders interests, or acted in a manner that would not advance the interests of any stakeholders. These cases should provide guidance in litigation involving benefit corporations and two are briefly discussed below.

*Kloha v. Duda*<sup>334</sup> is an example of directors successfully using a constituency statute to uphold a decision.<sup>335</sup> In *Kloha*, the plaintiff alleged the defendant directors breached their fiduciary duties for, among other things, considering family employment concerns in their decision making.<sup>336</sup> The court determined that the board could consider the impact of its decisions on employees, including family members.<sup>337</sup>

Similarly, in *Safety-Kleen Corp. v. Laidlaw Env'tl. Servs. Inc.*,<sup>338</sup> the court declined to grant a preliminary injunction, finding the Safety-Kleen board did not breach its fiduciary duties in recommending one proposal to stockholders and keeping defensive measures in place, where the directors' decision involved the consideration of non-stockholder interests that the Wisconsin statute expressly endorsed.<sup>339</sup> However, the *Safety-Kleen* court also suggested some limits on director discretion in considering other constituencies, noting that the board might be prevented from ignoring a clearly superior proposal solely due to the interests of other constituencies.<sup>340</sup>

Moreover, plaintiffs may still allege breaches of duty that do not involve allocation questions, and simply reflect breaches to the combined class of constituencies. In *Shepard v. Humke*,<sup>341</sup> the court found the plaintiff's fiduciary duty claim sufficient to survive the defendants' motion to dismiss.<sup>342</sup> The court explained that allegations of misrepresentations and involving a break-up fee could involve a claim that the directors failed to act in the best interests of all of the corporation's constituencies.<sup>343</sup>

### **B. Application to Voting Rights**

While courts have acknowledged the expanded discretion afforded to directors by “other constituency” statutes, that discretion is not without limits, particularly where voting rights are concerned. Those cases may provide important guidance for benefit corporations, because it is likely that the same concern for the corporate franchise will be applicable.

In *Warehime v. Warehime*,<sup>344</sup> the defendant directors cited to the Pennsylvania constituency statute, justifying their actions based on permissive consideration of constituents other than stakeholders.<sup>345</sup> While the court acknowledged the broad discretion granted by the business judgment rule and the ability of directors to consider non-stockholder constituencies, it concluded that those provisions could not validate actions intended to interfere with voting rights.<sup>346</sup> However, in one case a Georgia court refused to apply the *Blasius* test because a constituency statute was in effect.<sup>347</sup>

### **C. Impact on Enhanced Scrutiny**

The Barzuza Study examined the question of whether other constituency statutes affect the judicial standard of review.<sup>348</sup> In some states, the constituency statute explicitly rejects the enhanced scrutiny standards of *Revlon* and *Unocal*, and the cases follow the legislative mandate.<sup>349</sup> In other jurisdictions, however, the statute does not explicitly address the standard of review.<sup>350</sup> In some of those states, courts have nevertheless interpreted constituency statutes to mandate business judgment rule treatment of cases that might otherwise be subject to enhanced scrutiny.<sup>351</sup> In other states however, the courts continued to apply enhanced scrutiny.<sup>352</sup> These cases raise issues that will also be raised when benefit corporations are in situations that involve enhanced scrutiny for traditional corporations.

### **D. Standing for Non-Stockholders**

The Geczy Study found that none of the constituency statute cases recognized an enforceable right for non-stockholders, with twelve explicitly declining to do so.<sup>353</sup> Since constituency statutes are permissive in nature, no fiduciary duty runs to non-stockholders.<sup>354</sup> For example, in *Official Comm. Of Unsecured Creditors of PHD, Inc. v. Bank One*,<sup>355</sup> the court relied on the permissive nature of the constituency statute to deny fiduciary duties to creditors.<sup>356</sup> Similarly, the court in *In re I.E. Liquidation, Inc.*<sup>357</sup> dismissed breach of fiduciary duty claims based on the directors' failure to consider creditors' interests.<sup>358</sup> Thus, the courts have consistently interpreted the permissive language of constituency statutes as neither creating an affirmative duty to consider non-stockholders' interests nor the attendant right of action for failure to do so.

While benefit corporation legislation, including the Delaware statute, is mandatory, the statutes expressly provide that no right of action is created other than the right of stockholders to bring a derivative suit.<sup>359</sup> Similarly, the MBCL provides no right of action for non-stockholders.<sup>360</sup> Thus, benefit corporation legislation provides greater clarity than many constituency statutes, where a lack of enforcement right for third parties is only implied by the permissive nature of the statutes.<sup>361</sup>

### **E. Conclusions**

Overall, the Geczy Study found that constituency statutes truly expanded the authority of directors, as opposed to simply codifying earlier common law.<sup>362</sup> In some jurisdictions, the language permitting directors to consider other constituencies was found to reinstate the business judgment rule where enhanced scrutiny might otherwise apply.<sup>363</sup> However, except in one case, no courts found that such language altered the standard of review applicable to decisions affecting the stockholder franchise.<sup>364</sup> The case law also shows constituency statutes did not create a concurrent expansion of non-stockholder constituent rights.<sup>365</sup> Each of these outcomes is likely to have resonance in the interpretation of benefit corporation statutes, including in Delaware.

### **PRACTICE POINT:**

Reviewing the literature on constituency statutes will help lawyers guide clients

adopting benefit corporation status.

## **VI. Financial Impact of Constituency Statutes**

A 1993 event study determined that the adoption of constituency statutes did not have a statistically significant impact on stock prices.<sup>366</sup> Nearly twenty years later, The Geczy Study was conducted to determine the impact of constituency statutes on investment by high fiduciary duty institutions (“HFDis”).<sup>367</sup> HFDis are defined as pension funds and endowments, which share similar, strict fiduciary duties.<sup>368</sup> Ultimately, the study found no significant adverse impact on investment by HFDis when corporations in which they were invested became subject to constituency legislation:

The empirical findings show that constituency statutes were not a roadblock to institutional investment with especially high fiduciary duties. We cannot rule out that constituency statutes had *some* effect on HFDis investment, but we can rule out that these investors significantly altered investment behavior after the passage of the statutes, as one might expect if these institutions perceived material conflicts with their fiduciary duties. We consider these findings promising for new legislations such as the benefit corporation laws, insofar as constituency laws expanded management prerogatives to consider nonshareholder interests.<sup>369</sup>

At least two other papers have found that the adoption of constituency statutes are linked to increased innovation.<sup>370</sup>

While the studies are limited, they indicate that the introduction of the concept of consideration of stakeholder interests has not adversely impacted corporations or their stockholders: stock prices were not affected and investor fiduciaries did not flee based on a perception that investments in companies with broad fiduciary regimes violated their own fiduciary duties. Because the benefit corporation regime provides greater accountability and transparency than does the constituency statute regime, and because it does not make duties to stockholders permissive, it seems likely that the results for benefit corporations and their stockholders will be similarly positive.

### **KEY CONCEPT:**

Academic studies show that the adoption of constituency statutes was not viewed negatively by the stock market. These results suggest that benefit corporation status should not adversely affect stockholders.

## **CHAPTER SIX: Alternative Entities**

### **PRACTICE POINT / APPENDIX ALERT:**

The operating agreement of an LLC may be drafted to create the same characteristics of purpose, accountability, and transparency as benefit corporations. An accountability provision is included as Appendix 10.

Benefit corporations are increasingly popular structures for entrepreneurs looking to achieve both profit and social benefit, but similar goals can be accomplished in Delaware with a limited liability company. LLCs may present an

attractive alternative for entrepreneurs who want to incorporate a social purpose into their companies. Incorporating as an LLC would bring many benefits, including pass-through taxation and a flexible management structure.

The founder of an LLC may contract around default fiduciary duties to create a company with managers who have the same obligations as the directors of a benefit corporation. Recent Delaware cases have addressed the issue of default fiduciary duties in the LLC context.<sup>371</sup> Recent amendments to Delaware’s Limited Liability Company Act (“LLC Act”) clarified that managers of LLCs have default fiduciary duties.<sup>372</sup> Nevertheless, the managers’ duties may be “expanded or restricted or eliminated by provisions in the limited liability company agreement.”<sup>373</sup> LLC founders are free to choose the terms of the agreement because courts will enforce explicit contractual provisions, even if they may appear onerous or one-sided.<sup>374</sup>

The LLC Act imposes an important limit on private ordering when it states that an LLC agreement “may not eliminate the implied contractual covenant of good faith and fair dealing.”<sup>375</sup> The implied covenant of good faith and fair dealing has been described in two potentially conflicting ways. First, courts have explained it as a limited “gap-filler” requiring the court to arrive at an answer for a situation not explicitly accounted for in the contract.<sup>376</sup> According to this view, “one generally cannot base a claim for breach of the implied covenant on conduct authorized by the agreement.”<sup>377</sup> Second, courts have identified the implied covenant as a broader method for a court to “refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving” the benefit of the bargain.<sup>378</sup>

Despite these limits, the LLC structure is sufficiently flexible to create a benefit corporation-like arrangement through private ordering. In fact, many LLCs are already certified as “B Corps” (e.g., Urban Green Development, LLC; Blue Earth Consultants, LLC; Good Capital, LLC) by B Lab, a non-profit entity that certifies socially conscious business entities and that requires a legal structure that creates broad accountability.<sup>379</sup> B Lab requires certain language in the operating agreement to ensure the LLC’s mission is aligned with its stakeholders. That language is reproduced in Appendix 10.

There are also significant drawbacks to using an LLC structure. First, many investors strongly favor investing in a corporation rather than an LLC.<sup>380</sup> While there is a well-developed body of case law for corporations, LLC case law is much less developed.<sup>381</sup> Additionally, LLC operating agreements are more varied than their corporate counterparts (charters and bylaws), which are “relatively standard-form.”<sup>382</sup> For these reasons, many investors avoid investing in LLCs.<sup>383</sup> If founders anticipate raising capital, they should be wary of forming an LLC. Second, writing benefit corporation provisions into an LLC agreement does not allow companies to differentiate themselves from the competition. In a marketplace where “green-washing” is common, a legal change of structure from LLC to PBC can signal the company’s commitment to its core values.<sup>384</sup>

## APPENDICES

### APPENDIX 1 - Quick Guide to Becoming a PBC

This outline describes the major steps required for an existing Delaware corporation to become a Delaware public benefit corporation.

1. *Summary.* In order to become a public benefit corporation (a “PBC”), a traditional Delaware corporation must draft an amendment to its certificate of incorporation (an “Amendment”). The Amendment must be approved by the board of directors, and then by the stockholders. Once approved, the Amendment must be filed with the



Secretary of State of Delaware. Under certain circumstances, the corporation must provide its stockholders who do not approve the Amendment with the right to cash out their stock for fair value (“appraisal rights”). Once the amendment is filed, the corporation should include a legend on its stock certificates, stating that the corporation is a PBC. A newly forming corporation may simply file its initial certificate of incorporation as a PBC.

2. *Contents of Amendment.* The following certificate provisions are either required or should be considered:

2.1. The heading of the certificate must state that the corporation is a public benefit corporation.

2.2. The name of the corporation may be changed to include the words “public benefit corporation,” the abbreviation “P.B.C.,” or the designation “PBC.” If the name does not include such indicators, then if the PBC is not publicly traded, the PBC must notify anyone who purchases stock that the corporation is a PBC.

2.3. The certificate must identify one or more specific public benefits to be promoted by the corporation.

2.4. Delaware gives a PBC the option of committing in the certificate of incorporation or bylaws to make its statement about its efforts to create public benefit: (1) available to the public (as opposed to its stockholders only); (2) annually (as opposed to biennially); or (3) in accordance with a third party standard (as opposed to using its own methodology).

2.5. Delaware permits a PBC to include in its certificate a provision that a disinterested failure by a director to satisfy the requirements applicable to directors of a public benefit corporation will not constitute an act or omission not in good faith or a breach of the duty of loyalty. The purpose of such a provision is to protect directors and should be considered by any corporation considering an election to be a public benefit corporation. *See* the sample language in Appendix 2.

Note: The Delaware statute will permit the provisions described in 2.3 and 2.4 to be placed in the bylaws instead of the certificate. Placing them in the certificate of incorporation will make them more difficult to change.

3. *Board approval.* The board of directors must approve the Amendment and recommend that the Amendment be submitted to the stockholders for approval. The certificate of incorporation and bylaws should be reviewed to determine the vote required.

4. *Stockholder approval.* The stockholders must approve the Amendment. The statute requires a 2/3’s affirmative vote of the outstanding shares of the corporation. The certificate of incorporation and bylaws should be reviewed to determine whether any additional vote is required.

5. *Appraisal rights.* If the corporation is not publicly traded, stockholders who did not vote for an amendment are entitled to an appraisal by the Delaware Court of Chancery of the fair market value of the stockholder’s share of stock. The corporation is required to provide its stockholders with notice of their right to an appraisal. See Appendix 3 for details regarding the process and requirements for appraisal rights in Delaware.

6. *File Amendment.* After the board and stockholders approve the Amendment, the Amendment must be prepared and filed with the Secretary of State.



7. *Print and issue new stock certificates.* The Delaware law requires that a stock certificate issued by a PBC note conspicuously that the corporation is a PBC. It is unclear whether that requirement applies to stock certificates issued before a corporation becomes a PBC. To avoid a later challenge by a person that acquires shares represented by a stock certificate without that notation, the corporation should consider printing new stock certificates with the required notation and issuing the new stock certificates to its existing stockholders.

8. *Name change.* If the PBC has adopted a new name, it should make the necessary changes to reflect the new name. The corporation should update, for example, bank accounts, business cards, registrations, etc. There is no set timing for completion of these changes; however, a corporation should aim to complete them within a commercially reasonable time following the PBC election.

## APPENDIX 2 - PBC Charter Provisions

### Purpose clause:

1. *Purpose.* The purpose of the Corporation is to engage in any lawful act or activity for which a corporation may be organized under the Delaware General Corporation Law.

2. *Public Benefit Corporation.* The Corporation shall be a public benefit corporation as contemplated by subchapter XV of the Delaware General Corporation Law (the “DGCL”), or any successor provisions, that it is intended to operate in a responsible and sustainable manner and to produce a public benefit or benefit, and is to be managed in a manner that balances the stockholders pecuniary interests, the best interests of those materially affected by the corporation’s conduct and the public benefit or benefits identified in this certificate of incorporation. If the DGCL is amended to alter or further define the management and operation of public benefit corporations, then the corporation shall be managed and operated in accordance with the DGCL, as so amended.

3. *Purposes.* As its specific purpose, the corporation shall promote a positive effect (or reduce negative effects [state affected persons, entities, communities or interests and effects constituting the corporation’s specific public benefit(s), which may include (without limitation) effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature].

4. *Third Party Standard.\** The Corporation shall deliver its public benefit statement annually, make it available to the public on its website, or if it does not have a website, upon request, and prepare it in accordance with a third party standard applied consistently with any application of that standard in prior statements or accompanied by an explanation of the reasons for any inconsistent application. A third party standard means a credible standard for defining, reporting, and assessing a corporation’s social and environmental performance that:

- a. Assesses the effect of the business and its operations on the interests of those materially affected by the corporation’s conduct;
- b. Is developed by an organization that is not under the control of the corporation or its affiliates; and
- c. Has information publicly available concerning:

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i. The criteria and relative weighting the standard uses to assess the corporation’s overall social and  
\* This provision is not required. It can be used for Delaware PBCs that want to use the transparency provisions included in the MBCL.

environmental performance;

ii. The process by which the standard is developed and revised; and

iii. The independence of the organization that developed the standard, including:

1. The material owners;

2. The members of the organization's governing body and how they are selected; and

3. The organization's material sources of financial support.

In addition to the requirements under Section 366(b) of the DGCL, the statement shall include all of the following:

a. A narrative description of the process and rationale for selecting the third-party standard used to prepare the statement; and

b. A statement of any connection between the entity that established the third-party standard, or its directors, officers, or material owners, and the Corporation, or its directors, officers, and material owners, including any financial or governance relationship that might materially affect the credibility of the objective assessment of the third-party standard;

c. The assessment shall include an assessment of the Corporation's creation of a material positive impact on society and the environment, taken as a whole, from the business and operations of the Corporation.

5. *Severability*: To the extent that any provision of this ARTICLE [ ] is found to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of any other provision of this ARTICLE [ ].

**Liability Limitation:** \*\*

To the fullest extent permitted by law, a director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. If the Delaware General Corporation Law is amended to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law, as so amended.

Any disinterested failure to satisfy DGCL § 365 shall not, for the purposes of Sections 102(b)(7) or 145 of the DGCL, or for the purposes of any use of the term "good faith" in this certificate of incorporation or the bylaws in regard to the indemnification or advancement of expenses of officers, directors, employees and agents, constitute an act or omission not in good faith, or a breach of the duty of loyalty. Any repeal or modification of this ARTICLE [ ] shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification.

\*\* When adding this provision indemnification contracts with directors and officers should be reviewed to ensure that any use of the term "good faith" is appropriately modified to include the broadened concept of Section 365.

## **APPENDIX 3 - Quick Guide to Appraisal for Public Benefit Corporations**

Appraisal rights are a statutory remedy available to stockholders who object to certain extraordinary actions taken by a corporation (such as mergers, and now, under the PBCS, charter amendments to elect PBC status or similar events). This remedy allows stockholders to require the corporation to buy their stock at a price equal to its fair market value (plus interest) as of the time immediately before the extraordinary corporate action is taken.

### **The Corporation's Obligations Relating to Appraisal Rights**

- *Vote at a stockholder meeting.* If the event is to be submitted for approval at a meeting of the stockholders, the corporation must:
  - notify all of the stockholders (as of the record date for notice) at least 20 days prior to the meeting that appraisal rights are available; and
  - include in the notice a copy of Section 262 of the DGCL.
  - include in the notice all information material to the stockholders' decision whether to seek appraisal.
- *Approval by written consent.* If the event is approved by written consent of the stockholders (in accordance with DGCL § 228), the corporation must:
  - before the effective date of the event or within 10 days thereafter, notify each stockholder of the approval of the event and that appraisal rights are available;
  - include in the notice a copy of Section 262 of the DGCL;
  - include in the notice all information material to the stockholders' decision whether to seek appraisal;
  - notify such stockholders of the effective date of the event if given on or after the effective date

### **How a Stockholder Perfects Appraisal Rights**

To perfect appraisal rights in Delaware, a stockholder must comply with all of the following procedures:

- *Demand appraisal.* The stockholder must file a written demand for appraisal with the corporation before the stockholder vote on the event (or, if the event is approved by written consent, within 20 days of the appraisal notice).
- *Not vote in favor of or consent to the event.* The stockholder must either vote against the event or abstain from the vote.

- *Maintain continuous record ownership.* The stockholder making the demand must be the record (registered) holder of the stock from the date of the demand for appraisal through the effective date of the event.
- *File a petition with the Delaware Court of Chancery and serve a copy of the petition on the corporation.* Within 120 days after the effective date of the event, the stockholder must file a petition with the Court of Chancery and demand that it determine the value of the stock of all stockholders. It is not necessary for all dissenting stockholders to file the petition, but one stockholder must file to start the proceeding to determine the fair value of the corporation's stock (DGCL § 262(e)). All dissenting stockholders share in the cost of the proceeding.

### **How a Corporation Must Respond to a Demand for Appraisal Rights**

The corporation must follow certain procedures set out in the statute when responding to a demand for appraisal. These requirements include:

- Providing a statement stating the aggregate number of shares for which demands for appraisal have been received if requested by a stockholder who has perfected the right to an appraisal. This statement must be provided within ten days of the request ((DGCL § 262(e)).
- Filing a verified list of stockholders who have demanded appraisal with the office of the Register in Chancery within 20 days from receiving service of the appraisal petition (DGCL § 262(f)).

## **APPENDIX 4 - Rubric for Decision Making**

### **Summary:**

In 2013, Delaware adopted legislation authorizing a corporation created in Delaware to become a public benefit corporation (a "PBC"). The new law (like its counterparts, now adopted in more than 30 U.S. jurisdictions) allows for-profit companies to operate in a manner that sustainably creates long-term value for its stakeholders and others. Specifically, the Delaware law defines a PBC as a for-profit corporation that is intended to produce a public benefit or benefits and to operate in a responsible and sustainable manner.

The statute does not define "responsible and sustainable," but instead mandates that the directors must balance the interests of its stockholders with the public benefits it has identified in its charter, and the interests of those materially affected by the corporation's conduct. The Delaware law gives directors broad discretion with respect to such balancing, and allows corporations to eliminate monetary liability for disinterested directors making such balancing decisions. The statute also requires that the corporation provide its stockholders with a report (a "Benefit Report") at least once every two years. The report must include:

- the sustainability objectives established by the board;
- standards adopted to measure progress in promoting those objectives;
- factual information based on those standards regarding the corporation's success in meeting the standards; and
- an assessment of the corporation's success in meeting the standards.

Thus, in order to operate in a responsible and sustainable manner and meet its reporting requirements, the board of a PBC should engage in a continuing process of (1) determining who is materially affected by the corporation's business, (2) developing and maintaining criteria for balancing both the interests of those so effected, as well as any specific benefit identified in the corporation's charter, and (3) measuring progress against those criteria. The board may determine that some or all of the balancing obligations may be met by adopting one or more third party standards, and engaging in a continuing process of measuring against those standards.

The list below is an example of procedures a board may adopt in order to ensure that it is properly attending to the balancing question. There is no requirement that these particular procedures be followed.

**Committee:**

- Establish a stand-alone committee or delegate sustainability issues to audit, governance or other committee.
- Include in committee charter oversight of and/or recommendation with respect to:
  - Third party standards, if any
  - Internally generated standards
  - Choice of certifying body or bodies, if any
  - Benefit Report
  - Sustainability objectives and standards
  - Sustainability strategies and policies

**Management Role**

- Recommendations on third party standards and internally generated standards
- Recommendations on certification issues
- Recommendation of sustainability objectives and standards
- Recommendation of sustainability strategies and policies
- Report on progress toward impact objectives
- Draft Benefit Report

**Periodic Activity**

- Cycle should be synchronized with benefit reporting period
- Sustainability objectives to be established and assessed on an annual basis
- Quarterly committee meetings
- Quarterly report to Board, with longer session once or twice a year, giving Board significant opportunity to balance public benefits and stockholders' pecuniary interests
- Board to approve Benefit Report and impact objectives

#### **Non-Periodic Activity**

- Management charged with bringing significant sustainability issues to the board that come up out of cycle and that are not covered by policies (e.g., negotiation of energy contract; significant building projects)
- Committee should consider sustainability issues implicated by new developments (e.g., whether to purchase renewable energy or obtain LEED certification for new buildings)
- Committee may make balance decision, or decide to take balance question to Board based on significance; should report any decision to board

#### **Process Issues**

- Management recommendations to committee and committee recommendations to board should be distributed well in advance of committee and board meetings in order to give directors adequate time to review
- Where materials update prior materials, directors should be provided with redline copies, so that they can focus on changes
- Minutes should reflect sustainability issues discussed, resolution of those issues, and any direction given to the committee or management
- Internal checklists should be reviewed to determine whether sustainability issues should be added
- Where third party or internal standard is adopted, materials and minutes should reflect consideration of how standard maps to interests of those effected by the corporation's conduct

#### **Rubric for Individual Decisions**

- Identify materially affected constituencies (including specific benefits)
- Identify any standards or certifications that company uses that are implicated by decision

- Determine how different options would be assessed under such standards
- Determine whether there are any third party standards not being used by the company that should be used to assess the various options
- If so, determine how each option will be assessed under such standards
- Determine whether any outside expertise should be brought in
- Use relevant standards, certifications, management input and outside expertise, as applicable, to determine the effects of different options on shareholders and other relevant constituencies
- If the different choices the board faces have better implications for shareholders or one or more constituencies, board should acknowledge the necessity of making trade-offs, and make what it believes to be a reasonable decision
- A record should be made of the standards used, and how they were applied, as well as reports from management and outside experts.

The minutes should reflect the board's acknowledgment and consideration of the trade offs at issue.

## **APPENDIX 5 - Delaware Public Benefit Corporation Statute Compared to Model Benefit Corporation Legislation\***

[Click here to view comparison chart](#) (pdf - non-searchable)

\* Twenty-nine states and the District of Columbia have adopted some version of the MBCL to date.

## **APPENDIX 6 - When Appraisal Rights Are Available Under PBC Provisions**

1. Charter amendment that changes traditional corporation to PBC *unless* corporation is public.
2. Merger or consolidation of traditional corporation if shares are not publicly traded and are converted into or exchanged for shares of PBC.
3. Merger or consolidation of traditional corporation if shares are converted into or exchanged for shares of PBC that is not publicly traded.

## **APPENDIX 7 - When Two-thirds Vote Required Under Section 363**



1. Traditional corporation amends its charter to become a PBC.
2. PBC amends its charter to change its specific benefit.
3. PBC amends its charter to become a traditional corporation.
4. PBC amends its charter to change or delete provision requiring that its benefit report (i) be issued more frequently than biennially, (ii) be made publicly available, or (iii) use a third party standard or include third party certification.
5. Traditional corporation merges or consolidates if its shares become, or are converted into or exchanged for shares of PBC or similar entity.
6. PBC merges or consolidates and shares become, or are converted into or exchanged for, shares of traditional corporation or PBC with different benefit provisions.

## **APPENDIX 8 - DGCL Subchapter XV. Public Benefit Corporations**

- § 361 Law applicable to public benefit corporations; how formed.
- § 362 Public benefit corporation defined; contents of certificate of incorporation.
- § 363 Certain amendments and mergers; votes required; appraisal rights
- § 364 Stock certificates; notices regarding uncertificated stock.
- § 365 Duties of directors.
- § 366 Periodic statements and third-party certification.
- § 367 Derivative suits.
- § 368 No effect on other corporations.

### **§ 361 Law applicable to public benefit corporations; how formed.**

This subchapter applies to all public benefit corporations, as defined in § 362 of this title. If a corporation elects to become a public benefit corporation under this subchapter in the manner prescribed in this subchapter, it shall be subject in all respects to the provisions of this chapter, except to the extent this subchapter imposes additional or different requirements, in which case such requirements shall apply.

### **§ 362 Public benefit corporation defined; contents of certificate of incorporation.**

(a) A “public benefit corporation” is a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders’

pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation. In the certificate of incorporation, a public benefit corporation shall:

(1) Identify within its statement of business or purpose pursuant to § 102(a)(3) of this title 1 or more specific public benefits to be promoted by the corporation; and

(2) State within its heading that it is a public benefit corporation.

(b) "Public benefit" means a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature. "Public benefit provisions" means the provisions of a certificate of incorporation contemplated by this subchapter.

(c) The name of the public benefit corporation may contain the words "public benefit corporation," or the abbreviation "P.B.C.," or the designation "PBC," which shall be deemed to satisfy the requirements of § 102(a)(1)(i) of this title. If the name does not contain such language, the corporation shall, prior to issuing unissued shares of stock or disposing of treasury shares, provide notice to any person to whom such stock is issued or who acquires such treasury shares that it is a public benefit corporation; provided that such notice need not be provided if the issuance or disposal is pursuant to an offering registered under the Securities Act of 1933 [15 U.S.C. § 77r et seq.] or if, at the time of issuance or disposal, the corporation has a class of securities that is registered under the Securities Exchange Act of 1934 [15 U.S.C. § 78a et seq.].

## **§ 363 Certain amendments and mergers; votes required; appraisal rights**

(a) Notwithstanding any other provisions of this chapter, a corporation that is not a public benefit corporation, may not, without the approval of 2/3 of the outstanding stock of the corporation entitled to vote thereon:

(1) Amend its certificate of incorporation to include a provision authorized by § 362(a)(1) of this title; or

(2) Merge or consolidate with or into another entity if, as a result of such merger or consolidation, the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or other equity interests in a domestic or foreign public benefit corporation or similar entity.

The restrictions of this section shall not apply prior to the time that the corporation has received payment for any of its capital stock, or in the case of a nonstock corporation, prior to the time that it has members.

(b) Any stockholder of a corporation that is not a public benefit corporation that holds shares of stock of such corporation immediately prior to the effective time of:

(1) An amendment to the corporation's certificate of incorporation to include a provision authorized by § 362(a)(1) of this title; or

(2) A merger or consolidation that would result in the conversion of the corporation's stock into or exchange of the

corporation's stock for the right to receive shares or other equity interests in a domestic or foreign public benefit corporation or similar entity; and has neither voted in favor of such amendment or such merger or consolidation nor consented thereto in writing pursuant to § 228 of this title, shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock; provided, however, that no appraisal rights under this section shall be available for the shares of any class or series of stock, which stock, or depository receipts in respect thereof, at the record date fixed to determine the stockholders entitled to receive notice of the meeting of stockholders to act upon the agreement of merger or consolidation, or amendment, were either: (i) listed on a national securities exchange or (ii) held of record by more than 2,000 holders, unless, in the case of a merger or consolidation, the holders thereof are required by the terms of an agreement of merger or consolidation to accept for such stock anything except (A) shares of stock of any other corporation, or depository receipts in respect thereof, which shares of stock (or depository receipts in respect thereof) or depository receipts at the effective date of the merger or consolidation will be either listed on a national securities exchange or held of record by more than 2,000 holders; (B) cash in lieu of fractional shares or fractional depository receipts described in the foregoing clause (A); or (C) any combination of the shares of stock, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in the foregoing clauses (A) and (B).

(c) Notwithstanding any other provisions of this chapter, a corporation that is a public benefit corporation may not, without the approval of 2/3 of the outstanding stock of the corporation entitled to vote thereon:

(1) Amend its certificate of incorporation to delete or amend a provision authorized by § 362(a)(1) or § 366(c) of this title; or

(2) Merge or consolidate with or into another entity if, as a result of such merger or consolidation, the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or other equity interests in a domestic or foreign corporation that is not a public benefit corporation or similar entity and the certificate of incorporation (or similar governing instrument) of which does not contain the identical provisions identifying the public benefit or public benefits pursuant to § 362(a) of this title or imposing requirements pursuant to § 366(c) of this title.

(d) Notwithstanding the foregoing, a nonprofit nonstock corporation may not be a constituent corporation to any merger or consolidation governed by this section.

## **§ 364 Stock certificates; notices regarding uncertificated stock.**

Any stock certificate issued by a public benefit corporation shall note conspicuously that the corporation is a public benefit corporation formed pursuant to this subchapter. Any notice sent by a public benefit corporation pursuant to § 151(f) of this title shall state conspicuously that the corporation is a public benefit corporation formed pursuant to this subchapter.

## **§ 365 Duties of directors.**

(a) 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 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.

(b) A director of a public benefit corporation shall not, by virtue of the public benefit provisions or § 362(a) of this

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

(c) The certificate of incorporation of a public benefit corporation may include a provision that any disinterested failure to satisfy this section shall not, for the purposes of § 102(b)(7) or § 145 of this title, constitute an act or omission not in good faith, or a breach of the duty of loyalty.

## **§ 366 Periodic statements and third-party certification.**

(a) A public benefit corporation shall include in every notice of a meeting of stockholders a statement to the effect that it is a public benefit corporation formed pursuant to this subchapter.

(b) A public benefit corporation shall no less than biennially provide its stockholders with a statement as to the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation's conduct. The statement shall include:

(1) The objectives the board of directors has established to promote such public benefit or public benefits and interests;

(2) The standards the board of directors has adopted to measure the corporation's progress in promoting such public benefit or public benefits and interests;

(3) Objective factual information based on those standards regarding the corporation's success in meeting the objectives for promoting such public benefit or public benefits and interests; and

(4) An assessment of the corporation's success in meeting the objectives and promoting such public benefit or public benefits and interests.

(c) The certificate of incorporation or bylaws of a public benefit corporation may require that the corporation:

(1) Provide the statement described in subsection (b) of this section more frequently than biennially;

(2) Make the statement described in subsection (b) of this section available to the public; and/or

(3) Use a third-party standard in connection with and/or attain a periodic third-party certification addressing the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and/or the best interests of those materially affected by the corporation's conduct.

## **§ 367 Derivative suits.**

Stockholders of a public benefit corporation owning individually or collectively, as of the date of instituting such

derivative suit, at least 2% of the corporation's outstanding shares or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of at least \$2,000,000 in market value, may maintain a derivative lawsuit to enforce the requirements set forth in § 365(a) of this title.

## **§ 368 No effect on other corporations.**

This subchapter shall not affect a statute or rule of law that is applicable to a corporation that is not a public benefit corporation, except as provided in § 363 of this title.

## **APPENDIX 9 - Specific Public Benefits Examples\***

[Click here to view examples chart](#) (pdf - non-searchable)

\* From filings with Secretary of State, without editing.

## **APPENDIX 10 - B Lab Recommended Provision for Mission-Aligned LLCs**

In discharging his or her duties, and in determining what is in the best interests of the limited liability company (the “Company”) and its members, a managing member shall not be required to regard any interest, or the interests of any particular group affected by such action, as a dominant or controlling interest or factor.

He or she shall give due consideration to the following factors, including, but not limited to, the long-term prospects and interests of the Company and its members, and the social, economic, legal, or other effects of any action on the current and retired employees, the suppliers and customers of the Company or its subsidiaries, and the communities and society in which the Company or its subsidiaries operate, (collectively, with the members, the “Stakeholders”), together with the short-term, as well as long-term, interests of its members and the effect of the Company's operations (and its subsidiaries' operations) on the environment and the economy of the state, the region and the nation.

Nothing in this Article express or implied, is intended to create or shall create or grant any right in or for any person other than a member or any cause of action by or for any person other than a member.

Notwithstanding the foregoing, any managing member is entitled to rely upon the definition of “best interests” as set forth above in enforcing his or her rights hereunder and under state law, and such reliance shall not, absent another breach, be construed as a breach of a managing member's fiduciary duty of care, even in the context of a Change in Control Transaction where, as a result of weighing other Stakeholders' interests, a managing member determines to accept an offer, between two competing offers, with a lower price per unit.

## **ENDNOTES**

### **1-20**

<sup>1</sup> LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (1st ed. 2012).

<sup>2</sup> COLIN MAYER, *FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT* (1st ed. 2013).

<sup>3</sup> Adolph A. Berle and Merrick Dodd debated the merits of each conception, with Berle arguing for shareholder primacy and the ownership model

of the firm and Dodd arguing for consideration of other constituencies and the enterprise model of the firm. *See infra* notes 4 & 5. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264 (1992) (“I suggest that at least over the course of this century there have been, in our public life and in our law, two quite different and inconsistent ways to conceptualize the public corporation and legitimate its power. I will call them the property conception and the social entity conception.”).

<sup>4</sup> This conception was touted by Berle, who asserted that “all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times be exercisable only for the ratable benefit of all the shareholders as their interest appears.” A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931); *see also* Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, WAKE FOREST L. REV., at \*10 (2015) [hereinafter *The Dangers of Denial*] (“Despite attempts to muddy the doctrinal waters, a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare.”).

<sup>5</sup> Dodd argued for “a view of the business corporation as an economic institution which has a social service as well as a profit-making function.” E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932); *see also* Allen, *supra* note 3, at 265 (describing the “social entity” conception of the corporation as encompassing the idea that “corporate purpose can be seen as including the advancement of the general welfare. The board of directors’ duties extend beyond assuring investors a fair return, to include a duty of loyalty, in some sense, to all those interested in or affected by the corporation.”).

<sup>6</sup> Allen, *supra* note 3, at 265 (“The corporation comes into being and continues as a legal entity only with governmental concurrence. The legal institutions of government grant a corporation its juridical personality, its characteristic limited liability, and its perpetual life. This conception sees this public facilitation as justified by the state’s interest in promoting the general welfare. Thus, corporate purpose can be seen as including the advancement of the general welfare.”).

<sup>7</sup> *Hale v. Henkel*, 201 U.S. 43, 74 (1906) (“[T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law.”).

<sup>8</sup> *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

<sup>9</sup> *Id.* at 671.

<sup>10</sup> *Id.* at 684.

<sup>11</sup> Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ANAL. 305 (1976).

<sup>12</sup> Allen, *supra* note 3 at 265; *see also* Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1192-93 (discussing Frank Easterbrook and Daniel Fischel of the “Chicago School” and their conceptions of stockholders as the residual risk bearers of the corporation).

<sup>13</sup> Stout, *supra* note 12, at 1192-93.

<sup>14</sup> *See* Stout, *supra* note 12, at 1193 n.19 (quoting Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* 36-39 (1991)). This theoretical framework starts with economic “agency” theory, but it is important to note that the concept does not involve legal agency, wherein an agent is subject to the direct command of her principal; the corporation law itself is quite clear that although management decisions are made on behalf of stockholders, the directors retain broad discretion over those decisions.

<sup>15</sup> Dodd, *supra* note 5, at 1148.

<sup>16</sup> Allen, *supra* note 3, at 271 (“[T]he corporation has other purposes of perhaps equal dignity [to shareholder wealth maximization]: that satisfaction of consumer wants, the provision of meaningful employment opportunities, and the making of a contribution to the public life of its communities.”).

<sup>17</sup> Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 280-81 (1999); *see also* Allen, *supra* note 3, at 271 (“Resolving the often conflicting claims of these various corporate constituencies calls for judgment, indeed calls for wisdom, by the board of directors of the corporation.”).

<sup>18</sup> Frank Abrams, chairman of Standard Oil of New Jersey in a 1951 address, quoted in FORTUNE, October 1951.

<sup>19</sup> *Business: The New Conservatism*, TIME, November 26, 1956; *see also* Allen, *supra* note 3, at 271-72 (writing in 1992 that the enterprise model

“appears to have been the dominant view among business lenders for at least the last fifty years”).

<sup>20</sup> LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 108 (1st ed. 2012) (quoting Michael C. Jensen, “Value Maximization, Stakeholder Theory, and the Corporate Objective Function,” 12 *BUSINESS ETHICS QUARTERLY* 238 (2002)).

## 21-40

<sup>21</sup> *Id.* at 108 (“Balancing interests—decently satisfying several sometimes compelling objectives, rather than trying to maximize only one—is the rule and not the exception in human affairs.”); see also COLIN MAYER, *FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT* 193 (1st ed. 2013) (“The condemnation of multiple targets confuses simplicity of execution with completeness of principles. . . . the corporation should have a simple set of objectives but a broad set of values by which it judges their implementation.”).

<sup>22</sup> See *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986) (“It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation’s stockholders; that they may sometimes do so ‘at the expense’ of others [*e.g.*, debtholders] . . . does not . . . constitute a breach of duty.”); Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any “There” There?*, 75 S. CAL. L. REV. 1169, 1170 (2002) [hereinafter *The Social Responsibility of Boards*] (“The predominant academic answer is that corporations exist primarily to generate stockholder wealth, and that the interests of other constituencies are incidental and subordinate to that primary concern.”).

<sup>23</sup> 8 DEL. C. § 101(b); 8 DEL. C. § 102(a)(3) (“It shall be sufficient to state . . . that the purpose of the corporation is to engage in any lawful act or activity.”).

<sup>24</sup> *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33 (Del. Ch. 2010) (“Promoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders. When director decisions are reviewed under the business judgment rule, this Court will not question rational judgments about how promoting non-stockholder interests . . . ultimately promotes stockholder value.”).

<sup>25</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) (holding that when a corporation is to be sold in a cash-out merger, directors’ duty is to maximize the short-term value to stockholders, regardless of the interests of other constituencies).

<sup>26</sup> 16 A.3d 1 (Del. Ch. 2010).

<sup>27</sup> *Id.* at 15-16.

<sup>28</sup> *Id.* at 32.

<sup>29</sup> *Id.* at 34-35.

<sup>30</sup> See Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 *WAKE FOREST L. REV.* 135, 151 (2012).

<sup>31</sup> See *id.* at 155. Some commentators point to the breadth of discretion under the business judgment rule as evidence that directors can take the interest of other stockholders into account. Blair & Stout, *supra* note 17, at 299-303. However, as the issues cited in the text make clear, that discretion must be used with the intent to create stockholder value. For a discussion regarding the breadth of the business judgment rule, see *infra* Part I.F.

<sup>32</sup> According to *TW Servs., Inc. v. SWT Acquisition Corp.*:

[D]irectors, in managing the business and affairs of the corporation, may find it prudent (and are authorized) to make decisions that are expected to promote corporate (and shareholder) long run interests, even if short run share value can be expected to be negatively affected, and thus directors in pursuit of long run corporate (and shareholder) value may be sensitive to the claims of other “corporate constituencies.”

14 Del. J. Corp. L. 1169, 1183-84 (Del. Ch. 1989); see also *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (“A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.”); *Mills Acq. Co. v. MacMillan, Inc.*, 449 A.2d 1261, 1282 n.29 (Del. 1989) (permitting a board to consider “the impact of both the bid and the potential acquisition on other constituencies, provided that it bears some reasonable relationship to general shareholder interests”); William B. Chandler, *Hostile M&A and the Poison Pill in Japan: A Judicial Perspective*, 2004 *COLUM. BUS. L. REV.* 45, 56 (2004) (“Directors are permitted to consider the interests of other constituencies (such as creditors, employees, and the local community in which the company operates), but Delaware law emphasizes that they should consider these other interests only to the extent that they affect stockholder interest. This position obviously aligns the Delaware courts with the school of thought holding that the corporation’s sole purpose is to achieve the best financial return for the present group of stockholders.” (emphasis added)).



<sup>33</sup> *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

<sup>34</sup> *Id.*

<sup>35</sup> Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 V.A. L. & BUS. REV. 163, 170 (2008).

<sup>36</sup> *The Dangers of Denial*, *supra* note 4; *cf.* Stout, *supra* note 12, at 1203-04 (“In *Revlon*, the Delaware Supreme Court held that in an ‘end-game’ situation where the directors of a publicly traded firm had decided to sell the firm to a company with a controlling shareholder—in brief, had decided to turn their publicly held company into a privately held one—the board had a duty to maximize shareholder wealth by getting the best possible price for the firm’s shares. *Revlon* thus defines the one context in which Delaware law mandates shareholder primacy.”); David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L. J. 181, 199-200 (2014) (“Stout does discuss *Revlon*, but, like many scholars, she misconstrues its point. Stout argues that *Revlon* stands for the proposition that directors are only obligated to maximize shareholder value when a firm is about to be sold . . . In terms of formal logic, Stout has committed the fallacy of ‘denying the antecedent.’ For the logical statement, ‘if A, then B’ it is a fallacy to conclude ‘not A, therefore not B.’ In *Revlon*, the Delaware Supreme Court held that if [A] the firm is for sale, then [B] directors must maximize profits. Stout concludes from this that if the firm is not for sale, directors do not have to maximize profits. But this does not follow as a matter of logic, and it is not *Revlon*’s teaching . . . *Revlon* . . . holds that so long as a business is a going concern Delaware will defer to the directors’ discretion in determining how to maximize shareholder value. This, the *Unocal* and *Revlon* courts recognize, may often include being good to non-shareholders. However, in the last period, where the shareholders will have no continuing interest in the firm, directorial attention to the interests of non-shareholders cannot possibly bear on shareholder interests, and, therefore, at the moment, attention to non-shareholder interests would necessarily violate the one duty that is always in place: the duty to the shareholders.”).

<sup>37</sup> *The Dangers of Denial*, *supra* note 4, at 11-12.

<sup>38</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (holding that “[t]he rights of the [noteholders] were fixed by contract” and therefore the noteholders “required no further protection” from *Revlon*’s board of directors).

<sup>39</sup> 8 DEL. C. § 122(9).

<sup>40</sup> *Theodora Holding Corp. v. Henderson*, 257 A.2d 398, 405 (Del. Ch. 1969); *see The Dangers of Denial*, *supra* note 4, at 24 (“[W]hen approving contested charitable gifts, Delaware courts have emphasized that the stockholders would ultimately benefit from the gift in the long run.”); *cf. The Dangers of Denial*, *supra* note 4, at 20 (“Of course, it is true that the business judgment rule provides directors with wide discretion, and that it enables directors to justify by reference to long run stockholder interests a number of decisions that may in fact be motivated more by a concern for a charity the CEO cares about, or the community in which the corporate headquarters is located, or once in a while, even the company’s ordinary workers, than long run stockholder wealth. But that does not alter the reality of what the law is. *Dodge v. Ford* and *eBay* are hornbook law because they make clear that if a fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty.”).

## 41-60

<sup>41</sup> *See, e.g., In re Answers Corp. S’holders Litig.*, No. 6170-VCN, 2012 WL 1253072, at \*8 n.48 (Del. Ch. Apr. 11, 2012) (finding that plaintiffs’ complaint adequately alleged facts sufficient to infer that (1) two directors appointed by a 30% stockholder were interested in a merger where the 30% stockholder desired to exit its otherwise illiquid investment and (2) otherwise disinterested and independent directors acted in bad faith by consciously failing to seek the highest value reasonably available for all stockholders based on allegations that, against their own financial advisor’s advice, those directors acquiesced in an expedited sale process in order to accommodate the 30% stockholder; noting that the court “wonder[ed] if an explanation will emerge [for the independent directors’ decision to conduct an expedited market check] because disinterested and independent directors do not usually act in bad faith”).

<sup>42</sup> *In re Synthes, Inc. S’holder Litig.*, 50 A.3d 1022, 1036 (Del. Ch. 2012) (“It may be that there are very narrow circumstances in which a controlling stockholder’s immediate need for liquidity could constitute a disabling conflict of interest irrespective of pro rata treatment. Those circumstances would have to involve a crisis, fire sale where the controller, in order to satisfy an exigent need (such as a margin call or default in a larger investment) agreed to a sale of the corporation without any effort to make logical buyers aware of the chance to sell, give them a chance to do due diligence, and to raise the financing necessary to make a bid that would reflect the genuine fair market value of the corporation.”).

<sup>43</sup> *Id.* (“The world is diverse enough that it is conceivable that a mogul who needed to address an urgent debt situation at one of his coolest companies (say a sports team or entertainment or fashion business), would sell a smaller, less sexy, but fully solvent and healthy company in a finger snap (say two months) at 75% of what could be achieved if the company sought out a wider variety of possible buyers. . . .”); *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 38 (Del. Ch. 2013) (“Stockholders may have idiosyncratic reasons for preferring decisions that misallocate capital. Directors

must exercise their independent fiduciary judgment; they need not cater to stockholder whim.”).

<sup>44</sup> See *In re Answers Corp.*, 2012 WL 1253072, at \*8.

<sup>45</sup> See *infra* Part A.

<sup>46</sup> See *In re Crimson Exploration Inc. S’holder Litig.*, No. 8541-VCP, 2014 WL 5449419, at \*12 (Del. Ch. Oct. 24, 2014) (stating that entire fairness review applies in “(a) transactions where the controller stands on both sides; and (b) transactions where the controller competes with the common stockholders for consideration”); *In re John Q. Hammons Hotels Inc. S’holder Litig.*, No. 758-CC, 2009 WL 3165613 (Del. Ch. Oct. 2, 2009) (deciding to apply entire fairness review to a transaction where the controlling stockholder received a small equity interest in the surviving limited partnership, a preferred interest with a large liquidation preference, and various other contractual rights and obligations, while the minority stockholders received cash).

<sup>47</sup> *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 99 (Del. 2007) (citing *Prod. Res. Grp. v. NCT Grp., Inc.*, 863 A.2d 772, 790 (Del. Ch. 2004)).

<sup>48</sup> See, e.g., *Simons v. Cogan*, 549 A.2d 300, 304 (Del. 1988); *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986); *Geyer v. Ingersoll Publ’ns Co.*, 621 A.2d 784, 787 (Del. Ch. 1992); *Prod. Res. Grp.*, 863 A.2d at 787.

<sup>49</sup> *N. Am. Catholic*, 930 A.2d at 101 (“[T]he need for providing directors with definitive guidance compels us to hold that no direct claim for breach of fiduciary duties may be asserted by the creditors of a solvent corporation that is operating in the zone of insolvency. When a solvent corporation is navigating in the zone of insolvency, the focus for Delaware directors does not change: directors must continue to discharge their fiduciary duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation for the benefit of its shareholder owners.”).

<sup>50</sup> *Id.*

<sup>51</sup> *Prod. Res. Grp.*, 863 A.2d at 794 n.67.

<sup>52</sup> *N. Am. Catholic*, 930 A.2d at 103 (“[W]e hold that individual creditors of an insolvent corporation have no right to assert direct claims for breach of fiduciary duty against corporate directors. Creditors may nonetheless protect their interest by bringing derivative claims on behalf of the insolvent corporation or any other direct nonfiduciary claim . . . that may be available for individual creditors.”).

<sup>53</sup> *In re Trados Inc. S’holder Litig.*, No. 1512-CC, 2009 WL 2225958, at \*7 (Del. Ch. July 24, 2009); see also *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 594 (Del. Ch. 1986) (“[W]ith respect to matters relating to preferences or limitations that distinguish preferred stock from common, the duty of the corporation and its directors is essentially contractual and the scope of the duty is appropriately defined by reference to the specific words evidencing that contract . . .”).

<sup>54</sup> *Jedwab*, 509 A.2d at 594 (holding that preferred stockholders may be owed fiduciary where the right claimed is “a right shared equally with the common [stockholders]”).

<sup>55</sup> *Trados*, 2009 WL 2225958, at \*7 n.42 (quoting *Equity-Linked Investors, L.P. v. Adams*, 705 A.2d 1040, 1042 (Del. Ch. 1997)).

<sup>56</sup> *LC Capital Master Fund, Ltd. v. James*, 990 A.2d 435, 447 (Del. Ch. 2010) (“[T]he only protection for the preferred is if the directors, as the backstop fiduciaries managing the corporation that sold them their shares, figure out a fair way to fill the gap left by incomplete contracting.”).

<sup>57</sup> See *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc’ns Corp.*, No. 12150, 1991 WL 277613, at \*34 (Del. Ch. Dec. 30, 1991) (“At least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to the corporate enterprise.”). In footnote 55, Chancellor Allen poses a hypothetical where a corporation’s sole asset is a judgment against a solvent debtor. With the case on appeal, the corporation’s directors must consider offers to settle for significantly less than the value of the judgment sought. Chancellor Allen discusses the differing incentives of stockholders, who would be likely to reject a settlement offer as the residual owners of the corporation entitled to any upside of a large judgment, and debt-holders, who would likely be in favor of accepting a smaller settlement to avoid risk that the judgment would be overturned, so long as the settlement was enough to satisfy the corporation’s liabilities. Chancellor Allen rejected the stockholder primacy model where a corporation is in the “vicinity of insolvency,” indicating that in that situation directors could “consider the community of interests that the corporation represents,” and that “the right (both the efficient and the fair) course to follow for the corporation may diverge from the choice that the stockholders (or the creditors, or the employees, or any single group interested in the corporation) would make if given the opportunity to act.” *Id.* at \*34 n.55.

<sup>58</sup> *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989) (“[D]irectors owe fiduciary duties of care and loyalty to the corporation and its shareholders.”); *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986) (“In performing their duties the directors owe fundamental fiduciary duties of

loyalty and care to the corporation and its shareholders.”).

<sup>59</sup> *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (“[D]irectors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties.”); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 368 (Del. 1993) (“[W]e have defined a board’s duty of care in a variety of settings. For example, we have stated that a director’s duty of care requires a director to take an active and direct role in the context of a sale of a company from beginning to end. In a merger or sale, we have stated that the director’s duty of care requires a director, before voting on a proposed plan of merger or sale, to inform himself and his fellow directors of all material information that is reasonably available to them.” (citations omitted)).

<sup>60</sup> *Cede & Co.*, 634 A.2d at 368 (“[D]irectors individually and the board collectively [ ] failed to inform themselves fully and in a deliberate manner before voting as a board upon a transaction. . . .”) (citing *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985); *Aronson*, 473 A.2d at 812).

## 61-80

<sup>61</sup> *Id.* at 361 (“[T]he best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally.”); *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939) (holding that the duty of loyalty requires a director or officer not “to use their position of trust and confidence to further their private interests” and, therefore, a director or officer is required “to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his [or her] skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers”); *Aronson*, 473 A.2d at 812 (“[D]irectors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally.”); *Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1345 (Del. 1987) (stating that the duty of loyalty “embodies not only an affirmative duty to protect the interests of the corporation, but also an obligation to refrain from conduct which would injure the corporation and its stockholders or deprive them of profit or advantage” (emphasis added)).

<sup>62</sup> *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (good faith is “a subsidiary element, i.e., a condition, of the fundamental duty of loyalty.”). Thus, “the obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty. Only the latter two duties, where violated, may directly result in liability, whereas a failure to act in good faith may do so, but indirectly.” *Id.* However, “[a] director cannot act loyally towards the corporation unless she acts in the good faith belief that her actions are in the corporation’s best interest.” *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003). The Delaware Supreme Court in *In re Walt Disney Co. Derivative Litig.* described conduct that would violate a director’s obligation to act in good faith:

A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties. There may be other examples of bad faith yet to be proven or alleged, but these three are the most salient.

906 A.2d 27, 67 (Del. 2006).

<sup>63</sup> *In re Orchard Enters., Inc. S’holder Litig.*, 88 A.3d 1, 33 (Del. Ch. 2014).

<sup>64</sup> See William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L. 859, 867 (2001) (“[T]he standard of review defines the freedom of action (or, if you will, deference in the form of freedom from intrusion) that will be accorded to the persons who are subject to its reach.”).

<sup>65</sup> *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 36 (Del. Ch. 2013):

[T]he standard of review depends initially on whether the board members (i) were disinterested and independent (the business judgment rule), (ii) faced potential conflicts of interest because of the decision dynamics present in particular recurring and recognizable situations (enhanced scrutiny), or (iii) confronted actual conflicts of interest such that the directors making the decision did not comprise a disinterested and independent board majority (entire fairness). The standard of review may change further depending on whether the directors took steps to address the potential or actual conflict, such as by creating an independent committee, conditioning the transaction on approval by disinterested stockholders, or both.

<sup>66</sup> *Aronson*, 473 A.2d at 812 (“The business judgment rule is . . . a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption.” (citations omitted)); *Gagliardi v. Trifoods Int’l, Inc.*, 683 A.2d 1049, 1052-53 (Del. Ch. 1996) (holding that the business judgment rule “provides that where a director is independent and disinterested, there can be no liability for corporate loss, unless the facts are such that no

person could possibly authorize such a transaction if he or she were attempting in good faith to meet their duty”). The business judgment rule “posits a powerful presumption in favor of actions taken by . . . directors.” *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993); *McMullin v. Bergan*, 765 A.2d 910, 916 (Del. 2000) (holding that the business judgment rule “combines a judicial acknowledgement of the managerial prerogatives that are vested in the directors of a Delaware corporation by statute with a judicial recognition that the directors are acting as fiduciaries in discharging their statutory responsibilities to the corporation and its shareholders”).

<sup>67</sup> See, e.g., *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); *Kaplan v. Centex Corp.*, 284 A.2d 119, 124 (Del. Ch. 1971).

<sup>68</sup> *In re RJR Nabisco, Inc. S’holders Litig.*, No. 10389, 1989 WL 7036, at \*1156 (Del. Ch. Jan. 31, 1989).

<sup>69</sup> *Brazen v. Bell Atlantic Corp.*, 695 A.2d 43, 49 (Del. 1997) (stating that under the business judgment rule, “[c]ourts give deference to directors’ decisions reached by a proper process, and do not apply an objective reasonableness test in such a case to examine the wisdom of the decision itself”); *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967-68 (Del. Ch. 1996) (“[C]ompliance with a director’s duty of care can never appropriately be judicially determined by reference to the content of the board decision that leads to a corporate loss, apart from consideration of the good faith or rationality of the process employed. That is, whether a judge or jury considering the matter after the fact, believes a decision substantively wrong, or degrees of wrong extending through ‘stupid’ to ‘egregious’ or ‘irrational’, provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a *good faith* effort to advance corporate interests. To employ a different rule—one that permitted an ‘objective’ evaluation of the decision—would expose directors to substantive second guessing by ill-equipped judges or juries, which would, in the long-run, be injurious to investor interests. Thus, the business judgment rule is process oriented and informed by a deep respect for all *good faith* board decisions.” (footnotes omitted)).

<sup>70</sup> *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971); *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995) (holding that a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be “attributed to any rational business purpose”); *Gagliardi*, 683 A.2d at 1052-53 (holding that the business judgment rule “provides that where a director is independent and disinterested, there can be no liability for corporate loss, unless the facts are such that no person could possibly authorize such a transaction if he or she were attempting in good faith to meet their duty”).

<sup>71</sup> *Paramount Commc’ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989) (“[A]bsent a limited set of circumstances as defined under *Revlon*, a board of directors, while always required to act in an informed manner, is not under any *per se* duty to maximize shareholder value in the short term, even in the context of a takeover.”); *id.* at 1154 (“The fiduciary duty to manage a corporate enterprise includes the selection of a time frame for achievement of corporate goals . . . . Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy.” (citations omitted)); see also Corp. Laws Comm., ABA Bus. Law Section, *Benefit Corporation White Paper*, 68 BUS. LAW. 1083, 1085 (2013) [hereinafter *Benefit Corporation White Paper*] (“When the corporation faces more general, day-to-day decisions, the conflict between shareholders and other constituencies is less pronounced and directors might more easily be able to arrive at the conclusion that a decision that directly benefits a non-shareholder constituency also increases the long-term value of the corporation’s stock, even if, in the view of the short-term market, it appears to come at a cost to shareholders.”).

<sup>72</sup> “[I]t has long been clear that a corporation may properly expend corporate funds, for instance, for employee outings or other employee benefits; for charitable and community purposes in areas where it had operations; and to assist suppliers in staying in business, all at the expense of shareholders (in the sense that they had an equity in the funds used) on the theory that such expenditures advanced the long-term interests of the corporation.” Comm. on Corp. Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW 2253, 2257-58 (1990); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 770-72 (2005).

<sup>73</sup> See, e.g., Blair & Stout, *supra* note 17, at 299-300.

<sup>74</sup> *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997) (holding that “when a controlling shareholder stands on both sides of the transaction the conduct of the parties will be viewed under the more exacting standard of entire fairness as opposed to the more deferential business judgment standard”); *Frank v. Elgamal*, No. 6120-VCN, 2014 WL 957550, at \*28 (Del. Ch. Mar. 10, 2014) (“[T]he Court should subject a transaction to entire fairness review, even if the controlling stockholder does not stand on both sides, where the controlling stockholder and the minority stockholders are ‘competing’ for the consideration of the acquirer.”).

<sup>75</sup> *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983) (“When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain. The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.” (citations omitted)); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (“[I]f such director interest is present, and the transaction is not approved by a majority consisting of the disinterested directors, then the business judgment rule has no application . . . .”); *Orman*

v. *Cullman*, 794 A.2d 5, 22-23 (Del. Ch. 2002) (“To rebut successfully business judgment presumptions in this manner, thereby leading to the application of the entire fairness standard, a plaintiff must normally plead facts demonstrating ‘that a majority of the director defendants have a financial interest in the transaction or were dominated or controlled by a materially interested director.’ I recognize situations can exist when the material interest of a number of directors less than a majority may rebut the business judgment presumption and lead to an entire fairness review. That is when an ‘interested director fail[ed] to disclose his interest in the transaction to the board and a reasonable board member would have regarded the existence of the material interest a significant fact in the evaluation of the proposed transaction.’” (citations omitted)).

<sup>76</sup> The Delaware Supreme Court in *Weinberger v. UOP, Inc.* effectively explained the dual analysis of the entire fairness standard as follows:

The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company’s stock. However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.

457 A.2d at 711 (citations omitted).

<sup>77</sup> *Kahn v. Lynch Commc’n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994) (“It is a now well-established principle of Delaware corporate law that in an interested merger, the controlling or dominating shareholder proponent of the transaction bears the burden of proving its entire fairness.”).

<sup>78</sup> *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006).

<sup>79</sup> See *infra* Chapter Three, Section III.

<sup>80</sup> *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 457 (Del. Ch. 2011) (“[The intermediate standard of review] applies when the realities of the decision making context can subtly undermine the decisions of even independent and disinterested directors.”)

## 81-100

<sup>81</sup> *Id.* (quoting *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 810 (Del. Ch. 2007)).

<sup>82</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 185 (Del. 1986) (holding that, in a change of control situation, a “board’s action is not entitled to the deference accorded it by the business judgment rule”); *In re Smurfit-Stone Container Corp. S’holder Litig.*, No. 6164-VCP, 2011 WL 2028076, at \*13 (Del. Ch. May 20, 2011) (“Heightened scrutiny is appropriate because of an ‘omnipresent specter’ that a board, which may have secured a continuing interest of some kind in the surviving entity, may favor its interests over those of the corporation’s stockholders.”). Although this standard theoretically applies to all change in control transactions, litigation that moves forward after a transaction has been approved by stockholders and consummated after generally reverts to the business judgment standard due to the ratification effect of the stockholder vote, and the exculpation of independent directors authorized by Section § 102(b)(7). *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 313 (Del. 2015) (“In circumstances, therefore, where the stockholders have had the voluntary choice to accept or reject a transaction, the business judgment rule standard of review is the presumptively correct one and best facilitates wealth creation through the corporate form.”). A change in control occurs: “(1) when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear breakup of the company; (2) where, in response to a bidder’s offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company; or (3) when approval of a transaction results in a sale or change of control.” *Arnold v. Soc’y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1290 (Del. 1994) (citations omitted) (internal quotation marks omitted). The question whether a change in control has occurred focuses on the loss of the value of control. Thus, if a corporation is sold for cash, the sale is said to represent the only chance for stockholders to recognize the full value of the company, including any control premium. Similarly, if a corporation without a controlling stockholder merges with another company and its stockholders receive stock in a combined company that is controlled by a particular group or individual, the *Revlon* standard applies to board action. *Smurfit-Stone Container Corp.*, 2011 WL 2028076, at \*13 (“*Revlon* will govern a board’s decision to sell a corporation where stockholders will receive cash for their shares. *Revlon* applies . . . because, among other things, there is no tomorrow for the corporation’s present stockholders, meaning that they will forever be shut out from future profits generated by the resulting entity as well as the possibility of obtaining a control premium in a subsequent transaction.” (citations omitted)); see also *The Social Responsibility of Boards*, *supra* note 22, at 1175; *Smurfit-Stone Container Corp.*, 2011 WL 2028076, at \*12 (“If, for example, the resulting entity has a controlling stockholder or stockholder group such that the target’s stockholders are relegated to minority status in the combined entity, Delaware Courts have found a change of control would occur for *Revlon* purposes. But, if ownership shifts from one large unaffiliated group of public stockholders to another, that alone does not amount to a change of control.”).



<sup>83</sup> *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 44 (Del. Ch. 2013).

<sup>84</sup> *Benefit Corporation White Paper*, *supra* note 71, at 1084 (“[W]hen it becomes inevitable that a target corporation will be sold for cash, the target’s shareholders’ sole economic interest is limited to maximizing the cash to be received . . .”).

<sup>85</sup> *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (“Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.”); *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 71 (Del. 1995) (“Enhanced judicial scrutiny under *Unocal* applies whenever the record reflects that a board of directors took defensive measures in response to a perceived threat to corporate policy and effectiveness which touches upon issues of control.” (internal quotations omitted)).

<sup>86</sup> *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995).

<sup>87</sup> *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 457 (Del. Ch. 2011).

<sup>88</sup> *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 934 (Del. 2003) (holding that “‘safety devices’ adopted to protect a transaction that did not result in a change of control are subject to enhanced judicial scrutiny under a *Unocal* analysis”); *Reis*, 28 A.3d at 459 (“Enhanced scrutiny likewise extends to defensive measures that have the potential to insulate last period decision-making from market forces or undermine the ability of stockholders to reject the transaction.”).

<sup>89</sup> *Unocal*, 493 A.2d at 955 (“In the face of this inherent conflict directors must show that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed because of another person’s stock ownership.”).

<sup>90</sup> *Id.* (“If a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed.”); *see also Moran v. Household Int’l, Inc.*, 500 A.2d 1346, 1356 (Del. 1985).

<sup>91</sup> A response is “coercive” if it is aimed at forcing upon stockholders a management-sponsored alternative to a hostile offer. *Unitrin*, 651 A.2d at 1387 (Del. 1995).

<sup>92</sup> A response is “preclusive” if it deprives stockholders of the right to receive all tender offers or precludes a bidder from seeking control by fundamentally restricting proxy contests or otherwise. *Id.*

<sup>93</sup> *Id.* at 1367 (stating that the Court of Chancery should have focused its *Unocal* review “first, upon whether the [defensive measure] was draconian, by being either preclusive or coercive and; second, if it was not draconian, upon whether it was within a range of reasonable responses to the threat . . . posed”); Allen, Jacobs & Strine, Jr., *supra* note 64.

<sup>94</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 176 (Del. 1986).

<sup>95</sup> *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 660 (Del. Ch. 1988) (reasoning that enhanced scrutiny is necessary because “[a]ction designed principally to interfere with the effectiveness of a vote inevitably involves a conflict between the board and a shareholder majority”).

<sup>96</sup> 285 A.2d 437 (Del. 1971); *see also* Allen, Jacobs & Strine, Jr., *supra* note 64, at 885 n.99 (“*Blasius* drew inspiration from the *Schnell* doctrine that action by fiduciaries, even if lawful, could be improper if it was inequitable.”).

<sup>97</sup> *Schnell*, 285 A.2d at 439.

<sup>98</sup> *See* Allen, Jacobs & Strine Jr., *supra* note 64, at 885 (“*Blasius* reaffirmed the traditional view that director actions primarily motivated to effect a disenfranchisement have a dim chance of being sustained.”).

<sup>99</sup> *In re MONY Grp., Inc. S'holder Litig.*, 853 A.2d 661, 674 (Del. Ch. 2004); *see also Williams v. Geier*, 671 A.2d 1368, 1376 (Del. 1996).

<sup>100</sup> 1 A.3d 310 (Del. Ch. 2010), *aff’d*, 15 A.3d 218 (Del. 2011).

## 101-120

<sup>101</sup> *Id.* at 335-36 (citations omitted); *see also Third Point LLC v. Ruprecht*, No. 9469-VCP, No. 9467-VCP, No. 9508-VCP, 2014 WL 1922029, at \*15 (Del. Ch. May 2, 2014) (quoting *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1130 (Del. 2003) (“[T]he *Blasius* and *Unocal* standards of enhanced judicial review (‘tests’) are *not* mutually exclusive.”)).

<sup>102</sup> *See* B Lab, <https://www.bcorporation.net/> (last visited Feb. 18, 2016).

<sup>103</sup> *See* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 841 (2012) (explaining benefit corporation legislation creates a “voluntary new corporate form” (emphasis added)).

<sup>104</sup> See Clark & Babson, *supra* note 103, at 840 (“[U]nder ‘constituency’ statutes, the consideration of non-shareholder interests is permissive, while under the benefit corporation statutes, it is mandatory.”); see also Leo E. Strine, Jr., *Making it Easier for Directors to “Do the Right Thing”*, 4 HARV. BUS. L. REV. 235, 246 (noting that in a sale situation, a benefit corporation statute “imposes upon [directors] the binding obligation to consider how all corporate constituencies and society generally will be regarded by the various bidders”).

<sup>105</sup> See Clark & Babson, *supra* note 103, at 840 (the mandatory scheme “provide[s] a framework for corporate responsibility that is both clear and lasting”).

<sup>106</sup> See Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land?*, 42 LOY. L.A. L. REV. 765, 797 (2009) (“Requiring corporations to elect coverage ensures that investors will be on notice of the fact that the investors’ preferences, at least in terms of strict wealth maximization, will not necessarily have priority over the interests of other constituencies.”); *Benefit Corporation White Paper*, *supra* note 71, at 1093 (suggesting high vote for opt-in).

<sup>107</sup> See Clark & Babson, *supra* note 103, at 840 (“That the listed considerations are required helps to ensure that the general public benefit is being pursued and created, thus tying back to the purpose of the corporation.”).

<sup>108</sup> See 8 DEL. C. § 366. See generally *infra* Chapter Two, Section II, Part E.

<sup>109</sup> 8 DEL. C. § 362(a).

<sup>110</sup> *Id.*

<sup>111</sup> 8 DEL. C. § 365(a).

<sup>112</sup> See *supra* Section I, Part D.

<sup>113</sup> While the PBCS allows entities to form as or become public benefit corporations by following the statutory provisions, the statute expressly states that it has no effect on other corporations. See 8 DEL. C. § 368 (“This subchapter shall not affect a statute or rule of law that is applicable to a corporation that is not a public benefit corporation, except [for the voting and appraisal requirements of a non-public benefit entity becoming a public benefit corporation].”). Accordingly, although the public benefit corporation subchapter provides beneficially-oriented entities a legal regime from which to achieve their beneficial business goals, the statute does not disturb Delaware’s well-established governing law for traditional corporations.

<sup>114</sup> See 8 DEL. C. § 362(a)(1) (the PBC must “[i]dentify within its statement of business or purpose [in its certificate of incorporation] one or more specific public benefits to be promoted by the corporation. . . .”); see also John Montgomery, *Delaware Proposes Historic Benefit Corporation Legislation*, GREAT FROM THE START: HOW CONSCIOUS CORPORATIONS ATTRACT SUCCESS (March 27, 2013), <http://www.greatfromthestart.com/delaware-proposes-historic-benefit-corporation-legislation/> (quoting B Lab as explaining that, “[i]n other words, Delaware goes a step further than the Model Benefit Corporation Legislation by requiring a declaration of a specific public benefit or benefits in addition to the general public benefit corporation of all stakeholders”).

<sup>115</sup> 8 DEL. C. § 362(b) (“‘Public benefit’ means a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.”).

<sup>116</sup> For examples of specific public benefits, see Appendix 9.

<sup>117</sup> See 8 DEL. C. § 365(a); see also MODEL BENEFIT CORPORATION LEGISLATION § 102 cmt. (2013) (“By requiring that the impact of a business on society and the environment be looked at ‘as a whole,’ the concept of general public benefit requires consideration of all of the effects of the business on society and the environment.”). Under the MBCL, the broad concept of a general public benefit, defined as “[a] material positive impact on society and the environment takes as a whole . . .,” MBCL § 102, which is mirrored in the “interests of those materially affected by the corporation’s conduct” language of the Delaware statute; the MBCL specifically tasks directors with considering other stakeholder interests including: (i) the stockholders; (ii) the employees and work force of the corporation, its subsidiaries, and its suppliers; (iii) the customers; (iv) the community and society in which the business interacts and is located, (v) the local and global environment; (vi) both short and long term interests of the corporation, including the possibility that the corporation may better serve those interests by remaining independent; (vii) the ability of the corporation to accomplish its specific benefit purpose; and (viii) other factors or interests associated with the corporation and its stated public benefit. See MODEL BENEFIT CORPORATION LEGISLATION § 301 (2013).

<sup>118</sup> See 8 DEL. C. § 362(a).

<sup>119</sup> Compare 8 DEL. C. § 362(c) (2015), with 8 DEL. C. § 362(c) (2013), amended by S. B. No. 75, Section 11, 148th Gen. Assemb. (Del. 2015).



<sup>120</sup> See 8 DEL. C. § 362(c).

## 121-140

<sup>121</sup> See *id.*

<sup>122</sup> See 8 DEL. C. § 364.

<sup>123</sup> See 8 DEL. C. § 365(a) (PBCs); *accord* 8 DEL. C. § 141(a) (traditional Delaware corporations).

<sup>124</sup> See 8 DEL. C. § 365(a).

<sup>125</sup> Commercial promotion of such interests has been referred to as managing toward the “triple bottom line” of people, profit, and planet. See generally Shruti Rana, *Philanthropic Innovation and Creative Capitalism: A Historical and Comparative Perspective on Social Entrepreneurship and Corporate Social Responsibility*, 64 ALA. L. REV. 1121 (2013).

<sup>126</sup> See *supra* Chapter One, Section III, Part A.

<sup>127</sup> See *supra* Chapter One, Section III, Part C.

<sup>128</sup> See 8 DEL. C. § 365(a). Additionally, the public benefit corporate form may expand the corporation’s ability to deal with takeover threats because a threat to other constituency interests represents a threat to corporate policy and effectiveness under the Unocal analysis that is performed by courts determining whether a response is reasonable in relation to the threat perceived. See Frederick H. Alexander, *Amendments to the DGCL Remove Obstacles to Adoption of Public Benefit Status*, 13 CORP. LAW AND [ACCOUNTABILITY] REP. (BNA) (Apr. 2, 2015) [hereinafter *Amendments to the DGCL Remove Obstacles to Adoption of Public Benefit Status*].

<sup>129</sup> See *Amendments to the DGCL Remove Obstacles to Adoption of Public Benefit Status*, *supra* note 128. The legislative synopsis to the 2013 DGCL amendments, in which the PBCs subchapter was added, notes that “[d]irectors [ ] receive significant protections against claims by stockholders challenging disinterested decisions” and points to § 365(b) and § 365(c) as providing these protections. See Sen. 47, 147th Gen. Assembly, 79 Del. Laws, c. 122 § 8 (2013).

<sup>130</sup> See MODEL BENEFIT CORPORATION LEGISLATION § 102 (2013) (defining “benefit enforcement proceeding” to include action for “failure of a benefit corporation to pursue or create general public benefit or a specific public benefit set forth in its articles”); MODEL BENEFIT CORPORATION LEGISLATION § 305 (2013) (authorizing stockholders with minimum stock ownership to bring benefit enforcement proceedings); Appendix 5.

<sup>131</sup> See 8 DEL. C. § 365(b). The protection afforded to a disinterested director acting on an informed basis and for a rational purpose is in addition to the protection afforded to a director of a traditional Delaware corporation acting in reliance upon the records of the corporation, upon employees and officers, or upon statements by persons the director “reasonably believes are within such [ ] person’s professional or expert competence” that was selected for guidance on the subject in question. See 8 DEL. C. § 141(e) (stating that traditional corporation directors “shall . . . be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of the corporation’s officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within such other person’s professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation”).

<sup>132</sup> See 8 DEL. C. § 365(b).

<sup>133</sup> See *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000). If a decision is irrational, it “may tend to show that the decision is not made in good faith, which is a key ingredient of the business judgment rule.” See *id.* Under the business judgment rule, a Delaware court will not second-guess a director’s decision “if [it] can be attributed to any rational business purpose.” See *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971). Further, even if a stockholder “believes a decision [is] substantively wrong, or degrees of wrong extending through ‘stupid’ to ‘egregious’ or ‘irrational,’ [it] provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a good faith effort to advance corporate interests.” See *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996); *accord Reading Co. v. Traylor Train Co.*, 9 Del. J. Corp. L. 223, 229 (Del. Ch. 1984) (“The business judgment rule allows for the possibility that other people might disagree with a board’s decision.”). However, the protection afforded by the business judgment rule may be undermined by irrational decisions entered into “for a reason unrelated to a pursuit of the corporation’s best interests,” even if that decision does not provide a direct financial benefit to the director. See *In re RJR Nabisco, Inc. S’holders Litig.*, 14 Del. J. Corp. L. 1132, 1159 (Del. Ch. 1989) (“Greed is not the only human emotion that can pull one from the path of propriety; so might hatred, lust, envy, revenge, . . . shame or pride. Indeed any human emotion may cause a director to place his own interests, preferences or appetites before the welfare of the corporation.”). PBC law, of course, broadly expands the conception of “the corporation’s best interests.”

<sup>134</sup> See *Brehm*, 746 A.2d at 264 (discussing irrational business behavior as it relates to “waste” and stating that “[i]rrationality may be the functional equivalent of the waste test . . .”).

<sup>135</sup> See 8 DEL. C. § 365(b) (“A director of a public benefit corporation shall not, by virtue of the public benefit provisions or § 362(a) of this title, have any duty to any person on account of any interest of such person in the [corporation’s specific] public benefit . . . or on account of any interest materially affected by the corporation’s conduct . . .”).

<sup>136</sup> See *infra* Part F. 1.

<sup>137</sup> See 8 DEL. C. § 366.

<sup>138</sup> Compare 8 DEL. C. § 366 (2015), with MODEL BENEFIT CORPORATION LEGISLATION § 401 (2013).

<sup>139</sup> See 8 DEL. C. § 366(b).

<sup>140</sup> See *id.*

## 141-160

<sup>141</sup> Compare 8 DEL. C. § 366 (2015), with MODEL BENEFIT CORPORATION LEGISLATION § 401 (2013).

<sup>142</sup> See 8 DEL. C. § 366(c). For an example of a charter provision requiring that a PBC make an annual report against a third-party standard, see Appendix 2.

<sup>143</sup> See 8 DEL. C. § 361 (stating that public benefit corporations are subject to the remaining provisions of the DGCL other than those explicitly outlined in the subchapter); see also 8 DEL. C. § 367 (permitting derivative suits to enforce the public benefit purpose of the corporation).

<sup>144</sup> Specifically, Section 362 mandates the PBC be managed in a balanced fashion, and Section 365 imposes the obligation to so manage the corporation on the board. 8 DEL. C. §§ 362(a) and 365(a). Section 365 then provides that such obligation runs only to stockholders. 8 DEL. C. § 365(b). Similarly, because the statutory statement that PBCs are “intended . . . to operate in a responsible and sustainable manner” is only precatory, and supportive of the balancing requirement, such a derivative suit is also the only mechanism to address that concept in a lawsuit, as well.

<sup>145</sup> See 8 DEL. C. § 367.

<sup>146</sup> See *id.*

<sup>147</sup> See *infra* Part D. 1.

<sup>148</sup> See 8 DEL. C. § 365(c).

<sup>149</sup> 8 DEL. C. § 102(b)(7); see 1 DAVID A. DREXLER et al., DELAWARE CORPORATION LAW AND PRACTICE, § 6.02[7] (Matthew Bender, 2015). Specifically, § 102(b)(7) allows “[a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director.” However, the express language of the statute does not allow exculpation of a director’s actions or omissions that (i) “breach [ ] the director’s duty of loyalty to the corporation or its stockholders,” (ii) are “not in good faith or which involve intentional misconduct or a knowing violation of the law,” (iii) include the declaration of an unlawful dividend or stock repurchase or redemption, or (iv) result in a transaction from which the director receives an improper personal benefit.

<sup>150</sup> 1 DAVID A. DREXLER et al., DELAWARE CORPORATION LAW AND PRACTICE, § 15.05[1] (Matthew Bender, 2015).

<sup>151</sup> See *id.*; see also *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1151-54 (Del. Ch. 1994) (analyzing the meaning of “interested” director).

<sup>152</sup> See 1 DAVID A. DREXLER et al., DELAWARE CORPORATION LAW AND PRACTICE, § 15.05[1], § 6.02[7] (Matthew Bender, 2015).

<sup>153</sup> See *Amendments to the DGCL Remove Obstacles to Adoption of Public Benefit Status*, *supra* note 128; see also 8 DEL. C. § 102(b)(7) (permitting a provision in the certificate of incorporation exculpating a director’s personal liability for breaches of the duty of care).

<sup>154</sup> See *infra* Part D. 3.

<sup>155</sup> See *Quadrant Structured Prods. Co., Ltd. v. Vertin*, 115 A.3d 535, 547 (Del. Ch. 2015) (“[D]irectors do not face a conflict of interest simply because they own common stock or owe duties to large common stockholders.”); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 958 (Del. 1985) (“Nor does this become an ‘interested’ director transaction merely because certain board members are large stockholders.”); *Cheff v. Mathes*, 199 A.2d 548, 554 (1964) (“The mere fact that some of the other directors were substantial shareholders does not create a personal pecuniary interest in the decisions made by the board of directors . . .”). But see, *supra* note 42 and accompanying text (liquidity concerns of large stockholders may create a conflict). This argument seems particularly strong in light of the legislative determination that a significant level of stock ownership

is necessary to pursue balancing claims, since the requirement suggests that such ownership is necessary to balance competing, non-ownership (stakeholder) interests in order to make a stockholder an adequately representative derivative plaintiff.

<sup>156</sup> See 8 DEL. C. § 361.

<sup>157</sup> *Lambrech v. O'Neal*, 3 A.3d 277, 281 (Del. 2010).

<sup>158</sup> *Id.* at 281-82.

<sup>159</sup> *Id.* at 285-86 (“[The Court in *Rales v. Blasband*] held that the traditional *Aronson v. Lewis* demand excusal test would not be employed in considering whether a demand on the parent board was required in a double derivative action. Rather, a different test (the ‘*Rales* test’) would apply, which is whether the particularized factual allegations of the complaint create a reasonable doubt that the parent’s board of directors could properly have exercised its independent and disinterested business judgment in responding to a demand. This Court further held that in a double derivative action the *Rales* test would apply as of the time the complaint was filed, as distinguished from the time of the alleged wrongdoing.”).

<sup>160</sup> 8 DEL. C. § 365(a).

## 161-180

<sup>161</sup> 8 DEL. C. § 367.

<sup>162</sup> Such an incorporation could encompass a certificate of incorporation filed in connection with a conversion of another term of entity into a Delaware corporation or the domestication of a non-U.S. entity into a Delaware corporation. See 8 DEL. C. §§ 265 and 388 (authorizing conversion and domestication by filing a certificate of conversion of domestication, respectively, in each case, along with a certificate of incorporation).

<sup>163</sup> See 8 DEL. C. § 363(a).

<sup>164</sup> Compare 8 DEL. C. § 363(a) (requiring a supermajority vote to convert from a traditional entity to a public benefit corporation), with 8 DEL. C. § 251(c) (requiring “a majority of the outstanding stock of the corporation entitled to vote thereon” to effectuate a merger of a traditional Delaware corporation), and 8 DEL. C. § 242 (requiring majority stockholder approval to amend the certificate of incorporation of a traditional Delaware corporation).

<sup>165</sup> 8 DEL. C. § 363(b).

<sup>166</sup> See 8 DEL. C. § 363(a) (2013), amended by S. B. No. 75, Section 12, 148th Gen. Assemb. (Del. 2015).

<sup>167</sup> See *Amendments to the DGCL Remove Obstacles to Adoption of Public Benefit Status*, *supra* note 128.

<sup>168</sup> See *Amendments to the DGCL Remove Obstacles to Adoption of Public Benefit Status*, *supra* note 128.

<sup>169</sup> See 8 DEL. C. § 363(c).

<sup>170</sup> See *id.* There is not a supermajority vote required to initially adopt extra-statutory reporting requirements in a benefit corporation certificate of incorporation. Although 365(c)(3), which only uses the terms “amend” would not impose the supermajority vote in a merger effect solely for the purpose of amending the public benefit provisions, *see, e.g., Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 855 (Del. 1998) (holding that where a certificate of incorporation grants a class vote on an amendment, alteration or repeal of the certificate, there is no implicit right to a class vote on a merger that results in such an amendment, alteration or repeal unless the certificate specifically provides for rights in such context by adding terms such as “whether by merger, consolidation or otherwise”), Section 365(c)(2) would, in fact, impose a supermajority vote on such a transaction, because the outstanding shares would “become” shares of non-benefit corporations.

<sup>171</sup> Compare 8 DEL. C. § 363(c), with 8 DEL. C. § 363(a).

<sup>172</sup> See 8 DEL. C. § 363(a)(2).

<sup>173</sup> *Id.*

<sup>174</sup> See 8 DEL. C. § 363(c)(2).

<sup>175</sup> See 8 DEL. C. § 363(b).

<sup>176</sup> See *id.*

<sup>177</sup> See *id.*

<sup>178</sup> Compare 8 DEL. C. § 363(b) (public benefit corporations), with 8 DEL. C. § 262 (traditional corporations). To avoid appraisal rights, the stockholder must receive (A) shares of stock (or depository receipts in respect thereof) in a corporation that is traded on a national securities ex-

change or publicly held by more than 2000 holders of record, (B) cash in lieu of fractional shares (or fractional depository receipts in respect thereof) in a corporation that is traded on a national securities exchange or publicly held by more than 2000 holders of record, or (C) any combination of these types of consideration. 8 DEL. C. § 363(b).

<sup>179</sup> See 8 DEL. C. § 262(h) (“Through such proceeding the Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors.”); see also Frederick H. Alexander et al., *M&A Under Delaware’s Public Benefit Corporation Statute: A Hypothetical Tour*, 4 HARV. BUS. L. REV., 255, 257-66 (2014) (stating that “it follows that Delaware’s general appraisal statute applies to PBCs,” and providing further analysis of how the Court of Chancery might value a public benefit corporation’s stock for appraisal purposes).

<sup>180</sup> See 2 DAVID A. Drexler et al., *DELAWARE CORPORATION LAW AND PRACTICE*, § 36.02 (Matthew Bender, 2015).

## 181-200

<sup>181</sup> See 8 DEL. C. § 262(d); *Enstar Corp. v. Senouf*, 535 A.2d 1351 (Del. 1987); see also *Gilliland v. Motorola, Inc.*, 859 A.2d 80 (Del. Ch. 2004) (holding that material information necessary for stockholders to decide whether to seek appraisal must be included in the short-form merger context).

<sup>182</sup> *Shell Petroleum, Inc. v. Smith*, 606 A.2d 112, 114 (Del. 1992).

<sup>183</sup> *Id.* (quoting *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985)).

<sup>184</sup> See 8 DEL. C. § 262(d).

<sup>185</sup> See *id.*

<sup>186</sup> See *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983).

<sup>187</sup> See *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182 (Del. 1988).

<sup>188</sup> See *Tri-Continental Corp v. Battye*, 74 A.2d 71, 72 (Del. 1950); accord *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 942 (Del. 1985); *Weinberger*, 457 A.2d 701, 713 (Del. 1983); *Robbins & Co. v. A.C. Israel Enters., Inc.*, 11 Del. J. Corp. L. 968, 980 (Del. Ch. 1985).

<sup>189</sup> See 8 DEL. C. § 262(h) (“In determining such fair value, the Court shall take into account all relevant factors.”).

<sup>190</sup> See 2 DAVID A. DREXLER et al., *DELAWARE CORPORATION LAW AND PRACTICE*, § 36.07[3] (Matthew Bender, 2015).

<sup>191</sup> See *Cavalier Oil Corp. v. Harnett*, 1988 WL 15816, at \*16 (Del. Ch. Feb. 22., 1988), *aff’d*, 564 A.2d 1137 (Del. 1989).

<sup>192</sup> Frederick H. Alexander et al., *M&A Under Delaware’s Public Benefit Corporation Statute: A Hypothetical Tour*, 4 HARV. BUS. L. REV., 255, 260-66 (2014).

<sup>193</sup> *Id.* at 261.

<sup>194</sup> *Id.* at 263.

<sup>195</sup> *Id.* at 264-66.

<sup>196</sup> *Id.* at 262-23 (citing *Tri-Continental Corp.*, 74 A.2d at 72).

<sup>197</sup> See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993) (“Fiduciary duties are not special duties; they have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings.”); David Rosenberg, *Making Sense of Good Faith in Delaware Corporate Fiduciary Law: A Contractarian Approach*, 29 DEL. J. CORP. L. 491, 493 (“The relationship between corporate directors and stockholders can be viewed, then, essentially as a contract, the terms of which may be crafted according to the parties’ own understanding of what the market will bear.”). But see *id.* (“Opponents of this point of view believe that fiduciary duties originate from the unique ethical and moral implications of relationships in which one party entrusts his wealth or property to another. Further, they believe that the law must make these obligations unwaivable to protect potential victims from the misuse of the extraordinary degree of power entrusted to corporate directors.”).

<sup>198</sup> *Jones Apparel Grp., Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 845 (2004) (“Delaware’s corporate statute is widely regarded as the most flexible in the nation because it leaves the parties to the corporate contract (managers and stockholders) with great leeway to structure their relations, subject to relatively loose statutory constraints and to the policing of director misconduct through equitable review.”); Stout, *supra* note 12 at, 1206 (“Delaware corporate law, like most corporate law, is an enabling system. This means that most of the rules provided by Delaware are default rules

that corporate promoters are free to modify through charter and bylaw provisions.”).

<sup>199</sup> 8 DEL. C. § 102(b)(7) (permitting inclusion of a provision in the certificate of incorporation of a traditional Delaware corporation that would eliminate or limit the personal liability of a director to the corporation or its stockholders for monetary damages for a certain fiduciary duty breaches; but not permitting exculpation for (i) breach of the duty of loyalty, (ii) acts or omissions not in good faith, (iii) liability under the distribution provisions of the statute, or (iv) transactions from which the director derived an improper personal benefit).

<sup>200</sup> 8 DEL. C. § 122(17) (empowering a traditional Delaware corporation to “[r]enounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or 1 or more of its officers, directors or stockholders”).

## 201-220

<sup>201</sup> See 6 DEL. C. § 17-1101 (permitting limitations or elimination of any and all liabilities for “breach of duties” in limited partnership agreement); 6 DEL. C. § 18-1101 (same with respect to limited liability agreements). These provisions have been interpreted to authorize the complete elimination of the duties of care and loyalty in limited partnerships and limited liability companies. See *Loneragan v. EPE Holdings, LLC*, 5 A.3d 1008, 1017 (Del. Ch. 2010) (“The complaint frames each of these theories using the implied covenant of good faith and fair dealing because the Holdings LP Agreement eliminates default fiduciary duties in accordance with the authority granted by the Delaware Limited Partnership Act. . . .”); *Fisk Ventures, LLC v. Segal*, No. 3017-CC, 2008 WL 1961156, at \*11 (Del. Ch. May 7, 2008) (dismissing breach of fiduciary duty claims because “the LLC Agreement, in accordance with Delaware law, greatly restricts or even eliminates fiduciary duties”), *aff’d*, 984 A.2d 124 (Del. 2009).

<sup>202</sup> 8 DEL. C. § 102(b)(1); see also 8 DEL. C. § 102(a)(3) (requiring certificate of incorporation to include “nature of the business or purpose to be conducted or promoted”)

<sup>203</sup> Indeed, it is not entirely clear that a limit on “powers” under subsection (b)(1) could actually operate to alter fiduciary duties. While such a limit might delineate the space in which the corporation could act, directors would still be bound to act with care and loyalty towards stockholders within that space. In order to limit the effect of common law stockholder primacy, a power-limiting provision would have to reach beyond what one might naturally think subsection (b)(1) was intended to address.

<sup>204</sup> *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 118 (Del. Ch. 1952) (“[T]he stockholders of a Delaware corporation may by contract embody in the charter a provision departing from the rules of the common law, provided that it does not transgress a statutory enactment or a public policy settled by the common law or implicit in the General Corporation Law itself.”); *Jones Apparel Grp., Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 846 (2004) (noting that when evaluating a certificate provision, the court must “only invalidate a certificate provision if it ‘transgress[es]’—i.e., vitiates or contravenes—a mandatory rule of our corporate code or common law”).

<sup>205</sup> *Jones Apparel Grp.*, 883 A.2d at 848. For example, in *Rohe v. Reliance Training Network, Inc.*, the Delaware Chancery Court held that a certificate of incorporation could not contain a provision eliminating the annual meeting requirement and purporting to give directors on a non-staggered board three-year terms. No. 17992, 2000 WL 1038190, at \*10-\*11 (Del. Ch. July 21, 2000). The court determined that those particular certificate provisions were contrary to Delaware’s public policy and therefore violate the limitation in § 102(b)(1).

<sup>206</sup> *Siegman v. Tri-Star Pictures, Inc.*, 15 Del. J. Corp. L. 218, 236 (Del. Ch. 1989) (“[A]t least one scenario (and perhaps others) could plausibly be constructed where Article Sixth [the charter provision purporting to limit the liability of the corporation’s directors in certain circumstances] would eliminate or limit the liability of Tri-Star directors for breach of their fiduciary duty of loyalty—a result proscribed by § 102(b)(7).”).

<sup>207</sup> Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 627 & 627 n.82 (1997) (“Not only do traditional fiduciary loyalty restrictions thus differ from classic contract rules in content, but fiduciary strictures are not designed like contract background rules to fill gaps in, or enforce, explicitly specified preferences or protective provisions that the parties selected . . . . The functional role of management, as actor for the stockholders, and the structural bargaining incapacity and passive posture of the public stockholder which result in the state thus imposing broad fiduciary restrictions, preclude a court from ‘interpreting’ the meaning or scope of these so-called background rules as if they were deliberately and freely adopted by contracting parties.”).

<sup>208</sup> Frederick H. Alexander, *An Optimal Mix of Clarity and Flexibility*, DELAWARE LAWYER 31 (2008) (“Given the capitalistic milieu of the business corporation, it may seem counterintuitive to preclude participants from opting out of any rule. The theoretical answer is that too much freedom may sow confusion. By assuring a minimum level of governance, mandatory rules provide important clarity—an investor in a Delaware corporation need not read the charter of bylaws to know that there are certain bottom-line protections.”).

<sup>209</sup> See *supra*, Section II. Part G.

<sup>210</sup> See Strine, *supra* note 104, at 249 (indicating that the Delaware benefit corporation statute abolishes the requirement of traditional corporation directors’ “profit maximization duty”); Alexander et al., *supra* note 192, at 270 (explaining that “one of the motivating factors behind enactment of the PBC statute was the desire of entrepreneurs for assurance that in their vitally important, last period decision to sell the company, they could still bring to bear the considerations of public purpose that led them to create and operate the PBC”).

<sup>211</sup> 8 DEL. C. § 362(a).

<sup>212</sup> 8 DEL. C. § 362 (“A ‘public benefit corporation’ is a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner.”); see Strine, *supra* note 104, at 244 (“[A] Delaware benefit corporation must be an overall good corporate citizen, and not just be indulgent toward one narrow cause or interest.”).

<sup>213</sup> See 8 DEL. C. § 362 (“To that end, a public benefit corporation shall be managed in a manner that balances the stockholders’ pecuniary interests, the best interests of those materially affected by the corporation’s conduct, and the public benefit or public benefits identified in its certificate of incorporation.”).

<sup>214</sup> See 8 DEL. C. § 365(b) (specifying that the balancing of interests completed by a board of directors will “satisfy such director’s fiduciary duties to stockholders and the corporation if such director’s decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve”); Strine, *supra* note 104, at 248 (emphasizing importance of rule that “[t]he board’s good faith balancing of the interests of all constituencies would be entitled to the protection of the business judgment rule”).

<sup>215</sup> Furthermore, as noted above in Parts D. 2, F.1 and F.2, the statute contains explicit terms in order to ensure that PBC status does not result in increased nuisance litigation.

<sup>216</sup> See *infra* Chapter Four.

<sup>217</sup> 8 DEL. C. § 365(b); See *supra* Chapter One, Section III, Part B, for further discussion of the entire fairness standard with respect to traditional Delaware corporations.

<sup>218</sup> 8 DEL. C. § 365(b); Strine, *supra* note 104, at 249 (“No kind of equity investor has any rational incentive to tolerate self-interested action by top dogs like directors and key executives, because such behavior has a negative effect on all corporate constituencies, not just stockholders.”).

<sup>219</sup> *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993) (citation omitted).

<sup>220</sup> *Id.*

## 221-240

<sup>221</sup> *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 354 (Del. Ch. 1998) *aff’d in part, rev’d in part and remanded sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

<sup>222</sup> See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). Compare 8 DEL. C. § 365(b) (“[W]ith respect to a decision implicating the balance requirement in subsection (a) of this section, will be deemed to satisfy such director’s fiduciary duties to stockholders and the corporation if such director’s decision is both informed and *disinterested* and not such that no person of ordinary, sound judgment would approve.” (emphasis added)), with 8 DEL. C. § 144(a)(1) (referring to vote of “*disinterested directors*” (emphasis added)).

<sup>223</sup> See *Chen v. Howard-Anderson*, 87 A.3d 648, 671 (Del. Ch. 2014) (quoting *Orman v. Cullman*, 794 A.2d 5, 27 n.56 (Del. Ch. 2002) (citing *In re Mobile Commc’ns Corp. of Am., Inc. Consol. Litig.*, No. 10627, No. 10638, No. 10644, No. 10656, No. 10697, 1991 WL 1392, at \*9 (Del. Ch. Jan. 7, 1991)); see also *Katell v. Morgan Stanley Grp., Inc.*, No. 12343, 1995 WL 376952, at \*12 (Del. Ch. June 15, 1995) (“Delaware law presumes that investors act to maximize the value of their own investments.”); *In re Dollar Thrifty S’holder Litig.*, 14 A.3d 573, 600 (Del. Ch. 2010) (emphasizing that when directors own stock in the company, it gives those directors “personal incentive as stockholders to think about the tradeoff between selling now and the risks of not doing so”).

<sup>224</sup> See *supra* Chapter One, Section III, Part B.

<sup>225</sup> See 8 DEL. C. § 367.

<sup>226</sup> See 8 DEL. C. § 365.

<sup>227</sup> See *supra* Chapter One, Section III, Part C.

<sup>228</sup> See *supra* Chapter One, Section III, Part C.



<sup>229</sup> See Michal Barzuza, *The State of State Antitakeover Law*, 95 VA. L. REV. 1973, 1997-2014 (2009) [hereinafter *The Barzuza Study*].

<sup>230</sup> See *infra* Chapter Five, Section I.

<sup>231</sup> Thus, as discussed *supra* Chapter Two, Section II, Part D. 2, the statute expressly applies the business judgment rule to allocation decisions.

<sup>232</sup> *Supra* Chapter One, Section III, Part C.

<sup>233</sup> See Strine, *supra* note 104, at 245; Alexander et al., *supra* note 192, at 270 (addressing expectation that traditional corporate law precepts requiring the pursuit of maximization of stockholder gain “would operate differently in the case of a PBC”).

<sup>234</sup> See Strine, *supra* note 104, at 245-46 (contending that “one of the most important consequences of the Delaware statute is that it makes clear that the *Revlon* doctrine does not apply to benefit corporations” and that “the board must use its own judgment to choose the best sale partner based on a consideration of all corporate constituencies”); Alexander et al., *supra* note 192, at 270 (“[I]t seems clear that stockholder pecuniary gain is no longer the only permissible objective . . .”).

<sup>235</sup> See Alexander et al., *supra* note 192, at 270 (expressing doubt that “courts [will] really abandon the level of scrutiny they have come to apply to a sale of the company” and predicting various applications of the *Revlon* doctrine to PBCs); J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 512-13 (2013) (suggesting “that *Revlon* and its progeny could be relevant in the benefit corporation context” as the standard “creates the best framework for valuing bids”).

<sup>236</sup> See Alexander et al., *supra* note 192, at 270 (explaining the requirement of traditional directors to function to maximize stockholder gain “even in managing the corporation’s ordinary business affairs,” and that all of the interests directors can permissibly take into account must provide “rationally related benefits accruing to the stockholders”); *supra* Chapter One, Section III, Part C, for further discussion of *Revlon* in context of traditional Delaware corporations.

<sup>237</sup> See Alexander et al., *supra* note 192, at 270 (“[O]ne of the motivating factors behind the enactment of the PBC statute was the desire of entrepreneurs for assurance that in their vitally important, last period decision to sell the company, they could still bring to bear the considerations of public purpose that led them to create and operate the PBC.”); Strine, *supra* note 104, at 246 (stating that the PBC statute gives “directors a clear legal duty to . . . consider how all corporate constituencies and society generally will be regarded by various bidders”).

<sup>238</sup> 8 DEL. C. § 365(b); see *supra* Chapter Two, Section II, Part D; Alexander et al., *supra* note 192, at 271 (discussing various ways a court could look at the board’s balancing of obligations in the context of a sale of the company). But see Strine, *supra* note 104, at 246 (concluding that to act in accordance with the PBC statute, directors, “in a situation involving the sale of a public benefit corporation[,] where two bidders are both offering a substantial premium to the company’s stockholders that is within a fair range, the board could--and in fact, *would have to*--prefer a reasonable bidder at \$44 per share who has a track record of and is willing to make a binding commitment to managing in manner that is fair to the corporation’s other constituencies and society generally, over a bidder at \$46 per share with a track record of poor treatment of workers, consumers, and the environment” (emphasis added)).

<sup>239</sup> Alexander et al., *supra* note 192, at 271.

<sup>240</sup> See *supra* Chapter One, Section III, Part C.

## 241-260

<sup>241</sup> *Id.*

<sup>242</sup> See Alexander et al., *supra* note 192, at 272 (suggesting that *Unocal* will continue to apply to deal protections, as “it might be argued that the statute was only meant to address matters within board authority, and not to allow the board more authority or influence over matters that come within stockholder authority, such as votes on mergers so that *Unocal* will still apply”).

<sup>243</sup> Alexander et al., *supra* note 192, at 272-73; see also Murray, *supra* note 235, at 494 (recognizing that the *Unocal* test is “used in evaluating a benefit corporation’s takeover defense, but the threats and the reasonableness of the response would be evaluated in light of the purpose of the benefit corporation”). But see *The Barzuza Study*, *supra* note 229, at 1998-2008 (finding that most courts interpreted expanded director discretion under constituency statutes as eliminating the *Unocal* test.)

<sup>244</sup> See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 28 (Del. Ch. 2010) (“[T]he decision to deploy a rights plan will fall within the range of reasonableness if the directors use the plan in a good faith effort to promote stockholder value. . . . Using a rights plan to promote stockholder value is a legitimate exercise of board authority that accords with the directors’ fiduciary duties.”); *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 112-13 (Del. Ch. 2011) (illustrating concept in Delaware law that a board can appropriately deploy defensive devices to protect stockholders



from threat of mistakenly tendering into an inadequate offer); *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1376 (Del. 1995) (noting that a board can “properly employ[ ] a poison pill as a proportionate defensive response to protect its stockholders from a ‘low ball’ bid” if the board has a good faith belief that an offer is inadequate).

<sup>245</sup> See Alexander et al., *supra* note 192, at 272 (“[T]he range of permissibly identifiable threats to a PBC would extend to threats of the accomplishment of the PBC’s stated public purpose, as well as threats of a more traditional, financial type.”); Murray, *supra* note 235, at 511 (giving example of a threat to Patagonia’s mission of protecting the environment and arguing that it “could be considered, even to the extreme detriment of shareholder wealth”).

<sup>246</sup> See Alexander et al., *supra* note 192, at 273 (explaining that the “range of reasonableness standard” that courts employ to evaluate defensive devices “would be even looser in the case of a PBC”).

<sup>247</sup> Alexander et al., *supra* note 192, at 272.

<sup>248</sup> See *supra* Chapter One, Section III, Part D.

<sup>249</sup> See *The Barzuza Study*, *supra* note 229, at 2014-18 (concluding that, with one exception, courts in states that had adopted other constituency statutes continued to follow *Blasius*).

<sup>250</sup> See *supra* Chapter One, Section III, Part D.

<sup>251</sup> See *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).

<sup>252</sup> See Strine, *supra* note 104, at 249 (noting that PBC directors cannot take “actions that might be motivated by a desire to remain in office”).

<sup>253</sup> Alexander et al., *supra* note 192, at 273.

<sup>254</sup> See 8 DEL. C. § 366(b) (“A public benefit corporation shall no less than biennially provide its stockholders with a statement as to the corporation’s promotion of the public benefit or public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation’s conduct.”); B Lab, *Board Procedures for Public Benefit Corporations*, at 1, <http://benefitcorp.net/sites/default/files/Board%20Procedures%20for%20Public%20Benefit%20Corporations.pdf> [hereinafter B Lab Procedures] (“The statute requires that the corporation provide its stockholders with a report. . . at least once every two years.”). The procedures in this chapter are largely drawn from the B Lab Procedures, which were drafted by the author.

<sup>255</sup> See 8 DEL. C. § 366(b) (listing what must be included on the PBCs statement).

<sup>256</sup> See 8 DEL. C. § 366(c)(1) (“The certificate of incorporation or bylaws of a public benefit corporation may require that the corporation: (1) Provide the statement described in subsection (b) of this section more frequently than biennially . . . .”); Strine, *supra* note 104, at 244.

<sup>257</sup> See B Lab Procedures, *supra* note 254, at 1 (“This will allow for a process that both meets the compliance obligations and provides directors with continuing education and best practices on the company’s social and environmental impact objectives.”).

<sup>258</sup> See B Lab Procedures, *supra* note 254, at 1.

<sup>259</sup> Robert G. Eccles, Ioannis Ioannou & George Serafeim, *The Impact of Corporate Sustainability on Organizational Processes and Performance*, SSRN 1, 7 (2015), <http://ssrn.com/abstract=1964011>.

<sup>260</sup> See B Lab Procedures, *supra* note 254, at 2 (correlating board responsibility for sustainability with high sustainability performance).

## 261-280

<sup>261</sup> B Lab Procedures, *supra* note 254, at 2.

<sup>262</sup> B Lab Procedures, *supra* note 254, at 2.

<sup>263</sup> B Lab Procedures, *supra* note 254, at 2-3; see Leo E. Strine, Jr., *Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone*, 70 BUS. LAW. 679 (2015).

<sup>264</sup> See 8 DEL. C. § 363(c)(2); Strine, *supra* note 104, at 247 (“Importantly, the Delaware statute requires that a public benefit corporation cannot merge or consolidate with another entity if, as a result of that transaction, the surviving corporation’s certificate of incorporation does not contain the identical provisions identifying the public benefit or public benefits pursuant to § 362(a) of this title or imposing requirements pursuant to § 366(c) of this title, unless the transaction receives approval from two-thirds of the outstanding shares of the benefit corporation.” (internal quotations omitted)).

<sup>265</sup> See Strine, *supra* note 104, at 248 (“Thus, when the board of a Delaware benefit corporation negotiates in the context of a merger or acquisition, the Delaware statute’s terms give it leverage to extract desirable, enforceable protections for other constituencies as well as commitments to responsible, sustainable conduct from buyers, joint venture partners, and the like. Similarly, the super-majority provisions and the derivative suit provisions of the Delaware statute reduce the room for non-socially responsible interlopers, including potential buyers and activist hedge funds not concerned about the best interests of other constituencies, to act on the company in a way that threatens those constituencies.”).

<sup>266</sup> Strine, *supra* note 104, at 247.

<sup>267</sup> See Alexander et al., *supra* note 192, at 273 (addressing stockholder assurances “that the company will continue to promote the specified public benefit post-merger”).

<sup>268</sup> See Alexander et al., *supra* note 192, at 279.

<sup>269</sup> See Alexander et al., *supra* note 192, at 279; see also Joe Van Brussel, *Ben & Jerry’s Becomes B-Corp Certified, Adds Credibility To Impact Investing Movement*, THE HUFFINGTON POST, (October 25, 2015), [http://www.huffingtonpost.com/2012/10/23/ben-and-jerrys-b-corp-impact-investing\\_n\\_2005315.html](http://www.huffingtonpost.com/2012/10/23/ben-and-jerrys-b-corp-impact-investing_n_2005315.html) (“The Ben & Jerry’s leadership worked to negotiate with Unilever a very unique merger agreement and established an independent board of directors with jurisdiction over the Ben & Jerry’s mission statement and brand equity.”).

<sup>270</sup> Alexander et al., *supra* note 192, at 279 (explaining difficulty of enforcing this type of provision “to the extent a buyer obtains greater flexibility to manage under varying business conditions”).

<sup>271</sup> Alexander et al., *supra* note 192, at 279.

<sup>272</sup> Alexander et al., *supra* note 192, at 279.

<sup>273</sup> Alexander et al., *supra* note 192, at 279.

<sup>274</sup> See Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767, 818-19 (discussing contention that “[b]oard composition takes on more significance for larger benefit corporations”).

<sup>275</sup> *Id.* at 818.

<sup>276</sup> *Id.* at 818-19 (“A specialist on the board can help to ensure that specific issues like social mission feature in every high-level discussion about organizational objectives. She will have the ear of key executives and can apprise them of matters that bear on mission in the face of potential pressure to focus exclusively on profit.”).

<sup>277</sup> See 8 DEL. C. § 365(a), which mandates that directors of a public benefit corporation, “manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation’s conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.”

<sup>278</sup> MODEL BENEFIT CORPORATION LEGISLATION § 3.02 (2013), available at <https://www.bcorporation.net/> (last visited Feb. 23, 2016).

<sup>279</sup> See generally Christopher Geczy et al., *Institutional Investing when Shareholders are Not Supreme*, 5 HARV. BUS. L. REV. 73, 93-95 (2015) [hereinafter *The Geczy Study*] (providing an overview of constituency statutes); see also Allen, *supra* note 3, 276 (“The entity conception was even more clearly endorsed by the law in a remarkable series of legislative acts adopted . . . over the course of the last few years of the 1980s.”).

<sup>280</sup> See *The Geczy Study*, *supra* note 279.

## 281-300

<sup>281</sup> See *The Geczy Study*, *supra* note 279, at 114 (“[C]onstituency statutes did not open litigation floodgates as some critics cautioned.” (citations omitted)).

<sup>282</sup> See *The Geczy Study*, *supra* note 279, at 127 (“We cannot rule out that constituency statutes had some effect on [high fiduciary duty institution] investment, but we can rule out that these investors significantly altered investment behavior after the passage of the statutes.”).

<sup>283</sup> See Roberta Romano, *What is the Value of Other Constituency Statutes to Shareholders?*, 43 U. TORONTO L.J. 533, 537 (1993).

<sup>284</sup> See, e.g., Comm. On Corp. Laws, *supra* note 72 at, 2253 (“These statutes variously authorize . . . directors to take into account the interests of other ‘constituencies’—persons or groups other than shareholders—in performing their duties, including the making of change-of-control decisions.”).

<sup>285</sup> *The Geczy Study*, *supra* note 279, at 95 (“Constituency statutes expand the protection of the business judgment rule . . .”) (citing STEPHEN M. BAINBRIDGE, CORPORATE LAW 96-102 (2nd ed. 2009)).

<sup>286</sup> See, e.g., Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 99 (1999) (noting official comment to Indiana statute “implies that, like Pennsylvania, Indiana rejects the Revlon duty to auction”).

<sup>287</sup> See *id.* at 92-94 (explaining statutes’ origins in anti-takeover movement of 1980s); John H. Matheson & Brent A. Olson, *Shareholder Rights and Legislative Wrongs: Toward Balanced Takeover Legislation*, 59 GEO. WASH. L. REV. 1425, 1448-50 (1991) (discussing how increased discretion from statutes “bolster[s] the board’s anti-takeover decisions”).

<sup>288</sup> Brett McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV. 1227, 1228 (2004) (“[M]any commentators have charged that [the statutes’] main intent and effect is to help entrench incumbent managers.”).

<sup>289</sup> See *id.* at 1235 (observing how management initiation of statutes “helps explain why the statutes are permissive rather than mandatory”).

<sup>290</sup> See Comm. on Corp. Laws, *supra* note 72, at 2261 (listing factors permitted for consideration in constituency statutes).

<sup>291</sup> See Springer, *supra* note 286, at 98 (“Most statutes do not address [whether constituency interests may trump those of shareholders] directly.”).

<sup>292</sup> See Springer, *supra* note 286, at 98 (discussing statutes rejecting dominance of any single interest over others).

<sup>293</sup> See *The Geczy Study*, *supra* note 279, at 96.

<sup>294</sup> See *The Geczy Study*, *supra* note 279, at 97.

<sup>295</sup> See Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, EMORY L.J. 1085, 1089 (2000) (“Permissive statutes authorize directors to consider a wider group of interests when making corporate decisions if they so choose. Accordingly, permissive statutes allow consideration of stakeholder interests without demanding it.”).

<sup>296</sup> IND. CODE ANN. § 23-1-35-1(d) (2015) (emphasis added).

<sup>297</sup> See Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 29 n.68 (1992) (providing original language of Connecticut statute which mandated that directors “shall consider” non-stockholder interests).

<sup>298</sup> See Adams & Matheson, *supra* note 295, at 1089 (“Mandating statutes strictly require directors to take into account a wider group of interests when making corporate decisions. Instead of granting authority, these statutes impose a strict obligation on directors to consider stakeholder interest when making corporate decisions.”).

<sup>299</sup> CONN. GEN. STAT. § 33-756(d) (2015). The new provision reads:

(d) [A] director of a corporation [with registered securities] *may* consider, in determining what he reasonably believes to be in the best interests of the corporation, (1) the long-term as well as the short-term interests of the corporation, (2) the interests of the shareholders, long-term as well as short-term, including the possibility that those interests may be best served by the continued independence of the corporation, (3) the interests of the corporation’s employees, customers, creditors and suppliers, and (4) community and societal considerations including those of any community in which any office or other facility of the corporation is located. A director may also in his discretion consider any other factors he reasonably considers appropriate in determining what he reasonably believes to be in the best interests of the corporation.

*Id.* (emphasis added).

<sup>300</sup> See *The Geczy Study*, *supra* note 279, at 96 (“Idaho provides a slight deviation from the permissive grant . . .”).

### 301-320

<sup>301</sup> IDAHO CODE ANN. §§ 30-1602, 30-1702 (2015) (emphasis added). Comparison of the hybrid language in the Idaho statute with the more conventional language in the Indiana and Connecticut statutes suggests that a literal reading of a typical constituency statute frees directors from the obligation to give any consideration to stockholder interests.

<sup>302</sup> See *The Geczy Study*, *supra* note 279, at 102 (explaining constituency statutes apply to all corporations in a state).

<sup>303</sup> See Springer, *supra* note 286, at 102 (noting Pennsylvania allows corporations to opt-out of standard constituency provision).

<sup>304</sup> See Springer, *supra* note 286, at 101 (describing optional nature of some constituency statutes). In opt-in states, “constituency statutes are not default measures, but rather are language that a corporation may choose to include in its charter.” *Id.* at 101-102; see also *The Geczy Study*, *supra* note 279, at 97 (identifying two jurisdictions, Georgia and Maryland, as having these “opt-in” statutes); TENN. CODE ANN. § 48-103-204 (allowing consideration of other interests “if such factors . . . are permitted to be considered by the board of directors under the charter for such resident domestic corporation in connection with a merger, exchange, tender offer or significant disposition of assets” (emphasis added)).

<sup>305</sup> GA. CODE ANN. § 14-2-202(b)(5) (2015).

<sup>306</sup> See Comm. on Corp. Laws, *supra* note 72, at 2253 (“The Committee has reviewed the so-called ‘other constituencies’ statutes enacted during the last several years by at least twenty-five states to determine whether or not the Model Act should include such a provision.”).

<sup>307</sup> Comm. on Corp. Laws, *supra* note 72, at 2270-71.

<sup>308</sup> See Comm. on Corp. Laws, *supra* note 72, at 2261 (“We believe the Delaware courts have stated the prevailing corporate common law in this country . . .”).

<sup>309</sup> Comm. on Corp. Laws, *supra* note 72, at 2269. Such ramifications included confusion of directors caused by balancing interests, deterrence from serving on boards due to a new class of plaintiffs, reduction of stockholder’s ability to monitor director conduct, and a lack of director accountability. See Comm. on Corp. Laws, *supra* note 72, at 2269-70 (identifying potential unintended consequences of constituency statutes).

<sup>310</sup> See Allen, *supra* note 3.

<sup>311</sup> See McDonnell, *supra* note 288, at 1232-33 (noting opposition to constituency statutes was not surprising because they challenge the dominant view of shareholder primacy); Adams & Matheson, *supra* note 295, at 1090 (overviewing the historical debate). On the other hand, proponents of the enterprise mode welcomed constituency statutes as a vehicle for promoting corporate social responsibility. See Springer, *supra* note 286, at 102-04 (explaining proponents’ hopes for constituency statutes to protect stakeholder interests).

<sup>312</sup> See McDonnell, *supra* note 288, at 1233 (“The traditional argument for [shareholder primacy] is that shareholders are the owners of the corporation. Hence they have the right to expect that their property is managed in their interest.”).

<sup>313</sup> Springer, *supra* note 286, at 106; see Adams & Matheson, *supra* note 295, at 1095 (“Not only do opponents believe constituency statutes are contradictory to shareholder supremacy, some argue that existing law already adequately protects the interests of stakeholders.”) (citing James J. Hanks, Jr., *Playing with Fire: Nonshareholder Constituency Statutes in the 1990s*, 21 STETSON L. REV. 97, 115 (1991)). Specifically, Hanks notes:

The economic interests of employees, for example, are protected by minimum wage, safety, health, and plant-closing laws, and in many cases, collective bargaining agreements. Creditors are protected by fraudulent conveyance, preference, and bulk transfer statutes, as well as by contract. In recent years, after being battered by the increased debt burdens taken on by corporations acquired in leveraged buyouts, many lenders now include in their loan documents so-called “event risk” provisions protecting them in the event of a restructuring that substantially increases debt or otherwise depresses the value of the lenders’ debt securities.

Hanks, 21 STETSON L. REV. at 116. See also Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23 (1991); Mark E. Van Der Wide, *Against Fiduciary Duties to Corporate Stakeholders*, 21 DEL. J. CORP. L. 27 (1996).

<sup>314</sup> Comm. On Corp Laws, *supra* note 72, at 2268.

<sup>315</sup> Comm. On Corp Laws, *supra* note 72, at 2269 (“When directors must not only decide what their duty of loyalty mandates, but also to whom their duty of loyalty runs (and in what proportions), poorer decisions can be expected.”).

<sup>316</sup> Comm. On Corp Laws, *supra* note 72, at 2255.

<sup>317</sup> See, e.g., Comm. On Corp Laws, *supra* note 72, at 2262 (“[Constituency statutes] seem designed to protect directors against claims of breach of fiduciary duty if they choose to take into account interests other than those of shareholders.”).

<sup>318</sup> Brian J.M. Quinn, *Constituency Provisions and Intermediate Scrutiny Outside of Delaware*, M&A LAW PROF BLOG (Nov. 23, 2009), <http://lawprofessors.typepad.com/mergers/2009/11/unocal-duties-outside-of-delaware.html> (expressing concerns with operation of constituency statutes).

<sup>319</sup> See Roberta Romano, *A Guide to Takeovers: Theory, Evidence, and Regulation*, 9 YALE J. ON REG. 119, 171 (1992) (“[T]he statutes, ironically, protect managers more effectively than workers. Workers have no right to challenge board decisions for failing to consider their interest, while shareholders’ ability to sue managers successfully for opposing a bid is diminished.”); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1438-39 (1993) (noting that, under a “multi-fiduciary duty” standard, “management could freely pursue its own self-interest by playing shareholders off against nonshareholders. When management’s interests coincide with those of shareholders, management could justify its decision by saying that shareholder interests prevailed in this instance, and vice-versa.”); McDonnell, *supra* note 288, at 1231 (“[T]he statutes reduce the disciplinary pressure of shareholder suits on directors without

a concomitant increase in pressure from other groups. The statutes are a shield for managers, not a sword for employees or other non-shareholder groups.”).

<sup>320</sup> See *The Geczy Study*, *supra* note 279, at 111 (“The number of enforcement cases reviewed in this study, forty-seven in total, is not large, but not unexpectedly small given the limited enforcement mechanisms in all statutes, and further restrictions in state variations limiting the scope to takeovers, public companies, or both.”); Springer, *supra* note 286, at 109-10 (noting infrequency of constituency statutes in litigation); see also Springer, *supra* note 286, at 109-10 (“The fact that cases generally do not turn on constituency statutes alone is a function of . . . the availability of other anti-takeover mechanisms that do not seem to call into question directors’ fiduciary duties.”).

### 321-340

<sup>321</sup> See *The Geczy Study*, *supra* note 279, at 112 (observing the cases concerned statutes from thirteen jurisdictions, with Ohio, Pennsylvania, and Nevada analyzed most frequently, and that thirty-two cases were resolved after 2000).

<sup>322</sup> See *The Geczy Study*, *supra* note 279, at 105.

<sup>323</sup> See *The Geczy Study*, *supra* note 279, at 113, Table 3. Seventeen cases claimed breach of fiduciary duty in a takeover setting, twelve in bankruptcy or insolvency, and eleven in other situations. See *The Geczy Study*, *supra* note 279, at 113.

<sup>324</sup> See *The Geczy Study*, *supra* note 279, at 111 (overviewing results of study and enforcement coding).

<sup>325</sup> See *The Geczy Study*, *supra* note 279, at 111.

<sup>326</sup> See *The Geczy Study*, *supra* note 279, at 111.

<sup>327</sup> See *The Geczy Study*, *supra* note 279, at 106. The Positive category was subdivided into two categories, Subcategory A, which addressed directors’ expanded rights, and Subcategory B, which addressed no standing for non-stockholder constituents. *The Geczy Study*, *supra* note 279, at 106.

<sup>328</sup> See *The Geczy Study*, *supra* note 279, at 107. Similarly to the Positive category, Neutral/Positive cases were divided into subcategory A, where the court discussed expanded director rights, and B, where the court discussed no right of action for nonshareholders. *The Geczy Study*, *supra* note 279, at 107.

<sup>329</sup> See *The Geczy Study*, *supra* note 279, at 109. Subcategory A Neutral cases simply had citations to constituency statutes, and Subcategory B cases had references by name or “other nonsubstantive discussions.” *The Geczy Study*, *supra* note 279, at 109-10.

<sup>330</sup> See *The Geczy Study*, *supra* note 279, at 112 (“[o]nly four court opinions were classified as Neutral/Negative because they did not recognize expanded director duties nor depart from *Revlon* duties in takeover settings.” (citations omitted)).

<sup>331</sup> See *The Geczy Study*, *supra* note 279, at 111 (“We did not find cases that fell under the Negative category.”).

<sup>332</sup> See *The Geczy Study*, *supra* note 279, at 110.

<sup>333</sup> See *The Geczy Study*, *supra* note 279, at 111.

<sup>334</sup> 246 F.Supp.2d 1237 (M.D. Fla. 2003).

<sup>335</sup> See *The Geczy Study*, *supra* note 279, at 106-07.

<sup>336</sup> *Kloha*, 246 F.Supp.2d at 1244 (“Plaintiff claims that Defendant Directors caused the Company to remain in the losing operations of vegetables and citrus because they were beholden to F.S. Duda, who wanted to ensure continued family employment.”).

<sup>337</sup> *Id.* at 1246.

<sup>338</sup> No. 97 C 8003, 1999 WL 601039 (N.D. Ill. Feb. 4, 1998).

<sup>339</sup> *Id.* at \*18.

<sup>340</sup> *Id.* at \*12 (“[D]irectors have fiduciary duties to the shareholders which cannot be [ ] ignored.”); see *The Barzuza Study*, *supra* note 229, at 2014-17 (finding three cases in which courts applied the *Blasius* standard where a constituency statute was in effect).

### 341-360

<sup>341</sup> No. IP 01-1103-C H/K, 2002 WL 1800311 (S.D. Ind. Jul. 9, 2002).

<sup>342</sup> *Id.* at \*8 (“The court denies the defendants’ motion to dismiss the breach of fiduciary duty claim because, drawing all reasonable inferences in plaintiff’s favor, his allegations state a claim upon which relief could be granted.”).

<sup>343</sup> *Id.* at \*9.

<sup>344</sup> 777 A.2d 469 (Pa. Super. Ct. 2001), *rev'd on other grounds*, 860 A.2d 41 (2004).

<sup>345</sup> *See id.* at 480.

<sup>346</sup> *Id.* at 480-81 (citations omitted). The Court ultimately determined the “directors impermissibly exercised their power to retain their own positions by purposely depriving the majority shareholders of any real opportunity to affect the outcome of any vote. Such abuse of position, even if exercised in the belief that the company was thereby well served, violates the principles of corporate democracy that enable shareholders to control their own company.” *Id.* at 481; *see The Barzuza Study*, *supra* note 229, at 2014-17 (finding three cases in which courts applied the *Blasius* standard where a constituency statute was in effect).

<sup>347</sup> *Invacare Corp. v. Healthdyne Techs., Inc.*, 968 F. Supp. 1578 (N.D. Ga. 1997).

<sup>348</sup> *See The Barzuza Study*, *supra* note 229.

<sup>349</sup> *The Barzuza Study*, *supra* note 229. *The Barzuza Study* describes these as “strong” constituency statutes. *The Barzuza Study*, *supra* note 229, at 1996.

<sup>350</sup> *The Barzuza Study* calls these either “intermediate,” where the statute is explicit as to whether the ability to benefit other constituencies at the expense of stockholders or “weak,” where there is no such explicit statement. *The Barzuza Study*, *supra* note 229, at 1997.

<sup>351</sup> *The Barzuza Study*, *supra* note 229, at 1998-2014. *The Barzuza Study* found that three states with intermediate statutes and two states with weak statutes rejected *Unocal*, and two with weak statutes followed, while one state with a weak statute followed *Revlon* and three rejected it. *The Barzuza Study*, *supra* note 229, at 1998-2014.

<sup>352</sup> *The Barzuza Study*, *supra* note 229, at 1998-2014.

<sup>353</sup> *See The Geczy Study*, *supra* note 279, at 115 (“[Constituency statutes] did not create an enforceable right in any of the nonshareholder constituents.”); *see also* Steven M.H. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 STETSON L. REV. 163, 188-89 (1991) (“[Constituency] statutes are not intended to create in these other constituencies any legally enforceable rights, or to provide nonshareholder constituents with a direct voice in corporate governance. . . .”).

<sup>354</sup> *See, e.g., Washington Penn Plastic Co., Inc. v. Creative Engineered Polymer Prods., LLC*, No. 5:06CV1224, 2007 WL 2509873, at \*2 (N.D. Ohio Aug. 30, 2007) (“The permissive language of the statute forecloses the contention that the directors’ duty to the corporation’s creditor is fiduciary in nature.”).

<sup>355</sup> No. 1:03CV2466, 2004 WL 3721325 (N.D. Ohio Apr. 23, 2004).

<sup>356</sup> *Id.* at \*5.

<sup>357</sup> No. 08-6007, 2009 WL 2707233 (Bankr. N.D. Ohio Aug. 25, 2009).

<sup>358</sup> *Id.* at \*5 (“[T]he Court cannot conclude that the law imposes a mandatory obligation on a director to consider creditor interests, even when the entity is insolvent or operating in the zone of insolvency. The Court will therefore dismiss count five to the extent that it attempts to hold Counter-defendants liable for a breach of fiduciary duty for failing to consider creditor interests, as well as any other counts that similarly attempt to improperly impose upon a director the duty to act on behalf of creditors . . .”).

<sup>359</sup> *See* 8 DEL. C. § 365(b) (providing directors have “no duty to any person” under balancing obligation); 8 DEL. C. § 367 (providing stockholders, with minimum holdings a right to bring derivative such as challenging the balancing); *The Geczy Study*, *supra* note 279, at 102 (noting under both statutory regimes, non-stockholders lack enforcement rights).

<sup>360</sup> *See Clark & Babson*, *supra* note 103, at 849 (“The statute explicitly does not create a fiduciary duty to anyone who cannot bring a ‘benefit enforcement proceeding.’”). This is limited to shareholders, directors, investors with a threshold percentage interests, and other persons identified in the articles of incorporation. *See also* 8 DEL. C. § 367, which expressly provides that stockholders holding at least 2% of the corporation’s outstanding shares may bring a traditional derivative suit to enforce directors’ fiduciary duties.

### 361-384

<sup>361</sup> *But see The Geczy Study*, *supra* note 279, at 117 (“If under constituency statutes creditors were denied standing because directors had permission, but no obligation, to consider creditors, the mandatory ‘shall’ language in benefit corporation statutes may prove a viable argument.”). Benefit corporation legislation seems to do away with that concern by explicitly denying standing to third parties.



<sup>362</sup> See *The Geczy Study*, *supra* note 279, at 114 (“[I]t is clear that constituency statutes were seen, for the most part, as a true expansion of directors’ authority and not merely a codification of earlier common law. The low number of Negative and Neutral/Negative cases supports this assertion.”).

<sup>363</sup> See *The Geczy Study*, *supra* note 279, at 115; *The Barzuza Study*, *supra* note 229.

<sup>364</sup> *Supra* note 347 and accompanying text.

<sup>365</sup> See *The Geczy Study*, *supra* note 279, at 115 (“Constituency statutes expanded directors’ authority to consider nonshareholder constituents, but that expansion only protected directors and did not create an enforceable right in any of the nonshareholder constituents.”).

<sup>366</sup> Romano, *supra* note 283. For the study, Romano examined twenty-five states with constituency statutes and the change in stock prices on the day the bill was introduced, the first day the bill got a favorable vote, and the day the bill was signed into law. See Romano, *supra* note 283, at 536-37 (detailing methodology of event study). See Romano, *supra* note 283, at 535 (identifying what results would indicate negative impact). Romano identifies a number of factors that could have impacted the results of the study, such as combined impact with other anti-takeover legislation, problems with use of dates that may have been prior to public announcements, and variations in firm characteristics. See Romano, *supra* note 283 at 537-41. Alternatively, and “most compelling,” Romano speculates that “other constituency statutes are not perceived to have a negative wealth effect because they do not create dramatic changes in the common law of takeovers or in management’s behaviour in responding to hostile bids.” Romano, *supra* note 283, at 541.

<sup>367</sup> See *The Geczy Study*, *supra* note 279, at 75.

<sup>368</sup> *The Geczy Study*, *supra* note 279, at 80.

<sup>369</sup> *The Geczy Study*, *supra* note 279, at 127. Constituency statutes differ from benefit corporation legislation, in that the former did not expand the responsibilities of management. See *The Geczy Study*, *supra* note 279, at 127. This difference may pose certain challenges for benefit corporations not indicated by the study.

<sup>370</sup> Kacperczyk and Flammer, *The Impact of Stakeholder Orientation on Innovation: Evidence From a Natural Experiment* (August 2014); Atanassov, *Corporate Governance, Non-Financial Stakeholders, and Innovation: Evidence From a Natural Experiment* (June 2015).

<sup>371</sup> See *Auriga Capital Corp. v. Gatz Props., LLC*, 40 A.3d 839, 852 (Del. Ch. 2012) (expressing a view that default fiduciary duties exist in the LLC context, but that they can be supplanted or modified by clear contractual provisions); *Auriga Capital Corp. v. Gatz Props., LLC*, 59 A.3d 1206, 1218 (Del. 2012), *aff’g* 40 A.3d 839 (noting that the Court of Chancery’s “statutory pronouncements” regarding existence vel non of default fiduciary duties in the LLC context “must be regarded as dictum without any precedential value”).

<sup>372</sup> 6 DEL. C. § 18-1104 (“In any case not provided for in this chapter, the rules of law and equity, including the rules of law and equity relating to fiduciary duties and the law merchant, shall govern.”).

<sup>373</sup> 6 DEL. C. § 18-1101(c).

<sup>374</sup> See, e.g., *Greenmont Capital Partners I, LP v. Mary’s Gone Crackers, Inc.*, No. 7265-VCP, 2012 WL 4479999, at \*6, \*6 n.24 (Del. Ch. Sept. 28, 2012) (quoting *Seidensticker v. Gasparilla Inn, Inc.*, No. 2555-CC, 2007 WL 4054473, at \*3 (Del. Ch. Nov. 8, 2007)).

<sup>375</sup> 6 DEL. C. § 18-1101(c).

<sup>376</sup> See *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010), *aff’g* No. 3878-CC, 3934-CC, 2009 WL 1204346 (Del. Ch. Apr. 30, 2009) (“The implied covenant of good faith and fair dealing involves a ‘cautious enterprise,’ inferring contractual terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated.”).

<sup>377</sup> *Id.* at 1125-26 (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005)).

<sup>378</sup> *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (quoting *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985)).

<sup>379</sup> See Find a B CORP, B LAB, <https://www.bcorporation.net/community/find-a-b-corp> (follow the hyperlink, enter a company name in the “Company Search” box, choose an Industry, enter a City, choose a State, and a country, then select “Search Companies” for desired search result).

<sup>380</sup> See William H. Clark, Jr. & Larry Vranka, *The Need and Rationale for the Benefit Corporation: Why it is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public*, WHITE PAPER, Appendix C at 3 (Jan. 18, 2013 version).

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* at Appendix C at 4.

<sup>383</sup> *Id.* at Appendix C at 3 (“While some LLC’s have gone public, LLC’s still represent a small minority of IPOs over the last decade.”).



<sup>384</sup> See WHAT IS A BENEFIT CORPORATION?, <http://benefitcorp.net/attorneys> (last visited Feb. 18, 2016).

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