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**Is Becoming a Public
Benefit Corporation
Right for Your
Company?**

June 28, 2022

MCLE Information

- Most participants should anticipate receiving their certificate of attendance in 4-6 weeks following the webcast
- All questions regarding MCLE Information should be directed to CLE@gibsondunn.com

Today's Presenters



Stephen Glover is a partner in Gibson Dunn's Washington, D.C. office and has served as Co-Chair of the firm's Mergers and Acquisitions Practice Group. Mr. Glover has an extensive practice representing public and private companies in complex mergers and acquisitions, strategic alliances and joint ventures, as well as other corporate matters. Mr. Glover's clients include large public corporations, emerging growth companies and middle market companies in a wide range of industries. He also advises private equity firms, individual investors and others.



Julia Lapitskaya is a partner in Gibson Dunn's New York office and a member of the firm's Securities Regulation and Corporate Governance, Capital Markets, Environmental, Social and Governance (ESG), and Executive Compensation practice groups. Ms. Lapitskaya advises clients, including public companies and their executives and boards of directors, on a wide range of securities and corporate governance disclosure matters, with a focus on SEC, NYSE/Nasdaq and Securities Exchange Act of 1934 compliance and reporting requirements, corporate governance best practices, annual meeting and proxy matters, shareholder activism matters, board and committee matters, ESG and sustainability disclosures and executive compensation disclosure issues, including as part of initial public offerings and spin-off transactions.



Harrison A. Korn is an associate in Gibson Dunn's Washington, D.C. office, where he is a member of the firm's corporate department. His practice focuses on public and private mergers and acquisitions, the formation and operation of private equity and hedge funds, and capital markets and other corporate transactions, as well as general corporate matters, including securities law compliance and corporate governance.



Melissa DiVincenzo is a partner at the Wilmington, Delaware law firm Morris Nichols. Ms. DiVincenzo provides advice on corporate governance matters and private and public corporate transactions, including initial public offerings, mergers, asset sales, domestications, dissolutions and financing transactions. She has a specialized knowledge of Delaware law when structuring transactions and confronting complex or novel corporate issues.

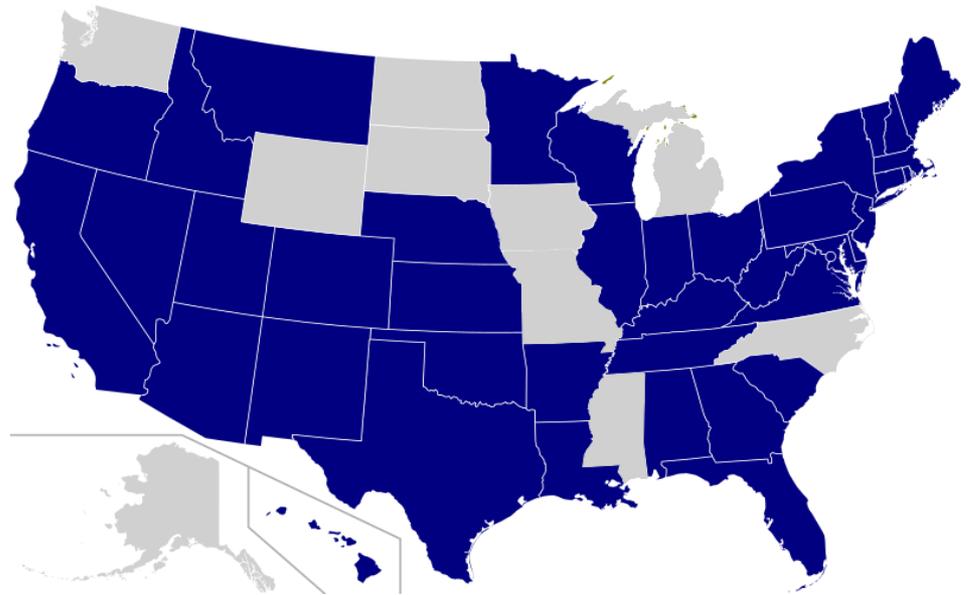
Topics to be Covered

- Overview of PBCs: Purpose, Board Decision Making, Enforcement and Reporting
- PBCs in the M&A and Activism Context
- PBCs vs B Corp Certification
- Risks & Benefits of the PBC Form
- History of PBCs and Formation Trends
- Shareholder Proposals Regarding PBC Conversions
- Process to Convert to a PBC

Overview of PBCs: Purpose, Board Decision Making, Enforcement and Reporting

Overview of PBCs: What is a PBC?

- A type of for-profit corporate entity currently authorized by 40 states and the District of Columbia
- Modifies directors' fiduciary duties to empower consideration of additional stakeholders alongside shareholders
- Two main approaches: Delaware approach and B Lab Model approach. Will generally discuss Delaware but will highlight key differences
- Some states also provide for Public Benefit LLCs and Public Benefit Limited Partnerships



Overview of PBCs: Public Benefit Purpose

In addition to operating in a responsible manner that creates a positive effect on society, Delaware requires (and B Lab Model permits) a PBC to include in its charter one or more specific public benefits as its statement of purpose.

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

- DGCL 362(b)

Overview of PBCs: Board Decision Making

PBC director's duties

- The board of a Delaware PBC is required to engage in a tripartite balancing of the following: (1) stockholders' pecuniary interests, (2) the interests of those materially affected by company's conduct, and (3) the company's public benefit purpose
- Up to the board to determine the relative weight to place on shareholders' and other stakeholders' interests, but unlike constituency statutes, which permit consideration of other constituencies, PBC statutes mandate those considerations
- PBCs are intended to produce public benefits and operate in a "responsible and sustainable manner" by engaging in the balancing described above
- PBCs otherwise remain for-profit stock corporations; other provisions of the general corporate statute still apply, except where the statute or case law provides PBC-specific rules

Compare to traditional governance requirements

- The purpose of the board's fiduciary duties currently is to act in the best interest of the corporation and its stockholders
- The board can consider other constituencies, but not as ends in themselves and such consideration must ultimately relate to advancing the interests of the stockholders

Overview of PBCs: Enforcement

- Balancing decision generally protected by business judgment rule
 - Only stockholders can enforce PBC balancing obligations, subject to certain ownership thresholds:
 - In Delaware, threshold is the lesser of 2% of the corporation's outstanding shares or shares with a market value of at least \$2,000,000
 - Some jurisdictions (but not Delaware) provide that if the PBC is a wholly owned subsidiary of a conventional corporation, shareholders owning 5% or more of the parent can bring a double derivative suit for failure of the subsidiary to comply with PBC duties
 - Thresholds would not apply to other types of lawsuits
 - There are not yet any Delaware cases examining a PBC board's exercise of its balancing obligations
- B Lab Model (but not Delaware) requires (for at least some companies) a designated benefit director with special oversight duties related to the corporation's compliance with its PBC purpose and duties

Overview of PBCs: Reporting

A PBC must provide a public benefit report to stockholders addressing the efforts of the corporation to promote the public benefit identified in its charter and of the best interests of those materially affected by the corporation's conduct

- **Content**: Must identify objectives and standards adopted by board to measure progress and provide factual information based on those standards regarding progress
- **Third-Party Involvement**: Delaware does not require standards be developed or progress certified by a third party unless the charter or bylaws provide otherwise; B Lab Model and most states do require third-party standards/certification
- **Frequency**: Delaware requires report be biennial unless the charter or bylaws provide for more frequent reporting; B Lab Model and most states provide for annual reports
- **Distribution**: Delaware only requires that report be provided to shareholders unless the charter or bylaws provide it must be made available to the public; B Lab Model and most states require it be made public

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PBCs in the M&A and Activism Context

PBCs in the M&A and Activism Context

- While there is not yet any relevant case law, in the M&A and activism contexts, the obligations of a PBC board and the applicable standards of judicial review will be different in many respects
- A sale of the company
 - When the board of a traditional corporation decides to sell control of the company, the focus of the board’s fiduciary duties is to get the best price reasonably available for stockholders in the short term; other constituencies cannot be considered (this is the “*Revlon*” case law)
 - In the PBC context, the tripartite balancing obligations would still apply—suggesting that the *Revlon* price maximization concepts would not be relevant
- Responses to hostile activity and activism
 - When the board of a traditional corporation responds “defensively”—for example, by adopting a “poison pill” to deter takeover activity—the “*Unocal*” judicial standard of review applies, requiring the board to show that it perceived a legitimate threat and responded reasonably and proportionately, without acting in a coercive or preclusive manner
 - In the PBC context, the board will be required to consider factors other than stockholder interests in determining whether there is a threat and whether a response is reasonable. Courts will need to consider such factors as well

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PBCs vs B Corp Certification

PBCs vs B Corp Certification

- Electing to become a Public Benefit Corporation is a change in legal status and changes directors' fiduciary obligations
- Becoming B Corp Certified is a private certification by B Lab that does not alter fiduciary duties
- Becoming B Corp Certified provides additional third-party validation, but comes with additional reporting requirements and expense
- Many companies become PBCs without becoming B Corp Certified, but generally a company must become a PBC (or an equivalent) to be B Corp Certified



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Risks & Benefits of the PBC Form

Potential Benefits of Being a PBC

- Flexibility to consider other stakeholders without exposure to claims that directors breached their fiduciary duties to shareholders
- Attract prospective ESG-focused investors
- Recruit, motivate and retain employees
- Increase appeal to consumers
- Improve relations with regulators

Potential Risks of Being a PBC

- Potential investor concern that balancing requirement could negatively impact financial returns
- May be a poor fit for business in some industries
- Uncertainty about market acceptance because of limited number of existing publicly traded PBCs
- Legal uncertainty as a result of no PBC-specific case law
- Additional reporting and disclosure requirements
- Concern from regulators and lenders about impact of PBC status

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History of PBCs and Formation Trends

Brief history of PBC Legislation

- Maryland became the first state to pass PBC legislation in 2010
- Delaware passed its statute in 2013
- Currently authorized by 40 states and the District of Columbia
- Statutes have been amended over time to make it easier to be a PBC. In Delaware:
 - 2015
 - Removed the requirement that the corporation’s name include “public benefit corporation,” “PBC,” or “P.B.C.”
 - Removed appraisal rights in connection with a conversion to a PBC for listed or widely held companies
 - Lowered required vote for conversion to or from a PBC from 90% of each class outstanding to 2/3 of all shares entitled to vote
 - 2020
 - Removed appraisal rights in connection with all conversions to a PBC, even for private companies
 - Removed any separate voting standard for conversion to or from a PBC (so is a majority of outstanding unless charter has a different standard)
 - Added a provision that a director’s ownership of a PBC’s stock generally doesn’t create a conflict and, in the absence of a conflict, by default no failure to satisfy the balancing requirement constitutes an act or omission not in good faith, or a breach of the duty of loyalty

Trends in PBC Formation

- Started with privately held companies with ESG or similar focus
- Public companies then started forming or acquiring PBC subsidiaries
 - Plum Organics acquired by Campbell Soup Company in 2013 and became a PBC
 - Other examples include Lung Biotechnology (United Therapeutics subsidiary), Ben & Jerry's (Unilever subsidiary), Athleta (Gap subsidiary), Danone North America (Danone subsidiary)



DANONE
NORTH AMERICA



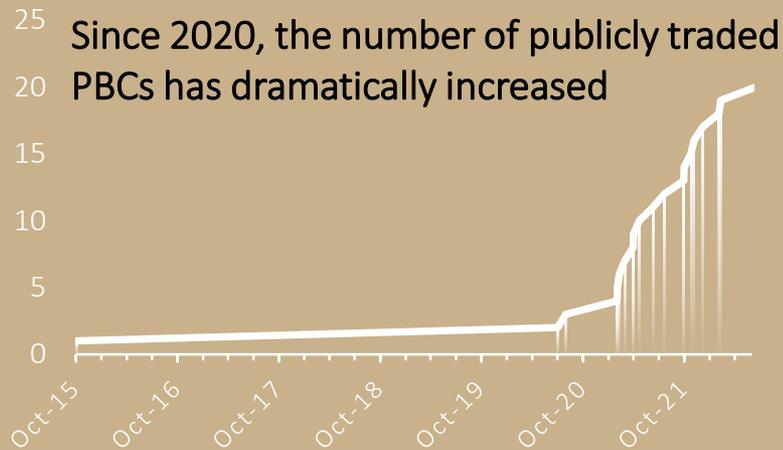
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Growth in Number of Public Company PBCs

25
20
15
10
5
0

Since 2020, the number of publicly traded PBCs has dramatically increased

Oct-15 Oct-16 Oct-17 Oct-18 Oct-19 Oct-20 Oct-21



Year	Number of Publicly Traded PBCs
Oct-15	1
Oct-16	1
Oct-17	1
Oct-18	1
Oct-19	1
Oct-20	2
Oct-21	20

Have become public PBCs by:

- Conversions (e.g., Veeva Systems and United Therapeutics)
 - Both experienced broad shareholder (89-99% of votes cast), ISS and Glass Lewis support
- IPOs (e.g., Allbirds, Coursera, Lemonade)
- deSPACs (e.g., Planet Labs, Authentic Brands)

coursera

zevia[®]

allbirds

 **sezzle**

Lemonade

WARBY PARKER

 **United Therapeutics**
CORPORATION

Veeva

ABG AUTHENTIC BRANDS GROUP

 planet. **THE VITA COMPANY**


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Shareholder Proposals Regarding PBC Conversions

Overview of Shareholder Proposals Related to PBCs

- Shareholder proposals on the topic were first submitted in 2020. Since then, a total of 23 precatory proposals requesting companies take action toward transitioning to a PBC
 - All but two of the proposals submitted requested that the company amend its governing documents to become a PBC
 - The remaining two proposals requested the company report on the feasibility of becoming a PBC—in each case, the proponent withdrew the proposal after each company agreed to issue the requested report
 - The most common proponents of PBC proposals were James McRitchie/Myra Young (10 proposals); John Harrington (5 proposals); and National Center for Public Policy Research (3 proposals)

Shareholder PBC Proposals	2022	2021	2020
Total # submitted	3	19	1
Withdrawn	-	3	1
Excluded via no-action request	1	1	-
Voted on	2	15	-
Average support (of votes cast)	1.7%	3.3%	-

- Of the 23 proposals submitted since 2020, only four have been withdrawn by the proponent and only two have been successfully excluded through an SEC no-action request have been submitted to public companies
 - Shareholder PBC proposals generally cannot be excluded through a no-action request because they relate to corporate governance—accordingly, these proposals may be an attractive option for shareholders seeking airtime at annual meetings
 - Of the two proposals excluded through a no-action request, one was excluded for failure to provide the required proof of ownership and one was excluded as materially false and misleading because the proposal requested that the company, incorporated in California, convert to a Delaware PBC

Overview of Shareholder Proposals Related to PBCs (cont.)

- The 17 shareholder PBC proposals voted on since 2020 received on average support from only 3.1% of votes cast, with only one proposal receiving more than 5% support
- The low level of support for shareholder PBC proposals appears to have been driven primarily by opposition to the proposals by company management
 - In addition, both Institutional Shareholder Services and Glass Lewis, the major proxy advisory firms, recommended shareholders vote “against” all 17 PBC shareholder proposals
- In explaining why shareholders should vote against PBC proposals, companies most often highlighted:
 - The company’s demonstrated commitment to both its shareholders and a broad community of stakeholders
 - Robust governance policies and practices that benefit shareholders’ long-term interests, including risk management, independent board oversight and regular shareholder engagement
 - Unnecessary costs and uncertainty associated with transitioning to a PBC, while providing shareholders and stakeholders with limited, if any, benefits
 - Requirement that a PBC identify one or more specific public benefits, which, if any, have not yet been identified by either the company or the shareholder proponent
 - Limited precedent and history regarding publicly traded companies converting to a PBC and difficulty to predict the impact conversion would have on the company’s short- and long-term success

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Process to Convert to a PBC

Process to Convert to a PBC

- Determine potential public benefit purpose
 - Should not be so narrow as to be unable to accommodate changes to the business
 - Should not be so broad as to be useless in guiding the board's decision making or make it so that the company is not able to report on promotion
- Board approval of charter amendment
 - Board's decision is governed by its current fiduciary duties
 - Board must determine that the conversion is in the best interests of its stockholders
 - Board should generally be protected by the business judgment rule as long as it carefully considers decision
- Shareholder approval
 - Public companies will generally need to prepare and mail a proxy statement
 - Should conduct outreach to shareholders, potentially before board approval, to get a sense of likely support, although public companies must make sure to be careful/comply with any applicable proxy solicitation rules
 - Consider hiring a public relations firm
 - For public companies, proxy advisory firms consider recommendations on a case-by-case basis, taking into account the board's stated rationale and the company's existing governance provisions

Questions?

Thank you for joining. If you have any other questions, please reach out to:

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