Loosening Shareholder Primacy's Grip on Environmental, Social, Governance ("ESG") Factors: Benefit Corporations Offer Increased Latitude in Decision-Making for ESG-Motivated Directors

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ABSTRACT

The longstanding view that corporations exist for the sole purpose of delivering profits to their shareholders has come under increased scrutiny in recent years. Critics of shareholder primacy have elevated considerations of environmental, social, and governance factors (ESG), and lauded companies that engage in strong corporate social responsibility initiatives. Legislators have responded to this recent shift of opinion by creating the "public benefit corporation" (PBC) entity form in both Delaware and 34 other states. This "hybrid" organizational form permits directors to consider multiple constituencies in their decision-making and pursue two corporate purposes simultaneously: the traditional pecuniary motive of returning profit to shareholders, as well as additional "public benefits" of their specification, which may be nonpecuniary.

This Note focuses on Delaware's PBC statute and seeks to disprove the theory that directors who choose that entity form and consider nonpecuniary corporate purposes and constituencies expose their companies to increased risk of liability. Although many traditional corporations have hesitated to convert to the PBC entity form, the characteristics of the PBC form that cause their skepticism actually serve to their benefit. PBCs provide directors increased latitude to consider and promote environmental, social, and governance goals in corporate decision-making, both in ordinary-course-of-business decisions as well as decisions related to change of control transactions. Doing business as a PBC also poses no legal risks materially different than those inherent to traditional corporations. For these reasons, directors of traditional corporations with ESG motivations should more seriously consider the PBC entity form.

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INTRODUCTION

Converting from a C corporation to a benefit corporation "is a complicated, and untested process for existing public companies."
- Josh Silverman, Etsy CEO, November 2017, $6B market cap.[1]

A. *Background*

The public benefit corporation ("PBC") entity form is a recent statutory innovation that allows corporate owners to weave a nonpecuniary corporate purpose, termed a "public benefit," into the fabric of the organization.[2] It was first created by statute in the United States in 2010,[3] in a shift towards greater consideration of environmental, social, and governance ("ESG") factors. Since then, over 5,400 organizations have chosen to incorporate as a PBC,

[1] Josh Silverman, *Business as a Force for Good: Defining Etsy's Path*, ETSY NEWS (Nov. 25, 2017), https://blog.etsy.com/news/ 2017/business-as-a-force-for-good-defining-etsys-path.

[2] Delaware terms such entities "public benefit corporations." Other states describe their entities simply as "benefit corporations." The use of "PBC" in this Note refers to the Delaware statutory public benefit corporation. Many states have also created a Benefit LLC, which this Note does not discuss. For more info, see Mohsen Manesh, *Introducing the Totally Unnecessary Benefit LLC*, 97 N.C. L. REV. 603 (2019); DEL. CODE ANN. tit. 8, § 362(b) (2015) (defining "public benefit" as any "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").

[3] First created in Maryland in 2010, the benefit corporation is a for-profit corporate entity. Subsequently, 36 states and the District of Columbia have adopted similar statutes. *See State by State Status of Legislation*, BENEFIT CORPORATION, https://benefitcorp.net/policymakers/state-by-state-status (last visited Oct. 8, 2020). The form is available alongside more common corporate forms such as C-corps, S-corps, and LLCs. In contrast, the similarly-named "Certified B-Corp" marketing label is offered by the nonprofit organization B Lab to firms of any entity type as a certification of ongoing commitment to ESG factors. *See generally Certification*, CERTIFIED B CORPORATION, https://bcorporation.net/certification (last visited Oct. 8, 2020). In the 15 states that have yet to enact benefit corporation legislation, firms can still obtain B Lab's "Certified B Corp" label even without incorporating as a benefit corporation.

either *ab initio* or by conversion[4] from another corporate form.[5] An accelerating number of large multinational firms are acquiring existing PBCs as subsidiaries,[6] and the first PBC to test the waters as a publicly traded standalone entity has experienced positive financial growth.[7]

Despite growing acceptance of the PBC form, the vast majority of PBCs so far are small- and medium-sized privately held firms.[8] Larger and publicly traded firms have thus far taken a "wait and see" approach to observe the success of first-movers from afar, likely stemming in part from uncertainty of how PBCs will fare in both the legal and investment arenas and from a perception that the characteristics of the PBC form expose the company (especially its directors) to scrutiny and liability for doing either "too little" or "too much" in pursuit of the stated public benefit.[9] The history of PBCs in the courts is admittedly very short—the entity form has existed for only 10 years, while the traditional corporate form has endured over 100 years[10]—and no court has yet (as of the date of this Note's publication) been called upon to parse the language of the PBC statute and confirm whether the fiduciary duties required of PBC directors are any different than those long-

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[4] References to "conversion" include amending the certificate of incorporation as provided in DEL. CODE ANN. tit. 8, § 362(a) (2013).
[5] *Find a Benefit Corp*, BENEFIT CORPORATION, https://benefitcorp.net/businesses/find-a-benefit-corp (last visited May 1, 2018).
[6] Large multinationals that have recently acquired a PBC or Certified B-Corp subsidiary include Anheuser-Busch, the Campbell Soup Company, Clorox, Coca-Cola, Gap, Group Danone, the Hain Celestial Group, Nestlé, OppenheimerFunds, Procter & Gamble, SC Johnson & Son, and Unilever. RYAN HONEYMAN & TIFFANY JANA, THE B CORP HANDBOOK: HOW YOU CAN USE BUSINESS AS A FORCE FOR GOOD 29–32 (2nd ed. 2019).
[7] *See also* Simply Wall St., *Laureate Education (NASDAQ: LAUR) Shareholders Have Enjoyed A 55% Share Price Gain*, YAHOO!FINANCE (Jan. 29, 2020) https://finance.yahoo.com/news/laureate-education-nasdaq-laur-shareholders-095301740.html (reporting that Laureate's total shareholder return is "up 55%, over three years [Q4 2016–Q4 2019], soundly beating the [general] market return of 40% (not including dividends)" over the same time period).
[8] Ellen Berrey, *Social Enterprise Law in Action: Organizational Characteristics of U.S. Benefit Corporations*, 20 TRANSACTIONS: TENN. J. BUS. L. 21, 27 (2018) ("[T]he overwhelming majority [of PBCs] are small, privately held firms.").
[9] The total number of other corporations still dwarf the number of benefit corporations in the United States. *See* FREDERICK H. ALEXANDER, BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE 9–10 (2018) ("[T]here are only five thousand benefit entities out of a total of 8 million business entities in the United States"). Frederick Alexander was one of the drafters of Delaware's PBC statute and his book is the most comprehensive review of the topic to date; the Honorable Leo E. Strine, Jr. (former Chief Justice of the Delaware Supreme Court) endorsed it in his foreword as a "comprehensive and learned overview". *Id.* at xii.
[10] *See* Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 249–70 (1976) (setting the birth date of the corporate form at least as early as Delaware's General Corporation Law in 1899).

established as required of directors of traditional corporations.[11] Certainly, the lack of case law addressing PBCs pales in comparison to the volumes of law already written regarding traditional corporations, and has made many a corporate director wary of venturing into the seemingly uncharted waters of PBCs.[12]

However, corporate directors should not deprive themselves of the advantages of benefit corporations until PBC case law reaches a similar level of development. Contrary to the view that the duties and obligations associated with this new corporate form remain obscure,[13] some clarity already exists. For example, without the PBC form, directors of traditional corporations are burdened by shareholder primacy: a mandate to link each of their actions to a uniform corporate purpose of increasing shareholders'[14] pecuniary value (whether manifested in the short term or long term). PBC directors, on the other hand, have been provided by statute an additional *nonpecuniary* corporate purpose as a possible motivation for their decision-making: consideration of effects on non-shareholders and the general public.

Two models of PBC statutes have taken shape. The Model Benefit Corporation Legislation ("MBCL") promulgated by B Lab[15] has been adopted by the largest number of states, and thus has already been analyzed by many commentators.[16] This Note does not focus on the MBCL or on B

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[11] *See* J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 366 (2014) ("This current lack of litigation is likely due to a combination of the entity forms being so new, the entities being mostly small, and the entities being mostly closely-held."); *see also* Stephen I. Glover et al., *A Corporate Paradigm Shift: Public Benefit Corporations*, GIBSON DUNN (Aug. 9, 2016), https://www.gibsondunn.com/a-corporate-paradigm-shift-public-benefit-corporations ("The PBC corporate form's relative novelty also brings risks arising from the lack of legal precedent clarifying how PBCs should be managed. No shareholder has yet sued over the management of a PBC. Therefore, difficult fiduciary duty questions remain unresolved.").

[12] *See* Silverman, *supra* note 1. Delay in adoption of the PBC form also stems from a general lethargy for change in the corporate form and status quo bias and, until its repeal in July 2020, a procedural hurdle of the 2/3 shareholder vote required to adopt the form. *See* DEL. CODE ANN. tit. 8, § 363 (2015); 82 Del. Laws 256 (2020).

[13] Michael Vargas, *The Next Stage of Social Entrepreneurship: Benefit Corporations and the Companies Using This Innovative Corporate Form*, BUSINESS LAW TODAY (Jul. 20, 2016) (The "precise contours of director responsibilities remain obscure."), https://www.americanbar.org/groups/business_law/publications/blt/2016/07/01_vargas/.

[14] This Note uses the terms "shareholder" and "stockholder" interchangeably.

[15] *See* Model Benefit Corporation Legislation § 301(e) (B Lab 2017), https://benefitcorp.net/sites/default/files/Model%20benefit %20corp%20legislation%20_4_17_17.pdf.

[16] *See, e.g.*, Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121 (2016); Christopher Lacovara, *Strange Creatures: A Hybrid Approach to Fiduciary Duty in Benefit Corporations*, 2011 COLUM. BUS. L. REV. 815, 826–34 (2011) (reviewing the differences amongst states in application of the MBCL). Other articles question the need for benefit corporations at all. *See* Sarah Dunn, *What is the Benefit of Benefit Corporations?*, 9 HOUSTON L. REV. 82 (2019).

Lab's "Certified B Corp" certification. This Note instead focuses on the PBC statute in Delaware, where over 1,000 PBCs have already chosen to incorporate,[17] unsurprisingly given the state's prominence in traditional corporation filings and preeminence in general corporate law.[18] Although Delaware's approach to the benefit corporation differs from the approach of most other states,[19] its PBC statute is likely to retain the leading share of the market moving forward.[20]

B. *Summary of Argument*

This Note argues that the expansion of corporate purpose provided by the Delaware PBC statute is accompanied by an expanded application of the deferential "business judgment rule," which paves the way for increased consideration of ESG factors in corporate decision-making, such as environmental impact, human rights, and increased transparency in corporate governance.[21] Thus, if a corporate director wishes to make decisions motivated by ESG, they will be viewed more favorably by Delaware courts and have more latitude to make such decisions if they are structured as a PBC rather than as a traditional corporation.

Even in absence of cases specifically addressing benefit corporations, this conclusion can be deduced from the plain language of the governing statute, existing case law, and extrajudicial guidance from judges

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[17] Frederick H. Alexander, *Next Phase for Benefit Corporation Governance Begins*, 33 No. 12 WESTLAW JOURNAL CORPORATE OFFICERS & DIRECTORS LIABILITY 1, at *2 (2017).

[18] *See* DELAWARE DIVISION OF CORPORATIONS, 2018 ANNUAL REPORT 2 (2018) ("67.2% of all Fortune 500 companies are incorporated in Delaware."); *In re* Prudential Ins. Co. Derivative Litig., 659 A.2d 961, 969 (N.J. Super. Ct. Ch. Div. 1995) ("Delaware is recognized as a pacesetter in the area of corporate law.").

[19] B Lab is the major proponent of the MBCL. As of 2019, the MBCL has been adopted in 33 states and the District of Columbia. Delaware has adopted similar provisions in its PBC statute, albeit with a few key differences. Colorado has chosen to follow Delaware's approach. For an overview of the differences between the MBCL and Delaware's PBC statute, see Murray, *supra* note 12, at 351 ("Delaware's new framework has already been largely followed by one state, Colorado. Colorado, however, adopted reporting requirements that are similar, in many respects, to the [MBCL].").

[20] *See* Casner & Edwards, LLP, *Client Alert: Nuts and Bolts of Delaware Public Benefit Corporations* (Dec. 6, 2017), https://www.casneredwards.com/news-and-resources/client-alert-nuts-and-bolts-of-delaware-public-benefit-corporations ("[O]ver 30% of all benefit corporations formed in the United States are governed by [Delaware's] form of legislation. For these reasons, the Delaware statute merits attention.").

[21] *See* Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731, 734 n.3 (2019) (listing examples of ESG considerations: "[e]nvironmental factors include climate change, carbon emissions, pollution, energy efficiency, waste management, biodiversity, deforestation, and water use related to water scarcity. Social factors include labor conditions, employee engagement, human rights, gender and diversity policies, and community relations. Governance factors include diversity on the board, executive compensation, audits and transparency for shareholders and other stakeholders, corruption policies, lobbying activities, and political contributions. The types of ESG factors and which factors should be considered material, vary from industry to industry.").

themselves. Section II of this Note clarifies that directors of a PBC face no new fiduciary duties beyond those already applicable to directors of traditional corporations, and that directors need not fear scrutiny for doing "too little" to advance the chosen nonpecuniary purpose. Section III argues that PBC directors are permitted more latitude for their decisions in the ordinary course of business than directors of traditional corporations because the expanded application of the business judgment rule protects them from allegations that they are doing "too much" in favor of their nonpecuniary purpose. Section IV argues that a similar conclusion extends to PBC directors' decisions made in connection with change of control transactions.

A director's choice of entity is multifaceted and takes into consideration many business and legal factors, not solely those mentioned in this Note. Notwithstanding those factors, this Note argues that concerns about fiduciary duties and the latitude given in decision-making should not be a barrier to the PBC form, even for publicly traded Delaware corporations. This topic is timely because public opinion about the purpose of corporations and their role in the economy is currently in flux. [22] The Business Roundtable, an influential group of the world's largest CEOs, recently issued a statement declaring that a move away from shareholder primacy and towards a commitment to all stakeholders[23] is necessary for businesses to remain successful.[24]

II. A DELAWARE PUBLIC BENEFIT CORPORATION DOES NOT HAVE SIGNIFICANTLY DIFFERENT LEGAL OBLIGATIONS OR SCOPE OF LIABILITY THAN A TRADITIONAL CORPORATION.

While the PBC entity is not risk-free for its directors, the PBC statute does not impose greater fiduciary duties than those imposed on directors of traditional corporations. The traditional duties expected of directors of a

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[22] This Note does not endeavor to debate the underlying purpose of the corporation (either fiduciary or normative), nor does it attempt to evangelize the benefits of the benefit corporation generally. That endeavor has already been undertaken by many scholars. *See, e.g.*, Tu, *supra* note 17; Michael B. Dorff, *Why Public Benefit Corporations?*, 42 DEL. J. CORP. L. 77 (2017).

[23] The term "stakeholder" used in this Note refers to each individual or entity that is materially affected by a corporation's conduct, whether or not they are a stockholder in the corporation.

[24] *Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy That Serves All Americans*," BUSINESS ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/VS3S-6Y8Y].

corporation are the duties of care and loyalty.[25] Part of the hesitancy to PBC adoption is a mistaken belief that the PBC form imposes additional fiduciary duties, and directors in search of maximum decision-making latitude should thus avoid a potentially more restrictive corporate form. Directors might also fear that by converting to a PBC they must now prepare to defend themselves from an expanded pool of potential litigants. However, interpretation of the plain language of the statute's text makes clear that there is nothing new or mysterious emanating from the PBC form in the way of fiduciary duties or litigation liability.[26]

Delaware's PBC statute is codified in the Delaware Code, Title 8, Subchapter XV, §§ 361–65. Except for the few PBC-specific customizations outlined therein (and described below), the volume of Delaware's well-established corporate law applies to PBCs in the same way as it does to traditional corporations.[27] Section 365 clarifies the PBC-specific duties of directors in its subsections (a)–(c). The statute's language both confirms that the customary fiduciary duties of care and loyalty apply to directors of a PBC, and also that no new duties have been added.

A. *The "Balancing" Standard Imposes No Fiduciary Duties On Directors Beyond Those Already Applicable To Directors Of Traditional Corporations*

Arguably the most influential portion of Delaware's PBC statute is § 365(a), which requires that the board of directors of a PBC "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."[28] Section 365(b) further clarifies that a director's "balancing requirement . . . 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

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[25] *See* Mills Acq. Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1989) ("Directors owe fiduciary duties of care and loyalty to the corporation and its shareholders.").

[26] *See* Christina Balestracci & William Perkins, *Liability Considerations for Delaware Public Benefit Corporations*, THE NATIONAL LAW REVIEW (Sept. 19, 2018), https://www.natlawreview.com/article/liability-considerations-delaware-public-benefit-corporations ("PBC status does not affect the duties of corporate directors, but rather expands the range of items to be considered by directors when making decisions.").

[27] *See* DEL. CODE ANN. tit. 8, § 361 (2013) ("If a corporation elects to become a public benefit corporation under this subchapter [XV] in the manner prescribed in this subchapter, it shall be subject in all respects to the provisions of this chapter [Chapter 1: General Corporation Law], except to the extent this subchapter imposes additional or different requirements, in which case such requirements shall apply.").

[28] DEL. CODE ANN. tit. 8, § 365(a) (2013) (emphasis added).

and not such that no person of ordinary, sound judgment would approve."[29] Section 365(c) protects directors by clarifying that "[i]n the absence of a conflict of interest, no failure to satisfy that balancing requirement shall . . . constitute an act or omission not in good faith, or a breach of the duty of loyalty, unless the certificate of incorporation so provides."[30]

This balancing requirement has three objects: stockholders, stakeholders, and the public benefit purpose. While this balancing "requirement"[31] instructs directors to *consider* stakeholders, it does not specify relative weights to be afforded to each object. Delaware courts have not yet issued any opinions interpreting the "balancing" required.[32] Courts are not, however, required to re-enumerate what is already expressed in a statute. The statue's considered use of the term "balancing" likely means giving "some" weight to each factor.[33] Thus, directors are free to balance the respective weights of the three objects as they deem appropriate, provided that at least marginal weight is given to each factor.[34] The practical implications of the balancing requirement both in the ordinary course of business and as related to change of control transactions are discussed further in sections III and IV, *infra*.

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[29] DEL. CODE ANN. tit. 8, § 365(b) (2013) (emphasis added). The MBCL takes a similar approach, clarifying that directors fulfill their balancing duties if they make a business judgment in good faith, were disinterested, informed themselves to the extent they reasonably believed necessary under the circumstances, and rationally believed the decision was in the company's best interest. *See* Model Benefit Corporation Legislation § 301(e), *supra* note 16.

[30] DEL. CODE ANN. tit. 8, § 365(c) (2020). Prior to the 2020 amendment, this provision was previously opt-in, but has now been converted to opt-out, and clarifies that a director's ownership of stock in a PBC does not by itself constitute a conflict of interest. *See* DEL. CODE ANN. tit. 8, § 365(c) (2013).

[31] *See* DEL. CODE ANN. tit. 8, § 365(b) (2013) (referring to the language of § 365(a) as the "balance requirement").

[32] *See* Glover et al., *supra* note 12 ("[T]here is no guidance as to how boards with dual responsibilities to shareholders and other constituencies should balance those sometimes-competing interests in practice.").

[33] ALEXANDER, *supra* note 10, at 94 (arguing that the use of the word "balance" implies "an insistence that stakeholder interest are given some weight", but that "[t]his requirement should only create incremental difference in light of Delaware's codification of the business judgment rule"); Murray, *supra* note 12, at 355 n.64 (2014) ("'Balance' could mean giving exactly equal weight to each factor, but more likely means giving some weight to each factor.").

[34] Scholars have proposed their own balancing tests on how the business judgment rule should be applied to evaluate the balancing test in § 365(a). *See, e.g.*, Jaime Lee, *Benefit Corporations: A Proposal for Assessing Liability in Benefit Enforcement Proceedings*, 103 CORNELL L. REV. 1075, 1096–98 (2018) (arguing that courts analyzing a director's balancing decision should consider the type of social benefit the organization claims to pursue, its total financial profits, the age of the corporation, and the length of time required to achieve its stated benefit purpose).

Even if the balancing requirement instructs a director to balance various interests in the director's ongoing management of the corporation, it does not rise or morph into an imposition of an additional duty that every incremental decision must somehow fulfill *all* three of the balanced interests simultaneously, or that the director might be held accountable for a failure to do so (perhaps as an allegation of doing "too little" for the public benefit purpose).[35] In using the business judgment rule to evaluate director decisions (discussed further in sections III and IV, *infra*), Delaware courts focus on the *procedure* of the decision-making process, not the *substance* of the resulting decision.[36] As such, if a director gives weight to all three factors when evaluating a decision, but the resulting decision perhaps only materially advances two of the three factors, Delaware courts will not disturb the decision, provided that it was informed and disinterested.[37] In drafting the statute to provide this intended result, the Delaware legislature does not provide a "fiduciary excuse" to PBC directors with which to evade disgruntled stockholders, but rather acknowledges that, similar to the application of the business judgment rule to traditional corporations, the legislature is not in a position to determine in advance how to best manage the corporation.[38]

By contrast, nonprofit corporations in many states (not including Delaware) are subject to the additional fiduciary duty of obedience, under which a director may make only decisions that are faithful to the mission of the nonprofit as stated in its charter (and the law generally).[39] If another director or the state's Attorney General feels a specific decision does not align with fulfillment of that mission, they may file a derivative lawsuit against the organization to enforce the duty of obedience. The duty of obedience presents no danger to director decision-making in Delaware,

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[35] *See* DEL. CODE ANN. tit. 8, § 365(c) (2020) ("no [disinterested] failure to satisfy the balancing requirement shall . . . constitute an act or omission not in good faith, or a breach of the duty of loyalty"); Matthew J. Dulac, *Sustaining the Sustainable Corporation: Benefit Corporations and the Viability of Going Public*, 104 GEO. L.J. 171, 177 (2015) ("[F]ailure to satisfy the stated specific public benefit, without more, does not constitute a breach of good faith.").

[36] In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967–68 (Del. Ch. 1996) ("[W]hether a judge or jury considering the matter after the fact, believes a decision substantively wrong . . . 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. . . . Thus, the business judgment rule is process oriented . . . ").

[37] *See* DEL. CODE ANN. tit. 8, § 365(b) (2013).

[38] *See* DEL. CODE ANN. tit. 8, § 141(a) (2019) ("The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors. . . .").

[39] Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 186 Misc. 2d 126, 715 N.Y.S.2d 575, 593 (Sup. Ct. 1999) (the duty of obedience "requires the director of a not-for-profit corporation to be faithful to the purposes and goals of the organization, since unlike business corporations, whose ultimate objective is to make money, nonprofit corporations are defined by their specific objectives: perpetuation of particular activities are central to the raison d'être of the organization.") (internal quotes omitted).

however, as Delaware does not recognize the duty of obedience for any type of corporation.[40]

The balancing requirement thus provides directors with broad discretion, as Delaware courts will not review the substantive aspects of a PBC director's balancing decision. A director will not be held liable for doing "too little" in pursuit of their PBC's public benefit, and the statute does not impose some new judicially enforceable fiduciary duty or minimum weight to any object on the balancing scale.[41]

B. *Pool Of Potential Plaintiffs Remains Limited To Qualified Shareholders*

Shareholders of a traditional Delaware corporation may bring claims of corporate mismanagement via either-a direct action for personal harm or a derivative suit for harm to the corporation.[42] The PBC statute does not modify the threat of direct actions for personal harm (either by individuals or as class actions) and, thus, a PBC is no more or less exposed than a traditional corporation to a suit alleging tort claims or damage to personal shareholder rights. The PBC statute does, however, limit the availability of shareholder derivative suits in three ways, which ensures that a PBC's consideration of a broader pool of stakeholders does not also broaden the pool of potential plaintiffs.[43]

First, although Delaware's PBC statute requires that directors consider stakeholders, it does not provide stakeholders with a legal right of action to enforce that consideration. Section 365(b) clarifies that PBC directors, while being required to balance the interest of stockholders, stakeholders, and the

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[40] *In re* Draw Another Circle., 602 B.R. 878, 893 (Bankr. D. Del. 2019) ("[W]hile Texas acknowledges the breach of fiduciary duty of obedience, Delaware does not.").

[41] Directors remain accountable to shareholders in other ways, such as via transparency reporting and annual elections. *See* Section III.A, *infra*.

[42] Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004) (Whether a suit is direct or derivative in Delaware turns on "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)."). Non-shareholders might bring an action against the corporation in tort or for breach of contract, but are not permitted to bring actions claiming corporate mismanagement because they are not shareholders of the corporation.

[43] The MBCL created a special term to describe a derivative suit brought by stockholders on behalf of a PBC to enforce the PBC balancing requirement: a "benefit enforcement proceeding." In practice, however, the only substantial difference between a benefit enforcement proceeding and a traditional derivative suit in Delaware is the limitation on standing mentioned above. Delaware eschews any unique name and simply refers to such a suit as a derivative suit. *See* Model Benefit Corporation Legislation, *supra* note 16, at § 305 and associated comments.

public benefit, owe a duty to the stockholders only, and not to stakeholders or to anyone affected by the public benefit.[44]

Delaware's general corporate law already restricts the pool of potential plaintiffs eligible to bring a derivative suit against traditional corporations to stockholders only.[45] Section 367 implements the same restrictions for suits against PBCs.[46] This limitation ensures that a PBC director balancing various constituencies, just like a traditional corporate director, is not *legally* accountable to anyone beyond the stockholders. The statute is intended to protect *directors* in their consideration of community stakeholders, not to arm stakeholders with some guarantee that their ESG goals will be furthered.

Section 367 reduces the pool of stockholders even further to *qualified* stockholders only.[47] A traditional Delaware corporation can face derivative suit liability from *any* stockholder who holds even a single share of stock.[48] The PBC statute imposes a higher threshold: only stockholders who (individually or as a class) hold at least 2% of the corporation's outstanding shares have standing to bring a stockholder derivative suit.[49] While not

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[44] DEL. CODE ANN. tit. 8, § 365(b) (2013) (A PBC director "shall not . . . have any duty to any person on account of any interest of such person in the public benefit[s] identified in the certificate of incorporation or on account of any interest materially affected by the corporation's conduct.").

[45] DEL. CODE ANN. tit. 8, § 327 (1998); *see also* Schoon v. Smith, 953 A.2d 196, 210 (Del. 2008) (confirming that plaintiffs only have standing to bring a derivative suit against a Delaware corporation if they meet the requirement of § 327, and declining to extend standing to a director of the corporation who did not own stock).

[46] DEL. CODE ANN. tit. 8, § 367 (2020) (requiring that plaintiffs who wish to bring an action to enforce the balancing requirement of § 365(a) must own "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 the corporation with a market value of at least $2,000,000 as of the date the action is instituted." The statute does not mention stakeholders.); *see also, e.g.*, MBCL § 305(c) ("A benefit enforcement proceeding may be commenced or maintained only . . . by: (i) a person or group of persons that owned . . . at least 2% of the total number of shares . . . or (ii) a person or group of persons that owned . . . 5% or more of the outstanding equity interests in an entity of which the benefit corporation is a subsidiary . . . .").

[47] DEL. CODE ANN. tit. 8, § 367 (2020).

[48] DEL. CODE ANN. tit. 8, § 327 (1998). For both traditional corporations and PBCs, the stockholder must hold the stock both at the time the breach occurred and throughout the litigation. *See* Arkansas Teacher Ret. Sys. v. Countrywide Fin. Corp., 75 A.3d 888, 894 (Del. 2013) ("[F]or a shareholder to have standing to maintain a derivative action, the plaintiff must not only be a stockholder at the time of the alleged wrong and at the time of commencement of suit but . . . must also maintain shareholder status throughout the litigation.").

[49] DEL. CODE ANN. tit. 8, § 367 (2020) ("Any action to enforce the balancing requirement of § 365(a) of this title, including any individual, derivative or any other type of action, may not be brought unless the plaintiffs in such action own individually or collectively, as of the date of instituting such action, 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 the corporation with a market value of at least $2,000,000 as of the date the action is instituted."). For publicly traded PBCs valued at over $100,000,000, this threshold expands to any individual (or class) holding at least $2,000,000 in shares, even if this constitutes less than 2% of the PBC's total value. Few PBCs of this size yet exist.

completely cancelling the threat of derivative suits, this provision presents yet another hurdle to reduce the likelihood that PBC directors would face a (potentially frivolous) derivative suit challenging their balancing decisions, especially from far-removed stakeholders with little relationship to the corporation.[50]

C. *Even Qualified Plaintiffs Face A High Burden Of Proof.*

If qualified stockholders do bring a derivative suit in Delaware, alleging a PBC director's decision caused harm to the PBC, courts are unlikely to find the director liable because of their significant deference to business judgment (see discussion in section III, *infra*).[51] Even if a plaintiff were to prevail in such a suit, the PBC's ability to exculpate its director from liability is the same as for traditional corporations. Delaware specifically allows a corporation's certificate of incorporation to exculpate directors from monetary liability for breaches of fiduciary duties, subject to certain conditions,[52] and Delaware's PBC statute extends this protection to exculpate PBC directors for failure to perform the balancing.[53] This exculpation of monetary liability likely acts as a severe disincentive to potential litigants.

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[50] Although shareholders of Delaware corporations who bring derivative claims face a difficult burden of proof in order to overcome the business judgment rule, it does not prevent them from trying. In 2018, 82% of public company M&A transactions over $100 million in value were litigated. CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES 1 (2018), https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-of-Public-Companies-Review-of-2018-M-and-A-Litigation-pdf.

[51] *See* Dulac, *supra* note 35, at 185 ("[A] Delaware court has never held a director liable for [a shareholder primacy] failure to maximize shareholder wealth.").

[52] DEL. CODE ANN. tit. 8, § 102(b)(7) (2019) (permitting a certificate of incorporation to include "[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, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 [unlawful dividends]; or (iv) for any transaction from which the director derived an improper personal benefit.").

[53] *See* DEL. CODE ANN. tit. 8, § 365(c) (2020) ("In the absence of a conflict of interest, no failure to satisfy that balancing requirement shall, 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, unless the certificate of incorporation so provides."); *accord* Murray, *supra* note 11, at 362 ("With monetary damages unavailable [under the MBCL], plaintiffs and their attorneys have less incentive to bring benefit enforcement proceedings, benefit corporation directors have less reason to fear the proceedings, and the public should have less confidence in the proceedings as an effective enforcement or brand-creating mechanism.").

No court, in *any* state, has yet been required to adjudicate such a suit; the sole example filed to date was settled before trial.[54] The risk of such a suit ever being brought in Delaware may be low to begin with, as the current trend for many of the largest PBCs is to operate as a subsidiary, often wholly-owned, of a larger traditional corporation.[55] In such relationships, the parent entity is unlikely to bring suit alleging its own mismanagement of its subsidiary; the stockholders of the parent are also unlikely to bring (or succeed in) a *double*-derivative suit on behalf of the PBC.[56] Thus, even though a suit attacking a PBC director's decision-making has yet to be adjudicated in any state, the outcome of such a proceeding is almost certain to favor the PBC directors' decision via the business judgment rule.

Increased transparency in reporting might also be thought to present a significant hurdle, perhaps because it has proven so at least for small PBCs in MBCL states.[57] The MBCL requires PBCs to adhere to a specific third-party reporting standard and make an annual benefit report available to the public.[58] Delaware does not *require* its PBCs to comply with either MBCL

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[54] Pirron v. Impact Makers, No. CL19002358-00 WL (Va Cir. Ct. May 8, 2019) (settled out of court); *see also* John Reid Blackwell, *Richmond-based Impact Makers and its Founder Settle Lawsuit*, RICHMOND TIMES-DISPATCH (Jun. 18, 2019), https://www.richmond.com/business/richmond-based-impact-makers-and-its-founder-settle-lawsuit/article_f591f6b8-3925-5c9e-9f81-210480a31a34.html; *Client Stories*, DUNLAP LAW, https://dunlaplawplc.com/client-stories/ (last visited Oct. 7, 2020) ("[T]he Board of Directors pressured Michael to resign as Permanent Director – a position created to allow him to oversee Impact Makers' direction and protect the gift to the community. When their efforts to oust Michael failed, in April 2019, the Board pushed through a sale of the $18.6M firm for only $1,000. Simply put, the Board violated Michael's rights to protect the company he created.").

[55] *See* HONEYMAN, *supra* note 6.

[56] See ALEXANDER, *supra* note 10, at 98, 99 n.46 (defining a double derivative suit as one "brought by a shareholder of a parent corporation seeking enforcement of a claim belonging to a wholly owned or majority controlled subsidiary of that parent," and describing a low possibility of success of such suits because plaintiffs would have to overcome the business judgment rule "squared").

[57] Some argue that, at least for small businesses in MBCL states, the incremental burden imposed by reporting requirements outweigh the rewards of converting to a PBC; however, this is likely not a concern for large publicly traded corporations. *See Is There a Legal Benefit to Forming a B Corporation?*, EMINUTES BLOG (last visited Jan. 25, 2020), https://eminutes.com/is-there-a-legal-benefit-to-forming-a-b-corporation (describing "increased reporting burdens" as a "substantial downside" for *small* benefit corporations, and explaining that "B corporation statutes require B corporations to produce an annual 'benefit report' that . . . (1) describes the ways in which the corporation pursued a general public benefit and any special public benefit(s) during the preceding year, and (2) assesses the corporation's performance relative to achieving such benefit(s) assessed against a third-party standard. . . . Given the questionable value in a small B corporation with few shareholders of [converting to a PBC actually] insulating directors/shareholders from suing each [other] for failing to maximize shareholder profits, this increased reporting burden creates a serious question as to the legal benefit of forming a B corporation when starting up a new enterprise with only a handful of shareholders.").

[58] *See* Model Benefit Corporation Legislation, *supra* note 15, at § 401 (requiring the benefit report to be made available annually and be assessed against a third-party standard); *id.* at § 402 (requiring the benefit report to be made available to the public).

mandate; a Delaware PBC is instead only required to provide a report to shareholders only every two years, but may "opt in" to heightened self-imposed reporting requirements if they so choose.[59] This more lenient approach is likely an effort by the Delaware legislature to address what is perceived as a major (if not the primary) roadblock to converting to a PBC.

III. Directors Are Permitted More Latitude For Decisions In the Ordinary Course of Business If They Structure Their Entity As a Public Benefit Corporation Rather Than a Traditional Corporation, Especially When Motivated By ESG Goals.

Even if the statute imposes no additional fiduciary duties that might penalize a director for doing "too little" in pursuit of the PBC's public benefit, cautious directors may also be concerned that the shareholder primacy expectation to which they are accustomed will bridle their latitude of permissible decision-making and allow a disenchanted shareholder to curb them from doing "too much" in pursuit of the PBC's public benefit purpose. However, the statute's text and an analysis of the applicable standard of review make clear that PBC directors enjoy broader decision-making latitude than that permitted to their traditional corporate counterparts.

A. *The Business Judgment Rule Is Widened Beyond Shareholder Primacy.*

The traditional fiduciary duties expected of corporate directors are the duties of care and loyalty.[60] The duty of care requires that directors make their decisions on an informed basis. The duty of loyalty is a commitment to both avoid conflicts of interest and to remain loyal to the corporate purpose (the "best interests of the company"). The duty of loyalty is policed using the business judgment rule standard of review. Similar to a contractual relationship, these fiduciary duties define what conduct investors should expect to receive from the fiduciaries to whom they entrust their investment in carrying out the corporate purpose.[61] The Delaware PBC statute expands the definition of corporate purpose.[62] To accommodate this expanded definition, the business judgment rule standard must also expand. Delaware's PBC statute does not modify a director's obligations under the

[59] *See* DEL. CODE ANN. tit. 8, § 366 (2013) (requiring Delaware PBCs to make a report on the corporation's promotion of its applicable public benefit(s) "no less than biennially" and to stockholders only, but stating that the corporation *may* self-impose a heightened reporting burden by providing the report more frequently, making the report available to the public, adhering to a third-party standard, or obtaining a third-party certification);

[60] Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1989).

[61] *See* Milicic v. Basketball Mktg. Co., 857 A.2d 689, 691 (2004).

[62] *See* section I.A, *supra*; DEL. CODE ANN. tit. 8, § 362(b), *supra* note 2.

duty of care or the conflict of interest component of the duty of loyalty, and courts will thus treat directors of a traditional corporation and a PBC the same with respect to these duties.[63]

Judicial deference to director decision-making is already broad for directors of traditional corporations. Courts prefer not to second-guess the judgment of corporate directors, and acknowledge, by applying the deferential business judgment rule, that directors are the parties in best position to manage their organizations.[64] One commentator notes that Delaware courts have enumerated three components of the rule.[65] First, in making a business decision, corporate directors enjoy a judicial presumption that they "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."[66] The presumption of acting on an informed basis implies fulfillment of the duty of care, while the presumption of acting in the best interests of the company implies fulfillment of the duty of loyalty. Second, to rebut this presumption, a plaintiff must plead a breach of fiduciary duty; if the plaintiff provides sufficient evidence, "the burden shifts to defendant directors to prove the entire fairness of a transaction."[67] Third, if the plaintiff fails to rebut this presumption, or if the directors overcome a challenge of entire fairness, Delaware courts will not disturb the directors' business judgment, provided that each decision "can be attributed to *any rational business purpose*."[68] In such circumstances, a court "will not substitute its own notions of what is or

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[63] A PBC balancing decision would likely never be challenged under the entire fairness standard because of § 365(c). However, if a PBC opted out of the protection of § 365(c), such balancing decision could be subject to attack. Even so, the entire fairness standard is used to guard against usurpation of personal benefit by the director, and not to challenge merely any situation where the shareholders allege their profit benefit was usurped by some other purpose. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 37–38 (Del. Ch. 2010) ("Entire fairness review ordinarily applies in cases where a fiduciary either literally stands on both sides of the challenged transaction or where the fiduciary expects to derive personal financial benefit from the challenged transaction in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally.").

[64] *In re* MFW Shareholders Litig., 67 A.3d 496, 526 (Del. Ch. 2013), *aff'd sub nom.* Kahn v. M & F Worldwide Corp. (Del. Mar. 14, 2014) ("Under Delaware law, it has long been thought beneficial to investors for courts, which are not experts in business, to defer to the disinterested decisions of directors, who are expert, and stockholders, whose money is at stake.").

[65] *See* Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 411 (2013) (describing the business judgment rule as defined by Delaware courts as having three components: the procedural guide, the rule-duty linkage strand, and the "substantive" law strand).

[66] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

[67] Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993), *modified*, 636 A.2d 956 (Del. 1994). If the plaintiff fails to provide sufficient evidence to rebut the presumption, the business judgment rule attaches immediately without the board being subjected to entire fairness review. *See also* eBay, 16 A.3d at 42 ("To prove a transaction was entirely fair, directors must demonstrate that the transaction was (1) effectuated at a fair price and (2) the product of fair dealing.").

[68] Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (emphasis added).

is not sound business judgment."[69] Delaware courts use this third "rationality" component of the business judgment rule to verify that directors' decision-making adhered to the corporate purpose. Because the business judgment rule evaluates only the procedure of the decision-making process, and not the substance of the resulting decision, in the context of PBCs, the business judgment rule evaluates the balancing process and the weight PBC directors afford to each of the sometimes-competing objectives they must consider, but the rule will not critique the substance of the ultimate decision resulting from that balancing.

Delaware Code § 102(a)(3) requires every corporation to file a certificate of incorporation that contains a statement outlining the corporation's business purpose(s).[70] Most corporations prefer not to allow this requirement to limit them and simply declare that they are formed for "all lawful acts and activities."[71] However, judicial interpretation has decided that only one definition of "business purpose" actually complies with the duty of loyalty: "shareholder primacy."[72] Shareholder primacy is a longstanding principle of American courts, stating that the purpose of a company is to generate profit for shareholders.[73] Fiduciary directors have broad latitude to decide *how* they go about pursuing that purpose, but the means must always be attached to the corporate end of accruing benefits to shareholders. In other words, "any" valid business purpose actually means only those actions which can be connected to shareholder primacy. The directors may fly their corporate "kite" wherever they like, provided the line is always anchored at the other end to the hand of shareholder primacy.

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[69] *Id.*
[70] DEL. CODE ANN. tit. 8, § 102(a)(3) (2019) (requiring the certificate of incorporation to state "the nature of the business or purposes to be conducted or promoted. It shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware, and by such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations, if any.").
[71] KENT GREENFIELD, THE FAILURE OF CORPORATE LAW 80 (2006).
[72] *See* eBay, 16 A.3d at 34 (holding that Delaware fiduciary principles require directors "to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders"); Julian Velasco, *Fiduciary Principles in Corporate Law*, THE OXFORD HANDBOOK OF FIDUCIARY LAW 61, 64 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019) ("In Delaware, at least, . . . a corporate fiduciary's duties ultimately are owed to the shareholders alone."); *cf.* Tu, *supra* note 16, at 155 (arguing that corporate law "does not mandate the pursuit of shareholder profit" because other non-pecuniary motives can be indirectly pursued by linking them to long-term pecuniary effects).
[73] *See, e.g.*, Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919); eBay, 16 A.3d at 34 ("Having chosen a for-profit corporation form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form . . . [including] acting to promote the value of the corporation for the benefit of its stockholders.").

However, the PBC statute expands the scope of permissible director action by allowing directors to use another hand, the hand of public benefit, to hold the company kite. Prior to Delaware's adoption of its PBC statute in 2013, directors of Delaware corporations had no latitude to consider nonpecuniary motivations *unless* such motivations accrued pecuniary results to shareholders.[74] Traditional corporations are only permitted to pursue corporate missions that accrue benefit to shareholders; "balancing" of any other consideration is impermissible.[75] The PBC statute, for the first time, expanded the definition of "business purpose" to permit nonpecuniary considerations.[76] Section 362 requires that each PBC identify and commit to "one or more specific public benefits" in its § 102(a)(3) statement of purpose.[77] This mandatory expansion of the definition of business purpose is arguably a confirmation from the Delaware legislature that PBCs are not beholden to the shareholder primacy norm incumbent upon traditional

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[74] Critical to this prior limitation to shareholder primacy is Delaware's continuing lack of a "constituency statute," which other states have enacted to provide statutory permission for directors of traditional corporations to consider constituencies beyond shareholders in their decision-making both day-to-day and in change of control transactions. *See, e.g.*, Norfolk S. Corp. v. Conrail, Inc., No. Civ.A 96-7167, 1997 WL 33463657 (E.D. Pa. Jan. 9, 1997) (interpreting Pennsylvania's constituency statute to permit corporation to accept a lower buyout offer in order to protect employees); Nathan E. Standley, *Lessons Learned from the Capitulation of the Constituency Statute*, 4 ELON L. REV. 209, 223–24 (2012) (explaining that *Norfolk Southern* held that "directors are not required to treat the financial welfare of shareholders as the paramount concern." 1997 WL 33463657). However, some disagree whether even the presence of a constituency statute unseats the shareholder primacy norm. *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, 768 n.13, 786–94 (2009).

[75] *See* eBay, 16 A.3d, at 35 ("Directors of a for-profit Delaware corporation cannot deploy a [corporate policy] to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law."); Citigroup Inc., 2018 WL 6705657, at 2-4 n.14 (S.E.C. No - Action Letter Jan. 28, 2019) (PBCs "allow directors to balance the interests of stockholders against other identified constituencies [. . .], but these new provisions do not apply to [Citigroup], which is a traditional for-profit corporation.").

[76] Some commentators argue that Delaware's creation of the PBC form only further solidifies that stockholder primacy, even under the deferential business judgment rule, restricts a director's ability to consider non-stockholder constituencies. *See* Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 504 (2019) ("The creation of [the PBC form] reinforces the conventional view that Delaware fiduciary law simply does not permit traditional corporations to consider non-stockholder constituencies.") (internal quotes omitted); *see also id.* at 503, 504 n.29 ("As the Court of Chancery explained in 2017, 'Delaware case law is clear' that to act loyally, officers and directors 'must, within the limits of [their] legal discretion, treat stockholder welfare as the only end, considering other interests only to the extent that doing so is rationally related to stockholder welfare.' Or put another way: 'Non-stockholder constituencies and interests can be considered, but only instrumentally, . . . when giving consideration to them can be justified as benefiting the stockholders.') (quoting Frederick Hsu Living Tr. v. ODN Holding Corp., No. 12108, 2017 WL 1437308, at *17, n.14 (Del. Ch. Apr. 24, 2017).

[77] DEL. CODE ANN. tit. 8, § 362 (2013).

corporations.[78] This hypothesis is further supported by § 365(a), which expands the traditional corporation's consideration of stockholders to now allow directors to also consider both "the best interests of those materially affected by the corporation's conduct" and "the specific public benefit[s] identified in its certificate of incorporation."[79] Both of these considerations fall under the common heading of "nonpecuniary" considerations, as neither is intrinsically related to increasing shareholder value, but rather to other factors that may not be financial. Whatever corporate purpose a director chooses to pursue, the director must still act rationally, avoid committing waste, and fulfill the duties of care and loyalty.[80] The change for PBCs lies in the expansion of what qualifies as a valid "business purpose," which now extends beyond solely shareholder primacy to include both pecuniary and nonpecuniary motives, thus providing increased latitude to directors who organize as a PBC.

With this expansion of definition, the standard of review must also expand. The good news for corporate directors is that the deferential business judgment rule would still find the use of either motive to be "rational."[81] The Delaware judiciary is not likely to invent a new method of review, even if the legislature has changed the course of Delaware corporate law for PBCs; the courts will simply adapt the well-tested business judgment rule to accommodate the expanded definition of business purpose, which now

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[78] Outside Delaware, the MBCL agrees. *See* comment to MBCL § 301 (clarifying that, when applying the business judgment rule, the definition of "best interests of the corporation . . . include the creation of general public benefit and specific public benefit").

[79] DEL. CODE ANN. tit. 8, § 365 (2013). States have taken various approaches to whether public benefits must be "general" or "specific." Delaware opted for a less paternalistic (and arguably clearer) approach than the MBCL, as Delaware does not impose a broader "general public benefit" as a mandatory additional consideration, but rather leaves the confines and boundaries of the public benefit to be pursued to the sole discretion and control of the directors of each PBC to define their mission for themselves.

[80] *See* Calma v. Templeton, 114 A.3d 563, 590 (Del. Ch. 2015) ("[T]he doctrine of waste is a residual protection for stockholders that polices the outer boundaries of the broad field of discretion afforded directors by the business judgment rule. Under Delaware law, directors waste corporate assets when they approve a decision that cannot be attributed to 'any rational business purpose.' To state a claim for waste, it must be reasonably conceivable that the directors authorized an exchange that was so one sided that no businessperson of ordinary, sound judgment could conclude that the corporation has received adequate consideration, *i.e.*, the transfer of corporate assets was a 'gift.'") (citations omitted).

[81] *See* Glover et al., *supra* note 12 ("[T]here is no guidance as to how boards with dual responsibilities to shareholders and other constituencies should balance those sometimes-competing interests in practice. The good news is that the business judgment rule still applies, so courts should give deference to board decision-making in balancing these interests.").

includes the public benefit.[82] The language of § 365(b) (that director decisions will satisfy their director duties if "informed and disinterested and not such that no person of ordinary, sound judgment would approve") mirrors the language Delaware courts have used to describe the business judgment rule for traditional corporations, and confirms the intent of the Delaware legislature to extend the business judgment rule standard of review to PBCs. In other words, courts will continue to defer to the decisions made by informed and disinterested directors in the ordinary course of business, but now also even if such decisions are motivated solely by nonpecuniary goals.[83]

Some commentators are concerned that permitted consideration of additional constituencies paves the way for abuse or degrades the assuredness of a return on shareholders' investment.[84] Others even question whether a broadening of corporate purpose beyond shareholder primacy puts investment in a PBC off-limits for institutional investors as a potential violation of *their own* fiduciary duties.[85] Director action is not now *carte blanche*, however. Section 365(a) requires that directors always at least consider pecuniary factors. Beyond § 365(a), directors are also still bound

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[82] *See* ALEXANDER, *supra* note 10, at 110 (noting that "the general operation of the business judgment rule . . . will remain intact under the [Delaware] public benefit corporation statute," but that this is not the case under the MBCL); B Lab, *Shareholder Duties and Protections*, BENEFIT CORP (last visited Oct. 8, 2020), https://benefitcorp.net/shareholder-duties-and-protections ("In the absence of applicable case law, director decisions will be treated with similar deference to that afforded other business judgments under current law."). Even if Delaware courts are long used to applying the business judgment rule in the context of shareholder primacy, they certainly cannot refuse to change course on grounds that they might disagree with the policy decisions of the legislature. *See* Prices Corner Liquors, Inc. v. Delaware Alcoholic Beverage Control Comm'n, 705 A.2d 571, 575 (Del. 1998) ("[C]ourts are not super-legislatures. It is not a proper judicial function to decide or even to express an opinion on what is or is not wise legislative policy.").

[83] *See* Glover et al., *supra* note 12 ("[T]he PBC form can be viewed as expanding the scope of the board's discretion under the business judgment rule. . . . The PBC form protects the board by giving it more freedom to consider other stakeholders affected by its decision-making without exposure to claims that it breached its fiduciary duty to shareholders. As a PBC, but not as a regular corporation, the board can balance multiple interests by, for example, deciding against an action that would maximize profits but harm the public benefit described in its certificate of incorporation.").

[84] *See* J. William Callison, *Putting New Sheets on A Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 108 (2012) ("For example, if directors conclude that electric car promotion is a social good, Teslas can be acquired for all corporate executives. If directors think that polar bear preservation is good, the corporation can spend large fortunes to maintain ice in Greenland.").

[85] *See* Christopher Geczy, Jessica S. Jeffers, David K. Musto, Anne M. Tucker, *Institutional Investing When Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73 (2015) (finding that institutional investors' willingness to invest was not altered by constituency statutes that *permitted* ESG consideration, but voicing uncertainty whether institutional investors will respond in the same manner to PBC statutes that *require* ESG consideration).

by the traditional prohibition against corporate waste,[86] the practical limitation of their annual reelection by shareholders, as well as added public scrutiny stemming from their reporting burden (if adopted). These limitations ensure that directors cannot shirk their duties to shareholders and solely favor the general public. Shareholders still have a legal right of enforcement in § 367 and may maintain a derivative lawsuit to enforce either of the two "prongs".

B. *ESG Goals Will Especially Benefit by No Longer Requiring A Tenuous Link to Shareholder Primacy.*

Although Delaware law already permits directors of traditional corporations to consider nonpecuniary motivations in certain circumstances, the current legal regime is a less-than-ideal solution because it requires directors to make unnecessary and sometimes misleading explanations for their decisions. The PBC statute instead allows ESG goals to be pursued openly, but in doing so retains reasonable checks to prevent director misappropriation.

Directors of a traditional corporation are already permitted to consider stakeholders other than stockholders, provided they ultimately link each decision they make based on nonpecuniary motivations to having some potential benefit accruing to stockholders[87] Delaware courts have evidenced this view by upholding decisions that provide such a link (*e.g.*, a "long-term" benefit accruing to shareholders far in the future[88]), and rejecting decisions that have openly considered nonpecuniary motivations *without* such a link.[89]

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[86] Calma v. Templeton, 114 A.3d 563, 590 (Del. Ch. 2015) (defining corporate waste as those transactions either not attributable to "any rational business purpose" or so one-sided that no business person of ordinary, sound judgment could find that the corporation received adequate consideration in return).

[87] 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*.") (emphasis added); *see also* Jonathan Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 179 (2008) (explaining that boards may take action that may not *seem* to directly maximize profits under *Revlon* and *Dodge*, provided there is some plausible connection to a rational business purpose that ultimately benefits shareholders in some way and any benefit to other constituencies is not at the shareholders' expense).

[88] *See* Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968); Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989).

[89] *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 37, 46 (Del. Ch. 2010); *accord* Honorable Leo E. Strine, Jr., *The Dangers of Denial: The Need for A Clear-Eyed*

Even linkages based upon rather tenuous pretenses have been accepted.[90] Indeed, Delaware courts have never imposed liability where a link to shareholder primacy has been claimed.[91] Given that courts have accepted even attenuated links, where directors have been able to "get away with" securing benefits for non-shareholders that arguably far outweigh the accompanying benefits to shareholders, some argue that this practice calls into question the norm of shareholder primacy, or even obviates the need for PBCs altogether.[92]

However, even if such tenuous links permit traditional corporations to indirectly consider stakeholders, limiting stakeholders to second-place consideration[93] in turn limits a corporation's ability to help them. The current solution is unfavorable for traditional corporations because they must declare shareholder primacy as their motivation for decisions to comply with current Delaware law, even if their true motivations are completely unrelated to shareholder primacy. Section 365(a) allows PBCs to shed this pretense, offering a more realistic picture of what is actually going on, and improves the potential for quality resulting benefits. Directors should welcome the

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Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law, 50 WAKE FOREST L. REV. 761, 776–77 (2015) ("Dodge v. Ford and eBay are hornbook law because they make clear that if a fiduciary admits that [a director] 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.") (emphasis added) (citing Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919)).

[90] *See* Kahn v. Sullivan, 594 A.2d 48, 51–63, 61 n.26 (Del. 1991) (upholding decision of lower court where "reasonable minds could differ" that oil company's decision to spend $50 million to house chairman of the board's extensive personal art collection was not "designed primarily to enhance [his] personal reputation," but rather that the company would economically benefit from the good will of the charitable donation and the ability to promote its oil business at the art museum).

[91] *See* Dulac, *supra* note 36, at 185, 185 n.87 (arguing that the fact that "a Delaware court has never held a director liable for failure to maximize shareholder wealth" casts doubt on whether shareholder primacy is actually required and dismissing *Revlon* as an inapplicable exception limited to the auction context).

[92] *See id.* at 186 (arguing that because deference under the business judgment rule is so broad, "the shareholder primacy norm--that directors must maximize shareholder value--may not truly restrain corporate directors' day-to-day decisions."); Tu, *supra* note 72, at 155 (arguing that corporate law "does not mandate the pursuit of shareholder profit" because other non-pecuniary motives can be indirectly pursued by linking them to long-term pecuniary effects).

[93] *See, e.g.*, Allen v. El Paso Pipeline GP Co., L.L.C., 113 A.3d 167, 180 (Del. Ch. 2014) ("[S]tockholders best interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end.") (quoting Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 147 (2012)); *id.* ("[D]irectors may promote the interests of other . . . constituencies for the ultimate benefit of the entity's [shareholders]."); Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("The Revlon board argued that it acted in good faith in protecting the noteholders because *Unocal* permits consideration of other corporate constituencies. Although such considerations may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.").

advent of the PBC because they can now avoid staging false (or at least tenuous) pretenses for their decision-making. They no longer need to fear reprimand for ESG-motivated decisions because such a motivation is permitted to them from the outset by statute.[94] For example, Patagonia (a California benefit corporation) donated 100% of its 2016 Black Friday profits to charity and had no fear of blowback from shareholders because its articles of incorporation state that one of its business purposes is to donate at least 1% of its annual profits to charity.[95]

Thus, the business judgment rule will still apply to provide PBC directors with the same level of legal deference they enjoyed as directors of traditional corporations. The expanded definition of corporate purpose, however, gives PBC directors a broader spectrum of protected action than what is available to directors of traditional corporations. This is a major and yet-untapped incentive for traditional corporations with genuine public benefit objectives to switch to a PBC structure.

IV. Directors Are Permitted More Latitude For Decisions In Change of Control Transactions If Their Entity Is Structured as a Public Benefit Corporation Rather Than a Traditional Corporation, Especially When Motivated by ESG Goals.

This increase in decision-making latitude (discussed in section III, *supra*) not only benefits directors in the ordinary course of business, but also in change of control transactions. When a traditional corporation experiences a change of control (commonly as a sale of the company), Delaware's established case law engages to protect the shareholders by ensuring they receive the maximum price for their shares that are being sold. The PBC statute expands the types of decisions directors may make in such situations, allowing them to consider factors beyond share price.

A. *The Existing Revlon Rule*

For traditional corporations, Delaware courts apply the shareholder primacy restriction not only to director decision-making in the ordinary

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[94] *Accord* ALEXANDER, *supra* note 10, at 38 (arguing that the breadth of the business judgment rule is not sufficient on its own to eviscerate the value of PBC legislation because "there may be stakeholder benefits that cannot be linked to shareholder value, no matter how long term. Nor should directors be forced to lie, whether in their deliberations or in legal proceedings, even if they can 'get away with it.'").

[95] Rose Marcario, *Record-breaking Black Friday Sales to Benefit the Planet*, PATAGONIA, https://www.patagonia.com/stories/ record-breaking-black-friday-sales-to-benefit-the-planet/story-31140.html (last visited Oct. 8, 2020).

course of business, but also during change of control transactions.[96] The "*Revlon* duty" states that, once a change of control is imminent, the directors' sole duty is to obtain the best sale price for the benefit of the shareholders.[97] Directors may consider other constituencies or value factors, but only to the extent such factors reasonably relate to shareholder interests.[98] Prior to the availability of the PBC form, traditional corporations up for sale were defenseless against any takeover offer that promised shareholders the largest financial return, even if the offer disregarded the corporation's nonpecuniary priorities. For example, financial realities forced AND 1[99] to sell in 2005, after which its carefully-crafted commitments to employees, the environment, and the local community were "stripped from the company within six weeks of the sale" by the winning bidder, American Sporting Goods.[100] To address this phenomenon, some states enacted "constituency statutes" that permitted directors to consider non-shareholder constituencies without restriction; however, these statutes have not provided the protection needed.[101] For example, even in a state with such a statute in place, the directors of ice cream icon Ben & Jerry's felt they had "no choice but to sell to the highest bidder or get sued," despite their preference to keep the corporation independently-owned.[102] Thus, while the *Revlon* shareholder

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[96] Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 44 (Del. 1994) ("In the sale of control context, the directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders—and they must exercise their fiduciary duties to further that end.") (citing *Revlon*, 506 A.2d at 182); *see also supra* Section III.A.

[97] Revlon, 506 A.2d at 182 (charging directors with the duty to "maximiz[e] the company's value at a sale for the stockholders' benefit. . . . [as] auctioneers charged with getting the best price for the stockholders at a sale of the company.").

[98] Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1282 n.29 (Del. 1989) (permitting directors evaluating an offer 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* . . . and the bidder's business plans for the corporation and their effects on stockholder interests") (emphasis added).

[99] Milicic v. Basketball Mktg. Co., 2004 PA Super 333, ¶ 2, 857 A.2d 689, 691 (2004) (identifying AND 1 as a Delaware corporation).

[100] *See* U. Pa. Wharton Sch. Bus., *B Lab's Bart Houlahan: Building More Socially Responsible Corporations*, KNOWLEDGE@ WHARTON (Nov. 7, 2012), https://knowledge.wharton.upenn.edu/article/b-labs-bart-houlahan-building-more-socially-responsible-corporations (in which AND 1's founder recounts his feeling that shareholder primacy left him no choice but to sell to the highest bidder).

[101] If a director still feels beholden to the shareholder primacy norm, even in a state with a permissive constituency statute, the director effectively cannot benefit from the permissive protection the statute is intended to provide. *See* ALEXANDER, *supra* note 10, at 135–48 (quoting J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 504 (2013)) ("Constituency statutes . . . do not seem to have been very effective in combating the shareholder wealth maximization norm. . . . While constituency statutes undoubtedly provide some protection for directors seeking to further the social or environmental mission of the corporation, the constituency statutes do not seem to motivate the average director to move beyond the shareholder wealth maximization norm.").

[102] *See* Dulac, *supra* note 6, at 185–86.

primacy duty functions to protect the financial interests of shareholders, it also works to the detriment of the founders of corporations with nonpecuniary priorities.

B. *The Widened Standards of The Business Judgment Rule Extend to PBC Change of Control Transactions.*

PBC statutes arguably remedy the failure of their constituency statute predecessors to provide corporations like Ben & Jerry's with protection for considering nonpecuniary objectives in change of control transactions. While the decisions of traditional corporate directors are subject to different standards of review during the ordinary course of business (the business judgment rule) and changes of control (the *Revlon* duty), at least three theories imply that this is not the case for PBC directors, whose decisions will be subject to the same standard of review (the PBC-widened business judgment rule) in both situations, and thus have more latitude than their traditional corporate counterparts.[103]

First, Delaware's PBC statute mandates that directors must consider both pecuniary and nonpecuniary factors in *all* decisions, which would include decisions in change of control transactions.[104] While the familiar *Revlon* rule would limit a traditional corporate director's business judgment to merely selecting the offer from the highest bidder, a PBC director is permitted and *required* by statute to consider nonpecuniary factors alongside (or even prioritized ahead of) pecuniary factors, and courts must thus enforce this policy choice by the legislature.[105]

Second, this statutory mandate is supported by the PBC form's intrinsic acknowledgement of a broader corporate purpose, as evidenced in the

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[103] *See* Murray, *supra* note 12, at 367 ("While unhappy shareholders may still sue directors of PBCs if directors take a lower financial bid, PBC directors will likely have significantly more protection [in change of control transactions] than directors of a traditional for-profit Delaware corporation.") (quoting a telephone interview with Samuel Nolen, a member of the drafting committee of Delaware's PBC statute); *cf.* Sean W. Brownridge, *Canning Plum Organics: The Avant-Garde Campbell Soup Company Acquisition and Delaware Public Benefit Corporations Wandering Revlon-Land*, 39 DEL. J. CORP. L. 703, 740 (2015) ("As it currently stands, the statute provides directors with an excess amount of discretion once the company ventures into Revlon-land, and it does so to the detriment of directors, shareholders, non-financial stakeholders, and the judiciary alike.").

[104] *See* DEL. CODE ANN. tit. 8, § 365(a) (2013).

[105] *See* reasoning *supra* Section III.A, regarding the expanded applicability of the business judgment rule generally; *see also* Glover et al., *supra* note 12 ("This flexibility could be particularly important if a PBC board decides to sell the company. Under the *Revlon* standard, the board of a standard Delaware corporation cannot consider social impact when choosing a buyer, but instead must focus solely on maximizing shareholder value. In contrast, the board of a PBC should be able to consider not only price but also other factors consistent with its purpose when deciding to sell.").

articles of incorporation of each PBC. Delaware considers a corporation's articles of incorporation to be a contract between the corporation's stockholders and directors (community stakeholders are *not* included).[106] Within its articles of incorporation, each PBC must describe its corporate purpose.[107] Just like investors in a traditional corporation, investors in a PBC thus implicitly consent to the corporate purpose stated in the articles upon making their initial investment. Because a PBC's corporate purpose must include at least one specified public benefit, the PBC's investors have thus "opted-in to a corporate framework that is not beholden to the wealth maximization norm."[108] This means that shareholders of a PBC have received notice, even from the outset, that in a change of control transaction, directors are permitted to prioritize nonpecuniary factors. This declaration of the corporation's intended plan in a PBC's articles dovetails with existing Delaware case law regarding corporate plans. In *Paramount v. Time*, the court held that corporate directors facing a change of control transaction may not be forced by shareholders to "abandon a deliberately conceived corporate plan" in order to instead obtain "a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy."[109] In that case, the court upheld a decision by Time's directors to restructure a planned merger transaction with Warner in order to protect it from a competing unsolicited tender offer by Paramount.[110] The Time directors thought that a merger with Warner, which would preserve the journalistic integrity of Time's magazine, was more favorable to shareholders in the long-term than the tender offer from Paramount that would provide a higher return in the short-term.[111] The requirement that a PBC's charter state the specific public benefit it endeavors to champion provides investors with advance notice of the "deliberately conceived" corporate plan its directors intend to follow both during ongoing operation of the PBC as well as during a change of control transaction.

Third, even if a court chose to apply the *Revlon* duty[112] unchanged as applied to PBCs, a PBC's directors could convincingly argue that the definition of a PBC company's value is broadened to include more than solely stock price.[113] For traditional corporations, "value" is solely

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[106] *See* Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010) ("Corporate charters and bylaws are contracts among a corporation's shareholders."); *accord* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 939 (Del. Ch. 2013) (citing *Airgas*, 8 A.3d at 1188 (Del. 2010)) ("the bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and stockholders formed within the statutory framework of the DGCL.").
[107] *See* DEL. CODE ANN. tit. 8, § 362(a)(1) (2013).
[108] *See* Brownridge, *supra* note 104, at 726.
[109] Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1154 (Del. 1989).
[110] *Id.* at 1143–49.
[111] *Id.*
[112] *See* Section IV.A, *supra*.
[113] *Accord* Dulac, *supra* note 36, at 193.

pecuniary.[114] In the context of PBCs, however, Delaware's PBC statute has intentionally and fundamentally altered the definition of what constitutes the "value" of the corporation for the benefit of its stockholders: a PBC's value lies both in pecuniary valuation as well as its effectiveness at fulfilling its public benefit purpose(s). Because the "value" that the *Revlon* rule seeks to maximize is no longer limited to only pecuniary interest, the court may no longer limit director actions in pursuit of value solely to those with pecuniary ends. *Revlon*'s requirement that any consideration of non-stockholder constituencies must also produce "rationally related benefits accruing to stockholders"[115] is thus fulfilled: director decisions that increase value in the PBC's pursuit of its stated public benefit purpose *is* a benefit accruing to PBC stockholders, and should thus receive the deference of the business judgment rule.[116]

Thus, the benefits of the PBC form include the permitted consideration of both pecuniary and nonpecuniary motives during both change of control transactions and in the ordinary course of business. If a PBC director makes a decision that is motivated by nonpecuniary considerations during a change of control transaction, Delaware courts will likely uphold the director's decision, allowing corporations like AND 1 and Ben & Jerry's to defend against a takeover attempt hostile to their existing corporate culture.[117] While no PBC has yet to engage in a change of control transaction that has produced

[114] *See* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 44–46 (Del. 1994) (equating "best value" of a change of control transaction with "highest possible price for shareholders." Although directors are "not limited to considering only the amount of cash involved, . . . the board should try to quantify" the value of any non-cash consideration, ultimately turning the comparison of offers into an evaluation of which offer would result in the highest pecuniary benefit to stockholders.); *accord* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34–35 (Del. Ch. 2010) (equating value with stockholder wealth maximization. "Directors of a for-profit Delaware corporation cannot deploy a [corporate policy] . . . to defend a business strategy that openly eschews stockholder wealth maximization . . . . Having chosen a for-profit corporation form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form . . . [including] acting to promote *the value of the corporation for the benefit of its stockholders*.") (emphasis added).

[115] 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*.") (emphasis added).

[116] *See* Dulac, *supra* note 35, at 191 ("Conceivably, as long as [directors of a Delaware] public benefit corporation act[] reasonably and in pursuit of the long-term corporate strategy, [they] can consider the interests of the constituents when defending a takeover or change of control scenario.").

[117] Unfortunately, the PBC form was unavailable to both AND 1 and Ben & Jerry's, as Delaware only adopted the form in 2013, after each company experienced its changes of control.

a court opinion,[118] directors of a traditional corporation should not allow this concern alone to prevent them from converting to a PBC, but should instead view this legislative leeway as an affirmative vote that they may convert with confidence.

C. *Publicly Traded PBCs Will Benefit the Most From This Added Permission.*

The expanded business judgment rule standard of review applicable to PBCs provides directors legislative permission to consider nonpecuniary motivations in a PBC's ordinary course of business and in change of control transactions.[119] While this expanded standard of review applies to both private and publicly traded PBCs, it will prove most valuable to publicly traded PBCs, and will become even more valuable as the size of the company increases.

Corporate shares generally represent ownership and voting rights. When all corporate shares are held by a single individual or a small, united group (as is the case of most small PBCs), dissent in corporate management from the majority opinion is unlikely, if not impossible. Many traditional corporations with strongly held nonpecuniary motivations of their founders choose to remain privately held to avoid the possibility that dissenters might attempt to modify the way the business is run.[120] These corporations enjoy protection from the threat of alternative views because they can select who is permitted to join their "family" and be a shareholder, thus ensuring that all shareholders are aligned with existing corporate policies. However, safety is not inherent to privately held corporations; even a single share transferred outside the family can expose the corporation to increased liability of dissent because that owner is free to sell that share to someone with interests opposed to the corporate policy.[121]

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[118] *See* Daniel Fisher, *Delaware's Public Benefit Corporation Lets Directors Serve Three Masters Instead of One*, FORBES (July 16, 2013, 2:06 PM), https://www.forbes.com/sites/danielfisher/2013/07/16/delaware-public-benefit-corporation-lets-directors-serve-three-masters-instead-of-one (quoting the MBCL's drafter, Bill Clark, that "[w]e haven't had a hostile run at a benefit corporation yet").

[119] *See* Sections III and IV.B, *supra*.

[120] *See, e.g.*, Kate Taylor, *Why Chick-fil-A Will Never Go Public,* BUSINESS INSIDER (Jan. 28, 2016), https://www.businessinsider.com/chick-fil-a-will-never-go-public-2016-1 (explaining that the founder of Chick-fil-a forbid the company from ever going public in order to protect its unique corporate culture and business strategies).

[121] *See* David A. Wishnick, Comment, *Corporate Purposes in A Free Enterprise System: A Comment on* Ebay v. Newmark, 121 YALE L.J. 2405, 2406 (2012) (explaining that Craigslist's founder transferred a minority stake to an employee for purpose of establishing "checks and balances" on himself, and that employee later left the company and sold his stake to the company's major competitor, which led to the *eBay Domestic Holdings, Inc. v. Newmark* case).

This loss of control increases with the proportion of shares transferred outside the "family". When a traditional corporation makes an offering of public securities, it receives in return both the "pro" of increased access to capital and the "con" of a widened base of (opinionated) shareholders. Shareholders can threaten corporate management by initiating litigation against (or on behalf of) the corporation, or by electing different directors to the board to influence corporate operations, provided they can muster the requisite votes. Taken to the extreme, a corporation that is traded publicly relinquishes some or all of its stock to be owned by "non-family" members, which increases the likelihood that someone will challenge the corporate policies.[122]

Directors wishing to insulate their corporation's nonpecuniary priorities from the potentially adverse opinions of a wider base of shareholders can utilize the PBC form's expanded standard of review as an important aid. While privately held PBCs also reap these benefits, the PBC form's ability to insulate director decision-making from dissenting shareholders is less potent when used by privately held PBCs than when used by their larger counterparts because a privately held PBC's ownership may already be aggregated within a small unified group or even a single shareholder.[123] The value of the PBC's ability to protect nonpecuniary-motivated decisions from dissenting shareholders will scale with the size of the company, meaning that large, publicly traded PBCs with a disaggregated ownership of shares stand to reap the benefits of the PBC form to a greater extent than their privately held counterparts.

Thus, even if a PBC willingly emerges from the protective insulation of self-selected private ownership, the PBC entity form continues to protect the corporation's nonpecuniary motives. Awareness of this protection will be a critical impetus for causing more traditional corporations to convert into PBCs in the future.

V. CONCLUSION

The public benefit corporation entity form provides new and untapped freedom to directors who wish to prioritize environmental, social, and governance goals in their corporate decision-making. Based on an

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[122] *See* CORNERSTONE RESEARCH, *supra* note 51 (stating that the vast majority of large corporate M&A transactions are litigated by shareholders).
[123] *See* Murray, *supra* note 12, at 366 n.117 ("This current lack of litigation is likely due to . . . the [PBC] entities being mostly closely-held.").

interpretation of the plain language of the Delaware public benefit corporation statute, as well as existing case law applicable to traditional corporations, Delaware courts will acknowledge this expanded latitude for decisions made both in the ordinary course of business, as well as related to change of control transactions. Contrary to early doubts that the PBC form and its increased decision-making latitude might present increased legal risks, the PBC is not likely to present legal risks materially different than its C corporation counterpart. What were previously perceived as legal uncertainties of the PBC form should instead be viewed as legal benefits, which will be enjoyed to a unique extent by publicly traded PBCs. Traditionally structured corporations that have some aspect of social benefit beyond the sole-bottom-line of profit maximization should view the PBC form as an avenue for additional value, not additional uncertainty.