



3.4 DELAWARE PUBLIC BENEFIT CORPORATION

ADVANTAGES

- ✓ Enjoys advantages applicable to Delaware corporations generally
- ✓ Protects boards of directors and management of corporations pursuing one or more enumerated publicly beneficial purposes
- ✓ Provides boards of directors and management ability to adjust weighting of social and profit maximization focus to account for changing circumstances
- ✓ Mandatory reporting requirements will provide some measure of accountability and certainty for mission to investors and strategic partners
- ✓ Highlights and brands an organization as having a publicly beneficial purpose in addition to the maximization of profits
- ✓ Provides shareholders with say in determining mission of entity
- ✓ May provide access to information to third parties, consumers, strategic partners, investors and others whose interests are aligned with the corporation's charitable or public purposes
- ✓ Substantially similar to the Social Purpose Corporation in California

DISADVANTAGES

- ☒ The same disadvantages applicable to corporations generally also apply to PBCs
- ☒ Must comply with potentially time-consuming and costly additional annual reporting requirements related to public benefit or benefits
- ☒ New form of corporation; potential impact on capital raising is unclear
- ☒ May be difficult for a corporation with numerous shareholders to transition to/from status as PBC because of approval requirements and dissenters' rights
- ☒ PBCs acting as an acquirer of a non-PBC in a merger or acquisition must obtain two-thirds approval of the outstanding stock of the corporation entitled to vote thereon
- ☒ PBCs acting as a target company in a merger or acquisition with a non-PBC acquirer must obtain the approval of two-thirds of the outstanding stock of the corporation entitled to vote thereon
- ☒ Effect of PBC status is unclear on valuation in public markets and reporting requirements of a PBC are not entirely reconciled with those required by the U.S. Securities and Exchange Commission for a public reporting company
- ☒ PBC is confused with the "Benefit Corporations" in other states despite significant differences
- ☒ A "public benefit corporation" in other states (like California) is a type of non profit corporate entity leading to further confusion

CASE STUDIES

Lemonade

Lemonade, Public Benefit Corporation, is a Delaware Public Benefit Corporation and provider of property and casualty insurance in the United States. Lemonade employs technology and behavioral economics to streamline the entire insurance process without the need for insurance brokers. Using an atypical business model for insurance companies, Lemonade keeps a flat 25% fee of a customer's premium while setting aside the remaining 75% to pay claims and purchase reinsurance. Unclaimed premiums are donated to a non-profit of customer's choosing. For more information, please visit <http://www.lemonade.com>.

New Leaf Paper, Inc.

New Leaf Paper, Public Benefit Corporation is a Delaware public benefit corporation whose mission is to be the leading national source for environmentally responsible, economically sound paper. The company has developed a unique approach to business, embedding its social and environmental values into every product line and every business relationship. New Leaf Paper develops and distributes environmentally superior printing and office papers that compete aesthetically and economically with leading virgin-fiber products. New Leaf Paper's goal is to inspire a fundamental shift toward environmental responsibility in the paper industry. New Leaf Paper is a founding public benefit corporation, converting from a traditional corporation in 2013. For more information, please visit <http://www.newleafpaper.com/>.

a) Overview

In August 2013, Delaware adopted a new form of for-profit corporation, the public benefit corporation, or PBC.¹⁰² The new legislation explicitly permits corporations to be formed in Delaware as a PBC or to convert from a corporation or other entity into a PBC in order to pursue one or more specifically enumerated social or charitable goals, a "public benefit," alongside other purposes of the corporation. Directors of a PBC are required to manage the business of the corporation in a manner that balances the specific public benefit(s) named in the corporation's charter on the one hand, and the pecuniary interests of the corporation's stockholders and those affected by the corporation's conduct on the other. Unlike the benefit corporation legislation passed in many other states, a Delaware PBC retains significant autonomy in deciding what public benefit(s) the corporation aims to further and how the pursuit of such benefit(s) will be prioritized relative to other corporate purposes. As a result, the legislation provides a flexible framework and liability protection against claims of breach of fiduciary duty for directors of a PBC when making such weighting decisions.

b) Organizational Structure

PBCs are governed by substantially the same rules regarding corporations as are applicable to other Delaware corporations.¹⁰³ See Section 2.3 for more information.

c) Establishment Costs and Documentation

See Section 2.3 above for more information on the requirements for establishing a corporation in Delaware. In addition to the requirements applicable to establishing all Delaware corporations, to be a

¹⁰² See 8 Del. C. §§ 361-368. The legislation became effective August 1, 2013.

¹⁰³ See 8 Del. C. § 368.

PBC, a corporation must also comply with requirements specific to PBCs:

Certificate of Incorporation

The Certificate of Incorporation of a PBC must identify one or more specific public benefits to be promoted by the corporation and state within its heading that it is a PBC.¹⁰⁴

A public benefit is defined as “a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than 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.”¹⁰⁵

Changes to the Public Benefit

As noted above, a PBC’s public benefit(s) must be clearly identified in its Certificate of Incorporation. The public benefit(s) established in the Certificate of Incorporation may only be amended or eliminated by a vote of at least two-thirds of the outstanding stock entitled to vote thereon.

Change of Corporate Form to or from a PBC

New entities may incorporate using the PBC form and existing for-profit corporations may also convert into PBCs. However, any decision by a pre-existing business entity to become a PBC, by either amending its Certificate of Incorporation or through a merger or other business consolidation, requires the approval of at least two-thirds of the outstanding stock of the corporation entitled to vote thereon.

The conversion of a PBC into another corporate entity requires the approval of at least two-thirds of the outstanding stock of the PBC entitled to vote thereon. PBCs may merge with other PBCs or with other entities governed by laws that permit such mergers, and the PBC may either survive or terminate in such mergers. However, any merger or reorganization materially altering or eliminating an existing PBC’s public benefit(s) requires the approval of the holders of at least two-thirds of the outstanding stock entitled to vote thereon.

In addition, dissenting stockholders of a corporation converting into a PBC may retain appraisal rights in the event that the required vote is obtained approving an amendment to the Certificate of Incorporation or certain business combinations resulting in PBC status and the stockholder did not vote in favor of the amendment or transaction. However, with respect to stockholders of a non-PBC converting into a PBC, rights will not be available for holders of shares listed on a national securities exchange or held of record by more than 2,000 holders (with certain limited exceptions).

d) Liabilities

In addition to the existing rights of a corporation’s directors and officers to exercise their business judgment as provided under Delaware law, PBC directors and officers retain the discretion to make decisions that specifically offset maximization of profit with the public benefit(s) set forth in the corporation’s Certificate of Incorporation when, in their business judgment, such a decision is necessary and appropriate. The Delaware PBC statute provides great flexibility in making such weighting decisions due to its silence on

^{104.} See 8 Del. C. § 362.

^{105.} See 8 Del. C. § 362(b).

how balancing pecuniary interests to the stockholders, the interests of those materially affected by the corporation's conduct and the specific public benefit(s) should be achieved. As a result, the directors and officers of a PBC are free to exercise their discretion within reasonable bounds and subject to oversight by the corporation's stockholders.

Third parties do not have enforcement rights to bring a cause of action against a Delaware PBC for failing to adhere to the pursuit of its public benefit(s). However, a PBC remains policed by its stockholders – stockholders may elect and remove directors and sue under a claim for breach of fiduciary duties under Delaware law. Moreover, stockholders owning at least 2% of a PBC's shares may bring a derivative suit on behalf of the corporation.¹⁰⁶ Derivative suits in Delaware present a higher degree of certainty than comparable mission-preserving enforcement mechanisms in other states – unlike the new, statutorily created “benefit proceedings” that exist in many benefit corporation jurisdictions, derivative suits in Delaware fall within the framework of the state's well developed body of corporate case law.

e) Governance and Regulatory Obligations

After a corporation has been properly formed, there are certain ongoing requirements with which it must abide in order to comport with corporate formalities and maintain good corporate status. PBCs are governed by the same rules regarding corporate structure as are applicable to other Delaware corporations. See Section 2.3 for more information on corporate governance and regulatory obligations.

In addition, certain other governance and regulatory requirements (summarized below) are also required of PBCs:

Reporting

In addition to the governance and regulatory obligations applicable to all Delaware corporations, PBCs have certain additional requirements. No less than every two years, a PBC must provide its stockholders with a report on the corporation's pursuit of its public benefit(s). The report must include (i) the objectives set forth by the corporation's board of directors to promote the public benefit(s); (ii) the standards adopted by the board of directors to measure progress in promotion of the public benefit(s); (iii) objective, factual information based on those standards regarding the success of the corporation in meeting its public benefit objectives; and (iv) an assessment of the corporation's success in meeting its objectives and promoting its enumerated public benefit(s).¹⁰⁷

There is no requirement that a PBC must publicly publish its report. However, a PBC may elect to include a provision in its Certificate of Incorporation or Bylaws that such reports must be made publicly available.¹⁰⁸

In addition, a PBC may also elect to include provisions in its Certificate of Incorporation or Bylaws to (i) provide its report more often than every two years or (ii) rely on a third party standard or certification in its report and assessment of its pursuit of its public benefit(s). However, absent such a provision, a PBC is not required to issue its reports more than once every two years or utilize any third-party standards.

^{106.} See 8 Del. C. § 367.

^{107.} See 8 Del. C. § 366(b)(1)-(4).

^{108.} See 8 Del. C. § 366(c)(2).

f) Tax Treatment

See Section 2.3 for more information on the tax treatment of corporations, including PBCs.

g) Financing

As further described in Section 2.3, one major benefit to the corporate form, including the PBC, is that it offers a wide variety of options for financing and raising funds for the business. As the legislation establishing PBCs only became effective on August 1, 2013, it is not clear what, if any, impact the adoption of the PBC form will have on financing and fundraising. However, it may provide access to investors whose interests are aligned with a PBC's public benefit(s).

h) Resources

For additional information, visit:

<http://delcode.delaware.gov/title8/c001/sc15/>.

<https://www.stout.com/en/insights/article/examination-delaware-public-benefit-corporation-legislation/>.

<http://www.theconglomerate.org/2013/10/delaware-public-benefit-corporations-specific-public-benefit-purposes.html>.