

DELAWARE PUBLIC BENEFIT CORPORATIONS 90 DAYS OUT: WHO'S OPTING IN?

ALICIA E. PLERHOPLES*

ABSTRACT

The Delaware legislature recently surprised the sustainable business and social enterprise sector. On August 1, 2013, amendments to the Delaware General Corporation Law became effective, allowing entities to incorporate as a public benefit corporation, a new hybrid corporate form that requires managers to balance shareholders' financial interests with the best interests of stakeholders materially affected by the corporation's conduct, and to produce a public benefit. For a state that has long ruled U.S. corporate law and whose judiciary has frequently invoked shareholder primacy, the adoption of the public benefit corporation form has been hailed as a victory by sustainable business and social enterprise proponents. And yet, the significance of this victory in Delaware is premature. Information about the number and types of companies opting into the public benefit corporation form has been cursory and speculative. This article fills that gap. In this article, I present new empirical research on the 55 public benefit corporations that incorporated or converted in Delaware within the first three months of the amended corporate statute's effective date. Based on publicly available documents and information, I analyze these first public benefit corporations with respect to the following characteristics: (1) year of incorporation as a proxy for corporate age, (2) industry, (3) charitable activities, (4) identified specific public benefit, and (5) adoption of model legislation options not required by the Delaware statute. My analysis returns the following results: 74% of public benefit corporations are new corporations in early stages of operation; 31% of public benefit corporations provide professional services (e.g., consulting, legal, financial, architectural design); the technology and education

* Alicia E. Plerhoples, Associate Professor of Law, Georgetown University Law Center. This article was presented at the U.C. Davis Business Law Journal Symposium on Corporate Social Responsibility at University of California, Davis, School of Law, the Alliance for Research on Corporate Sustainability's Research Conference at Cornell University's S.C. Johnson Graduate School of Management, and the Culp Colloquium at Duke University School of Law. Many thanks to my research assistant Cindy Woods. I would like to thank Dana Brakman Reiser, Cassady V. Brewer, Joan MacLeod Heminway, Susan H. MacCormac, J. Haskell Murray, Marcia Narine, Eric Talley, and Joshua Teitelbaum for their invaluable comments and help shaping this article. The research undertaken for this article was made possible by the Reynolds Family Endowed Faculty Research Fund.

sectors each represent 11% of public benefit corporations; 10% of public benefit corporations produce consumer retail products; 9% are engaged in the healthcare sector; 35% of public benefit corporations could have alternatively incorporated as a charitable nonprofit exempt from federal income tax. This article discusses these and other findings to assist in understanding the public benefit corporation and how it has been employed within the first three months of its adoption.

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I. INTRODUCTION

On August 1, 2013, an amendment to the Delaware General Corporation Law became effective, allowing entities to incorporate as a public benefit corporation, a new for-profit corporate form “intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner.”¹ Directors of a public benefit corporation are required to manage it in a manner that balances shareholders’ financial interests, the best interests of stakeholders materially affected by the corporation’s conduct, and a public benefit.²

Because Delaware is the most significant U.S. state with respect to corporate law,³ Delaware’s adoption of the benefit corporation statute was a

¹ DEL. CODE ANN. tit. 8 § 362(a) (2013).

² *Id.*

³ Corporate lawyers and businesses that seek access to capital and public markets look to Delaware for well-established case law, a modern statute, and a pro-business legislature. For a comprehensive discussion of Delaware’s prominence in corporate law, see LEWIS S. BLACK, JR. WHY CORPORATIONS CHOOSE DELAWARE, Del. Dept. of State, Div. of Corp. (2007). 50% of all publicly traded companies and 64% of the Fortune 500 companies are incorporated in Delaware. Jeffrey W. Bullock, Del. Sec’y of State, Del. Div. of Corp. 2012 Ann. Rep., 1 (2012), <http://corp.delaware.gov/pdfs/2012CorpAR.pdf>.

celebratory occasion for backers of the legislation.⁴ And yet, the significance of this victory in Delaware is premature. The public benefit corporation and other corporate forms with similar grounding—the benefit corporation in 23 jurisdictions, the flexible purpose corporation in California, and the social purpose corporation in Washington—are untested, and characterized by ambiguity and uncertainty. They have been criticized for their perceived lack of director accountability and enforcement mechanisms, and proliferation of the contested belief that corporate law requires managers of traditional corporations to pursue shareholder value to the exclusion of other corporate stakeholders.⁵ Critics abound. Benefit corporation legislation has been opposed and defeated in states like Michigan and North Carolina, where legislators and business lobbies claim that benefit corporations create a false dichotomy between “good” and “bad” business.⁶ Overall, very few companies have opted into the public benefit

⁴ B Lab notes on its website that the adoption of the public benefit corporation created a “seismic shift in corporate law.” B Lab is the nonprofit organization that provides separate certification to sustainable businesses (known as “B Corp” certification but not to be confused with the organizational form) and lobbies for states’ adoption of the benefit corporation form. B LAB, <https://www.bcorporation.net/> (last visited Jan. 16, 2014).

⁵ Dana Brakman Reiser, *Theorizing Forms of Social Enterprise*, 62 EMORY L.J. 682 (2013) (noting the lack of enforcement mechanisms in social enterprise corporate forms and offering alternative legal mechanisms to ensure pursuit of a social good); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 33 (2012) (noting that without appropriate accountability to specific public benefits, benefit corporations could be used for “greenwashing” and “faux CSR,” and advocating that corporate boards be required to prioritize the stakeholder interests the corporation will pursue); Alicia E. Plerhoples, *Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation*, 13 TRANSACTIONS: TENN. J. BUS. L. 221 (2012) (proposing a heightened judicial standard of review for director actions because of the lack of director accountability mechanisms set forth in the flexible purpose corporation statute); Mark A. Underberg, *Benefit Corporations vs. “Regular Corporations”: A Harmful Dichotomy*, THE HARV. LAW SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG., (May 13, 2013, 8:31 EST) <http://blogs.law.harvard.edu/corpgov/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy> (“The broader interests of responsible corporate governance are ill-served by creating a false dichotomy between “good” and “bad” companies based on the law that governs their conduct rather than on the choices made by those who run them.”). See also LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012) (arguing that corporate law has never dictated that corporate managers must pursue shareholder value to the exclusion of the interests of other stakeholders). *Contra* Jonathan Macey, *Sublime Myths: An Essay in Honor of the Shareholder Value Myth and the Tooth Fairy*, 91 TEX. L. REV. 911, at 912 & 915 (2013) (book review) (arguing that shareholder primacy is “efficient and sensible” because it constrains managerial choice and controls agency costs, and questioning the lack of alternative corporate governance mechanisms offered in Stout’s book).

⁶ See Sherri Welch, *Bills’ Implications Worry Business*, Crain’s Detroit Business (June 3, 2012), <http://www.crainsdetroit.com/article/20120603/FREE/306039919/bills-implications-worry-busines> (discussing the concerns of Michigan legislators and the Small Business Association of

corporation and its variations. By some accounts, there are approximately 350 such hybrid corporate forms throughout the United States.⁷

This article does not present a normative stance on the broader debate regarding the utility of public benefit corporations.⁸ Hybrid corporate forms such as the public benefit corporation will remain a fixture of state business statutes for some time to come.⁹ Instead, this article seeks to fill the informational gap about the number and types of companies opting into the public benefit corporation form to assist in understanding how the new organizational form has been employed initially. This article presents research on the 55 public benefit corporations that incorporated or converted in Delaware within the first three months of the amended corporate statute's effective date. In Part I, I discuss the statutory amendments to the Delaware General Corporation Law that allow entities to incorporate as public benefit corporations. I highlight two features of public benefit corporations—adoption of stakeholder governance management and pursuit of a public benefit. These two distinct features are often discussed as if they are one and the same; however, they have separate legal significance and consequences with respect to director liability. I also compare the Delaware statute to the model legislation for benefit corporations and conclude that the Delaware statute remains true to Delaware statutory precedent as an enabling statute—the Delaware statute's default rules are less restrictive than the model legislation. In Part II, I present the methodology employed in this descriptive research project. Part III presents the results of my research. Based on publicly available documents and information, I analyze the first public benefit

Michigan over proposed benefit corporation legislation); Wynne Coleman, *Why You Should Oppose SB99, the North Carolina Benefit Corporations Act*, 9-12 Project (March 1, 2013), <http://912murphync.com/sb99/>.

⁷ E-mail from J. Haskell Murray, Ass. Prof. of Mgmt., Belmont University to Alicia E. Plerhoples, Assoc. Prof., Georgetown University Law Center (Dec. 31, 2013, 15:33 EST) (on file with author) (referencing Professor Murray's ongoing research on benefit corporations for a forthcoming article for *Stanford Social Innovation Review*) [hereinafter Belmont E-mail].

⁸ As Stephen M. Bainbridge noted in his timely article on judicial interpretation of constituency statutes after they were adopted widely despite the concern of many corporate law scholars: "Ultimately . . . these broad policy issues are beside the point, or at least the point of this Article. The statutes are on the books in over half the states and are likely to remain so for the foreseeable future." Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 1024 (1992). Similarly, this article looks past the ongoing policy debate about the utility of hybrid corporate forms to study the forms' use and impact now that numerous states have adopted them.

⁹ E.g., Lloyd Hitoshi Mayer & Joseph R. Ganahl, *Taxing Social Enterprise*, 66 STAN. L. REV. 387, 389 (2014) (acknowledging that "these new forms are now an established part of the legal landscape" and proposing modest tax law reforms to enhance the strengths of hybrid corporate forms). Nonetheless, at least one state—North Carolina—recently repealed its low-profit limited liability or "L3C" statute. N.C. Limited Liability Company Act, ch. 57C, N.C. Gen. Stat. (amended by S.B. 439, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013)).

corporations with respect to the following characteristics: (1) year of incorporation as a proxy for corporate age, (2) industry, (3) charitable activities, (4) identified specific public benefit, and (5) adoption of model legislation options not required by the Delaware statute. Part IV offers my conclusions.

II. EMBRACING STAKEHOLDER GOVERNANCE AND CHARTERING PUBLIC BENEFIT

Incorporators of a new entity or shareholders of an existing corporation must affirmatively opt into the public benefit corporation form. Delaware law does not contain a constituency statute that would apply to all corporations incorporated in Delaware. Constituency statutes generally allow directors of a corporation to consider the interests of non-shareholder constituencies when making management decisions.¹⁰ No legislative history exists identifying why Delaware lacks a constituency statute. Nonetheless, California's legislative history provides a useful comparison. In 2008, then California Governor Schwarzenegger vetoed the constituency statute that had passed through the legislature because it would have upset "vital shareholder protections that have helped turn California into the economic powerhouse of the world."¹¹ The constituency statute would effectively renegotiate the fiduciary duties between shareholders and directors of California corporations without their affirmative approval and allow directors to manage California corporations for purposes "other than strictly financial return."¹² Although there was no such similar legislative confrontation in Delaware, the lack of a constituency statute in

¹⁰ Constituency statutes were promulgated in many states in the 1980s to protect local corporations in response to increased out-of-state takeover activity. Non-shareholder constituencies include employees, customers, creditors, suppliers, and the communities where the corporation is situated or does business; the national, state, and local economies; both the long-term and short-term interests of shareholders and the corporation; other community and societal factors. *E.g.*, 15 PA. CONS. STAT. ANN. § 1715 (2013). *See also*, Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land?* 42 LOY. L.A. L. REV. 765, 782 (2008) (describing the common provisions of constituency statutes). *Compare* Bainbridge, *supra* note 8 (providing a framework for courts to interpret constituency statutes, but arguing that constituency statutes will allow directors to justify their self-interested behavior).

¹¹ Veto Message from Governor Arnold Schwarzenegger to Members of the California State Assembly (Sept. 30, 2008), ftp://leginfo.public.ca.gov/pub/07-08/bill/asm/ab_2901-2950/ab_2944_vt_20080930.html.

¹² *Id.* Governor Schwarzenegger was not completely opposed to broadening the fiduciary duties of directors, but he found the constituency statute lacking because it failed to protect shareholders. In his veto message, Schwarzenegger "urge[d] the Legislature to consider and study new styles of corporate governance that can offer alternatives to the current model, but that maintain the vital shareholder protections that have helped turn California into the economic powerhouse of the world." *Id.*

Delaware may be based on the same premises—that it would apply to all corporations without shareholder approval. The public benefit corporation has an effect similar to a constituency statute. However, unlike a constituency statute, which applies to all corporations incorporated in a state, the public benefit corporation is its own entity designation. Incorporators of a new entity or stockholders and directors of an existing corporation must opt into the public benefit corporation form.¹³

The public benefit corporation is a for-profit entity “intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner.”¹⁴ “‘Public benefit’ means a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.”¹⁵ Specifically, directors of public benefit corporations must manage the corporation in a manner that *balances* (i) stockholders’ pecuniary interests, (ii) the best interests of those materially affected by the corporation’s conduct, and (iii) the public benefit or public benefits identified in its certificate of incorporation.¹⁶ In sum, the public benefit corporation has two components. First, the public benefit corporation embraces stakeholder governance management by requiring directors to balance stockholder and non-stockholder interests.¹⁷ Second, incorporators and stockholders must also state a specific public benefit within the corporation’s certificate of incorporation (or “charter”) filed with the Delaware Secretary of State.¹⁸ Hence, the incorporators or shareholders of a public benefit corporation

¹³ Converting a corporation to a public benefit corporation requires approval of 90% of the outstanding shares of each class of voting and nonvoting stock of the converting corporation. DEL. CODE ANN. tit. 8, § 363(a) (2013).

¹⁴ *Id.* § 362(a).

¹⁵ *Id.* § 362(b).

¹⁶ *Id.* § 362(a).

¹⁷ Stakeholder governance management is a management model through which corporate directors assess the financial and non-financial returns to stakeholders (and not only shareholders) of the corporation. Stakeholders may be asked to participate in decision-making and implementation of those decisions. RAJ SISODIA, JAG SHETH & DAVID WOLFE, *FIRMS OF ENDEARMENT: HOW WORLD-CLASS COMPANIES PROFIT FROM PASSION AND PURPOSE* (2007) (first using the term “stakeholder relationship management” and arguing that companies that use this business model have a competitive advantage and realize higher returns); Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLIN. L. REV. 215, 225-228 (2013) (discussing stakeholder governance as one of four business models employed by social entrepreneurs).

¹⁸ Although Delaware law requires a statement of a specific public benefit within the charter, many of the filed charters I reviewed for this article simply restate the general statutory definition of a public benefit rather than more narrowly define the public benefit. The statutory requirement of a specific public benefit was intended as an accountability mechanism—with a specified public benefit, directors need not pursue the vast range of a general public benefit, and shareholders have

affirmatively charter employment of stakeholder governance management and pursuit of a specific public benefit.

Despite the similar names, the public benefit corporation varies significantly from the benefit corporation, a corporate form that has been adopted in 22 states and Washington, D.C.¹⁹ The statutory provisions of benefit corporations vary slightly from state to state, but are each based on the model benefit corporation legislation drafted by lawyer William Clark and promulgated by B Lab, a 501(c)(3) tax-exempt organization.²⁰ Delaware adopted the public benefit corporation form only after several years of discussion amongst the Delaware Bar and the Court of Chancery, and after it had been adopted in several other states. Statements from the Delaware Governor's office illustrate that the Delaware Bar and government saw Delaware's role as the leader in U.S. corporate law as a primary reason for adopting the public benefit corporation form.²¹ With almost half of U.S. states having adopted or being on the verge of adopting the benefit corporation,²² Delaware was not going to allow other states to preempt its influence over this version of corporate law.²³

notice of a specified mission rather than a general mission. By stating the statutory definition of a public benefit as the PBC's specific public benefit, the directors of a PBC are likely to have more flexibility and less accountability in managing the PBC. J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. R. (forthcoming 2014).

¹⁹ BENEFIT CORP INFORMATION CENTER, *available at* <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited May 12, 2014) (providing a state-by-state legislative analysis of benefit corporation adoption and pending legislation).

²⁰ BENEFIT CORP INFORMATION CENTER, *Model Legislation*, <http://benefitcorp.net/for-attorneys/model-legislation> (last visited Dec. 19, 2013). B LAB, *The Nonprofit Behind B Corps*, <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps> (last visited Dec. 19, 2013).

²¹ Press Release, State of Del., Governor Markell Signs Public Benefit Corporation Legislation (July 17, 2013) *available at* <http://news.delaware.gov/2013/07/17/governor-markell-signs-public-benefit-corporation-legislation/> ("The State's recognition of this new type of corporation whose end objective is to create a positive impact on society and the environment is expected to have a significant effect on the development of this area of corporate law.") *See also* Delaware Governor Jack Markell, *A New Kind of Corporation to Harness the Power of Private Enterprise for Public Benefit*, HUFF POST THE BLOG, (July 22, 2013) http://www.huffingtonpost.com/gov-jack-markell/public-benefit-corporation_b_3635752.html. ("Because of Delaware's leading role in U.S. corporate law, enactment of benefit corporation legislation in my state is critical for these businesses that seek access to venture capital, private equity, and public capital markets.")

²² BENEFIT CORP INFORMATION CENTER, *supra* note 19.

²³ In the State of Delaware's press release, the Delaware Secretary of State remarked on key attributes of Delaware corporate law and what Delaware could bring to bear on the benefit corporation movement: "This law will provide benefit corporations with the stability, efficiency and predictability that are the hallmarks of Delaware corporate law," said Secretary of State Jeffrey W. Bullock who oversees the state's Division of Corporations. "Our Courts, our corporate and legal services industry, and my staff look forward to providing the high-quality infrastructure and support that managers and investors have come to expect from Delaware." Press Release, *supra* note 21.

Overall, the public benefit corporation statutory provisions are less restrictive than the model benefit corporation legislation. This is unsurprising. The Delaware General Corporation Law (hereinafter “DGCL”) is “an enabling statute intended to permit corporations and their shareholders the maximum flexibility in ordering their affairs. . . . it is written with a bias against regulation.”²⁴ Following Delaware statutory precedent, the Delaware statutory provisions concerning the public benefit corporation have few additional requirements beyond the substantive change to director’s management duties and requirement to adopt a specific public benefit. The key differences between the public benefit corporation and model benefit corporation legislation are set forth below in Table 1.

| <i>Delaware Public Benefit Corporations 90 Days Out</i> | | |
|---|--|--|
| Table 1 | | |
| Statutory Provision | Model Benefit Corporation Legislation | Delaware Public Benefit Corporation |
| Third Party Standard | Must assess public benefit using third party standard ²⁵ | Can opt into third party assessment, but not required ²⁶ |
| Benefit Report – Shareholders | Benefit report to shareholders annually ²⁷ | Benefit report to shareholders biennially ²⁸ |
| Benefit Report – Public | Benefit report required to be made public ²⁹ | Benefit report need not be made public (listed as optional in the statute) ³⁰ |
| Specific Public Benefit | Specific public benefit not required (listed as optional in statute) ³¹ | Required to state specific public benefit in charter ³² |

²⁴ BLACK, *supra* note 3, 2.

²⁵ MODEL BENEFIT CORP. LEGIS. § 401(a) (April 10, 2013) http://benefitcorp.net/storage/documents/Model_Benefit_Corporation_Legislation.pdf [hereinafter MODEL].

²⁶ DEL. CODE ANN. tit. 8, § 366(c)(3) (2013).

²⁷ MODEL, *supra* note 25, at § 402(a).

²⁸ DEL. CODE ANN. tit. 8, § 366(b).

²⁹ MODEL, *supra* note 25, at § 402(b).

³⁰ DEL. CODE ANN. tit. 8, § 366(c)(2).

³¹ MODEL, *supra* note 25, at § 201(b).

| Delaware Public Benefit Corporations 90 Days Out | | |
|--|--|---|
| Table 1 | | |
| Benefit Director | Benefit director required for public companies ³³ | Benefit director not required, nor mentioned in statute |
| Benefit Enforcement Proceeding | Benefit enforcement proceeding required to enforce public benefit ³⁴ | Benefit enforcement proceeding not mentioned in statute; no such proceeding required |
| Fiduciary Duty to Create Public Benefit | Directors have no fiduciary duty to beneficiaries to create public benefit; directors have no personal monetary liability for failure to create public benefit ³⁵ | Directors have no fiduciary duty to beneficiaries to create public benefit ³⁶ |
| Fiduciary Duty to Balance Interests of Various Stakeholders | Monetary liability for failure to balance stakeholders' interests permitted, but duty satisfied if director informed, disinterested, and rationally acts in best interest of corporation ³⁷ | Monetary liability for failure to balance stakeholders' interests permitted, but duty satisfied if director informed and disinterested, and ordinary, sound judgment used ³⁸ |

Under the model benefit corporation legislation, the directors of the benefit corporation must apply an independent, comprehensive, and credible third party standard to define, report, and assess the corporation's social and

³² DEL. CODE ANN. tit. 8, § 362(a)(1).

³³ MODEL, *supra* note 25, at § 302.

³⁴ MODEL, *supra* note 25, at § 305(a).

³⁵ MODEL, *supra* note 25, at §§ 301(c)(2) and 305(b).

³⁶ DEL. CODE ANN. tit. 8, § 365(b).

³⁷ MODEL, *supra* note 25, at § 301(e).

³⁸ DEL. CODE ANN. tit. 8, § 365(b).

environmental performance.³⁹ Moreover, the model benefit corporation legislation requires that an annual benefit report be produced to accompany the corporation's financial statements and that the report be made available to shareholders and the public.⁴⁰ Finally, under the model legislation, neither a director nor the public benefit corporation is liable for monetary damages for failure to pursue or create a general or specific public benefit.⁴¹

The Delaware statute is more flexible in several ways, providing minimal regulation that a corporation and its stockholders can explicitly contract around should they choose. Because the public benefit corporation form varies significantly from other business entities and allows corporations to pursue interests other than shareholder interests, the Delaware statute requires that stockholders be placed on notice of this variation. The public benefit corporation's chartered name must include the words "public benefit corporation" or "P.B.C." to put the world on notice that the entity is not a traditional corporation.⁴² The corporation must also notify its stockholders in every notice of a stockholder meeting that the corporation is a public benefit corporation.⁴³ More substantively, the incorporators or directors of a public benefit corporation must specify a particular public benefit in the corporate charter.⁴⁴ This requirement is not only an attempt to put shareholders on notice, but also to give shareholders control over the mission of the public benefit corporation and focus directors on a contractually agreed upon public benefit.⁴⁵ Regardless of any specified public benefit, the Delaware statute requires that the managers of a public benefit corporation balance stockholders' monetary interests and the interests of those materially affected by the corporation's conduct.⁴⁶ If and when necessary to protect themselves, managers of a public benefit corporation could assert a legal argument that such a broad balancing requirement encompasses many interests (even those that conflict with shareholders' monetary interests) and any public benefit that the corporation actually produces regardless of the public benefit specified in the corporate charter.

³⁹ MODEL, *supra* note 25, at § 102.

⁴⁰ MODEL, *supra* note 25, at §§ 401 and 402. The annual benefit report must include a number of statements, including a narrative description of the company's pursuit of the general public benefit or stated specific public benefit, the extent to which either was achieved, the process and rationale for picking the third party standard, an assessment of the company's social and environmental performance against the third party standard, each director's compensation from the company, and an annual compliance statement from the benefit director if the company has a benefit director.

⁴¹ MODEL, *supra* note 25, at § 301(c)(2) and 305(b).

⁴² DEL. CODE ANN. tit. 8 § 362(c) (2013).

⁴³ *Id.* § 362(a).

⁴⁴ *Id.* § 362(a)(1).

⁴⁵ Murray, *supra* note 18, at 8 n.40.

⁴⁶ DEL. CODE ANN. tit. 8, §§ 362(a) and 365(a).

Finally, while the model legislation creates a special procedure—a “benefit enforcement proceeding”—to enforce a firm’s pursuit (or lack thereof) of a public benefit,⁴⁷ the Delaware statute does not reference any separate procedure. This might imply that a derivative lawsuit is the appropriate action against the directors of a public benefit corporation for failure to pursue a public benefit. However, the Delaware statute expressly states that directors have no duty to outside beneficiaries to create a public benefit.⁴⁸ The Delaware statute is unclear whether the drafters intended to merely prohibit fiduciary duties to outside beneficiaries, or—more unlikely but not entirely implausible—to eliminate directors’ fiduciary duty to the corporation (and derivatively to stockholders) with respect to pursuing a public benefit. Statutory interpretations of the Delaware statute with respect to pursuing a public benefit may arrive at different results. Both the model and Delaware statute clearly allow director liability for failure to balance stockholders’ and stakeholders’ interests; both statutes confirm that the business judgment rule will apply. If a director’s decision with respect to balancing stockholders’ and stakeholders’ interests is informed, disinterested, and “not such that no person of ordinary, sound judgment would approve,” the director’s fiduciary duty is satisfied with respect to balancing stockholders’ and stakeholders’ interests.⁴⁹ A public benefit corporation can additionally limit director liability by opting into DGCL Section 102(b)(7), which eliminates the personal liability of directors except under certain circumstances, such as a breach of loyalty or knowing violations of the law.⁵⁰ This is a perceptible distinction in liability not often noted in legal analysis of the benefit corporation or public benefit corporation—seemingly, directors cannot be liable for failure to pursue a public benefit, but there is possibility of liability (however remote due to the business judgment rule and the 102(b)(7) liability waiver) for failure to balance stockholders’ and stakeholders’ interests. Nonetheless, only stockholders, and not stakeholders, have standing to bring a derivative claim, making directors more accountable to stockholders than stakeholders.

III.METHODOLOGY: DESCRIPTIVE RESEARCH

What companies have opted into the public benefit corporation form in Delaware? The answer requires accessing publicly available information of private companies that are not required to make any information public, other

⁴⁷ See *infra* note 34 and accompanying text.

⁴⁸ See *infra* note 36 and accompanying text.

⁴⁹ *Id.* § 365(b). See also MODEL, *supra* note 25, at § 301(e) for statement of business judgment rule.

⁵⁰ DEL. CODE ANN. tit. 8, § 102(b)(7) (2013) (explicitly allowing a public benefit corporation to place a Section 102(b)(7) exculpatory clause in its certificate of incorporation).

than file a certificate of incorporation with the Delaware Secretary of State. Delaware Department of State's Division of Corporations maintains a searchable online database of all entities registered in Delaware. A user of the database can search for a single entity by name but the database does not allow searches by entity type—i.e., a list of public benefit corporations is not available or searchable on the Delaware entities database. To gather an accurate list of public benefit corporations that converted or incorporated within the first 90 days of the amended corporate statute's effective date, I began with the list of public benefit corporations maintained on B Lab's website.⁵¹ I then cross-referenced the B Lab list with the Delaware Department of State's Division of Corporations searchable database of registered entities. By cross-referencing the B Lab list with the Delaware entities database, I confirmed the entities that are, in fact, incorporated as a public benefit corporation in Delaware and eliminated entities from the B Lab list that are not. Cross-referencing these two lists, however, does not capture public benefit corporations that may indeed have incorporated or converted in the first three months of the amended statute's effective date, but did not publicize their incorporation or conversion on the B Lab website. Nonetheless, late in my research my index was confirmed by a list of Delaware public benefit corporations compiled by the Delaware Secretary of State's office and obtained by Professor J. Haskell Murray.⁵²

I reviewed the public documents—the certificates of incorporation—of a cross-section of the public benefit corporations, as well as publicly available information about each public benefit corporation.⁵³ Using the publicly available information for each public benefit corporation, I then analyzed each according to several characteristics: (1) year of incorporation as a proxy for corporate age, (2) industry, (3) alternatively could have incorporated as a charitable nonprofit, (4) identified specific public benefit, and (5) adoption of model legislation options not required by Delaware statute. I explain and analyze each category below. Some of these characteristics are objective, such as the year of incorporation, identified specific public benefit, and adoption of model legislation options. For example, the year of incorporation in Delaware is factual and not subject to opinion—the date of incorporation of a public benefit corporation is publicly available on the Delaware Department of State's Division of Corporations searchable database of registered entities. Other characteristics, however, required

⁵¹ See *Find a Benefit Corp*, BENEFITCORP.NET, <http://www.benefitcorp.net/find-a-benefit-corp> (last visited Jan. 16, 2014).

⁵² Belmont E-mail, *supra* note 7.

⁵³ Specifically, my research assistant and I reviewed charters of 25 public benefit corporations and each public benefit corporation's webpage, if available, and the results of entity name searches through the Google search engine. I also conducted a search on the Delaware Department of State's Division of Corporations' searchable database to determine the exact name and year of incorporation in Delaware of each public benefit corporation.

subjectivity in analyzing and classifying the public benefit corporation. For example, whether a public benefit corporation that uses mobile technology to promote healthcare is classified as operating within the “technology” industry or the “healthcare” industry is influenced by my subjective opinion.⁵⁴ Another researcher could have classified these public benefit corporations differently. I attempt to overcome such failings by presenting an index of the public benefit corporations in the Appendix to this article, for readers to inspect for their own purposes.

IV. WHAT TYPES OF COMPANIES HAVE OPTED IN?

In the first three months of the effective date of the amendments to the DGCL, 55 public benefit corporations incorporated or converted from other entity types.⁵⁵ This number is dwarfed by the approximately 145,000 legal entities that incorporated in Delaware in 2012 and the one million legal entities that are actively domiciled in Delaware.⁵⁶ Compare this incorporation rate to California, another economically and legally significant corporate jurisdiction: 81 benefit corporations and 23 flexible purpose corporations incorporated in California in the first 12 months.⁵⁷ With 55 incorporations in just three months, Delaware is on a path to surpass California incorporations in absolute numbers.⁵⁸

A. Year of Incorporation in Delaware as a Proxy for Corporate Age

74% of public benefit corporations are most likely new corporations: 41 of the 55 (74.5%) public benefit corporations incorporated in Delaware in 2013. 39 of the 55 (70.9%) public benefit corporations incorporated in Delaware

⁵⁴ I did not use a standard industry classification methodology such as Standard & Poor's Global Industry Classification Standard. Such standards require information about a company—such as revenue and earnings—that is not publicly available for privately held companies, and all public benefit corporations are privately held.

⁵⁵ The amendment to the Delaware General Corporation Law was effective August 1, 2013. For the purposes of this article, my analysis includes public benefit corporations incorporated or converted in Delaware between August 1, 2013 and October 31, 2013. For a list of the public benefit corporations, see *infra* Appendix, p. 31.

⁵⁶ Bullock, *supra* note 3.

⁵⁷ Eric L. Talley, Corporate Form and Social Entrepreneurship: Who's Coming to the Party? PowerPoint Presentation at University of California, Davis School of Law, U.C. Davis Bus. L. J. Symposium (Nov. 21, 2013).

⁵⁸ It is possible that the rate of incorporation in Delaware will slow now that there is less media attention around public benefit corporations than there was at the time of the statutory amendments' passage and effective date.

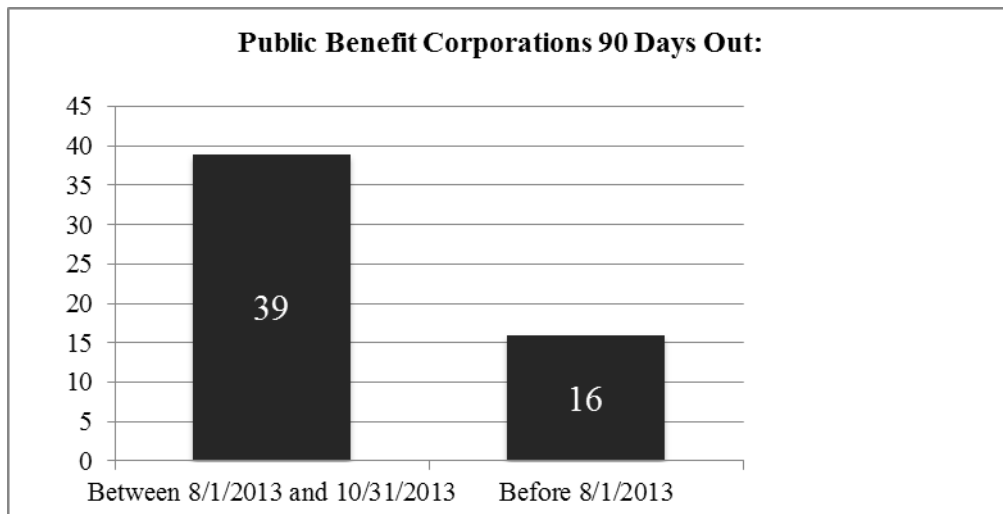
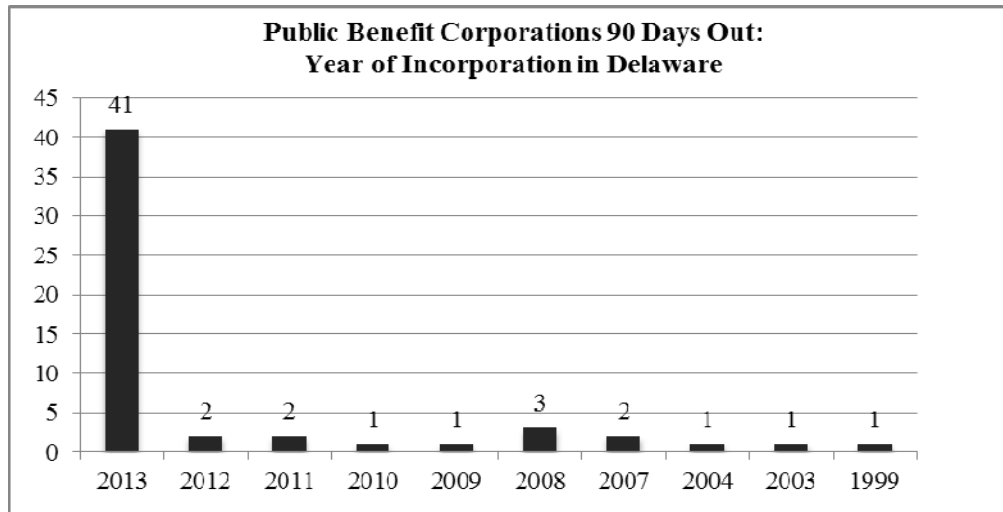
between August 1, 2013, and October 31, 2013.⁵⁹ Incorporation in Delaware is a proxy for length of corporate existence. It is possible that some of these corporations were previously incorporated in another state and re-incorporated in Delaware once the public benefit corporation form became available, or that they were created through acquisition or merger.⁶⁰ However, the lack of publicly available information (such as a lack of a website for the types of companies that would typically have a website) for many of these public benefit corporations suggests that they are mostly new corporations that have only recently begun any business operations.⁶¹ Only 14 public benefit corporations (25.4%) were incorporated in Delaware prior to 2013, indicating that these 14 companies converted to the public benefit corporation form. The following graph illustrates the year of incorporation in Delaware for the 55 public benefit corporations that incorporated or converted within the first three months.

⁵⁹ Two companies that converted to public benefit corporations were incorporated prior to August 1, 2013, the effective date of the amendments to the DGCL allowing for the public benefit corporation form: Unifi Communications, PBC incorporated on May 24, 2013; Slingshot Power, PBC incorporated on April 23, 2013. *See infra* Appendix, p. 31.

⁶⁰ Note, however, that the date of incorporation in Delaware (as indicated on the Delaware Department of State's Division of Corporations' searchable database) refers to the original date of incorporation in Delaware, even where a corporation or other entity converts to a public benefit corporation. Thus, previously incorporated entities that converted to a public benefit corporation retain the date of incorporation of the original entity on the Division of Corporations' searchable database. For example, Method Products, PBC originally incorporated in Delaware on September 30, 2003; Method Products was one of the first corporations to convert to a public benefit corporation in Delaware in September 2013, but the original incorporation date on the searchable database remains September 30, 2003. This indicates that Method Products, PBC existed prior to the amendment to the DGCL allowing for public benefit corporations. Method Products, PBC's Amended and Restated Certificate of Incorporation filed in Delaware on August 31, 2012, confirms this. Amended and Restated Certificate of Incorporation of Method Products, PBC, filed with State of Del., Sec'y of State (Aug. 1, 2013, 8:00 ET) (on file with author).

⁶¹ For the public benefit corporations that do have websites, their websites confirmed their early stage operations; some websites existed in beta form only or became loaded with information during the course of research for this article.

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The corporate age of these public benefit corporations raises questions about the likelihood of their long-term performance and success. Many new small businesses fail. Public benefit corporations may find success even more illusive given the statutory intent that they “operate in a responsible and sustainable manner” and requirement that they employ employee stakeholder governance management.⁶² Sustainable and responsible operations may siphon funds that these early stage companies do not have. For example, a public benefit corporation that promises to donate a percentage of its profits to a charity or pays its employees a living wage may face a higher cost of doing business. Nonetheless, some empirical evidence suggests that companies committed to

⁶² *Infra* Part I.

sustainability and that employ stakeholder governance management perform as well or better than companies that do not.⁶³ This may be due to the positive image that customers associate with a company that has a social mission and the free media attention that some companies receive for their philanthropic work or social mission.⁶⁴ This may be because consumers are willing to pay higher prices for such products and services, or at least that they are willing to patronize such companies over others when the price is the same. Companies that employ stakeholder governance and are committed to sustainability may also “attract better human capital, establish more reliable supply chains, avoid conflicts and costly controversies with nearby communities. . . , and engage in more product and process innovations in order to be competitive under the constraints that the integration of social and environmental issues places on the organization.”⁶⁵

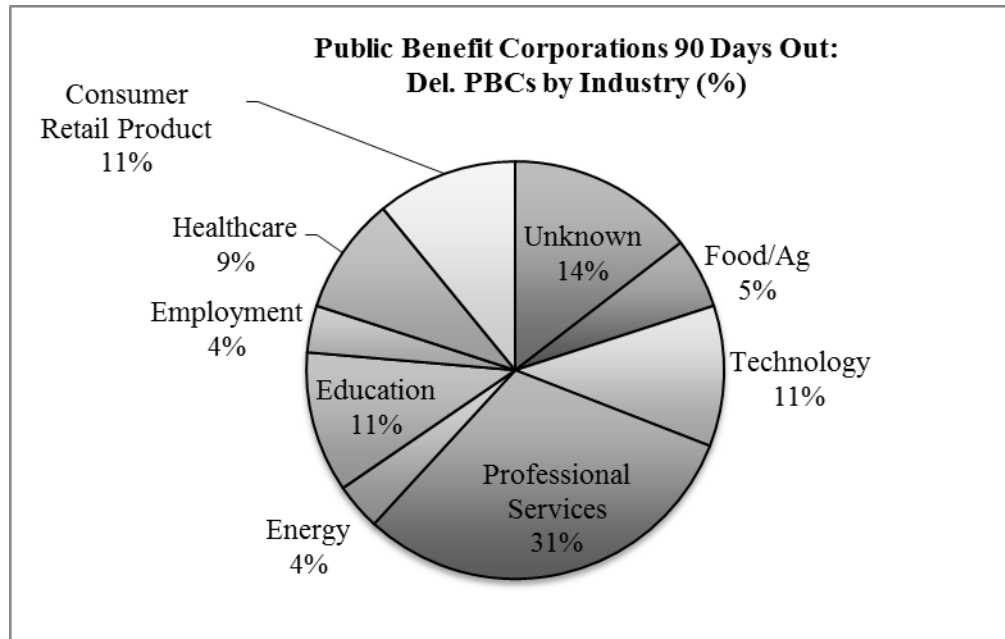
B. Delaware Public Benefit Corporations By Industry

Delaware public benefit corporations work in multiple industries, as depicted in the chart below.

⁶³ Robert G. Eccles, Ioannis Ioannou, & George Serafeim, *The Impact of Corporate Sustainability on Organizational Processes and Performance*, Harv. Bus. Sch., Working Paper, No. 12-035, p. 3, 19 (July 29, 2013) http://www.hbs.edu/faculty/Publication%20Files/12-035_a3c1f5d8-452d-4b48-9a49-812424424cc2.pdf (tracking the corporate performance of corporations over 18 years and finding that “High Sustainability” companies, i.e., companies with “a substantial number of environmental and social policies adopted for a significant number of years,” significantly outperform “Low Sustainability” companies in both financial and accounting performance. High Sustainability companies were also found to have established stakeholder engagement and be long-term oriented.)

⁶⁴ Christopher Marquis and Andrew Park, *Inside the Buy-One-Give-One Model*, 12 STAN. SOC. INNOV. REV. 28, 30 (Winter 2014) (noting that buy-one-give-one business model “offers companies several marketing and economic benefits,” namely “that customers are enticed to buy the products because of the simplicity and tangibility of the message: for every product purchased, one is given away to a person in need. . . . Buy-one-give-one companies also benefit from the free publicity they receive in the popular press.”)

⁶⁵ Eccles, *supra* note 63, 17 (theorizing explanations as to why High Sustainability companies outperform Low Sustainability companies).



31% of public benefit corporations that incorporated or converted to the form within the first three months of statutory effectiveness provide professional services, e.g., business consulting, legal, financial, and architectural design.⁶⁶ These public benefit corporations include consulting-like companies such as Kairos Society PBC, Inc., an accelerator for businesses innovating in entrepreneurship, science, and technology;⁶⁷ Urban.US Public Benefit Corporation, a network for start-ups working on urban challenges and creating smart cities;⁶⁸ and aimwith PBC, dedicated to scaling innovative nonprofits and social enterprise projects that focus on sustainable development.⁶⁹ Many of the public benefit corporations that provide professional services provide financial

⁶⁶ Admittedly, the largest group of the public benefit corporations falls into the “professional services” category because it includes several different types of professional services. The cohorts would be smaller had I given business consulting, legal, financial, and architectural design each a separate category. Nonetheless, some public benefit corporations provide multiple types of professional services and, therefore, cannot be easily distinguished as a “legal services” or “financial services” firm. For example, Exemplar Companies, Inc. consists of both a law firm and financial services firm; Grassroots Capital Management provides business consulting, financial management, and funding to small and microbusinesses; and Women’s Project for Longterm Care, PBC provides care, financial, and legal services to the elderly.

⁶⁷ Certificate of Incorporation of Kairos Society PBC, Inc., filed with State of Del., Sec’y of State (Oct. 16, 2013, 18:37 ET) (on file with author)

⁶⁸ URBAN.US, <http://urban.us> (last visited Apr. 18, 2014).

⁶⁹ Certificate of Incorporation of aimwith PBC, filed with State of Del., Sec’y of State (Sept. 5, 2013, 12:32 ET) (on file with author).

services.⁷⁰ For example, RSF Capital Management and Grassroots Capital Management Corporation⁷¹ are impact investment firms and Veteran Franchise Initiative PBC provides financing to veterans to start their own small business. Handup PBC⁷² and HeroX PBC⁷³ are both online crowdfunding platforms. Two public benefit corporations provide architectural design services: Amara Design Build, PBC⁷⁴ and International Well Building Institute PBC.⁷⁵

The technology, healthcare, and education sectors are also each well represented within the cohort of the public benefit corporations that incorporated or converted to the form in the first three months. The technology and education sectors each constitute 11% of the cohort; 9% of Delaware public benefit corporations focus on healthcare. The technology public benefit corporations make mobile applications,⁷⁶ host websites,⁷⁷ and aim to provide universal internet access.⁷⁸ Several public benefit corporations that operate within the healthcare sector do so through the use of information technology. CanSurround is a new company that will provide an online platform for patients to “better navigate the cancer experience”.⁷⁹ Profile Health Systems is developing software that allows patients to create personalized 3D health models/profiles to share with their doctors.⁸⁰ Consuli, PBC is a new company that is trying to solve the problem of “one provider to one patient” that is “too costly and time-consuming” and results in medical errors.⁸¹

⁷⁰ 7 of the 17 public benefit corporations that fall within the “professional services” category provide financial services.

⁷¹ GRASSROOTS CAPITAL MANAGEMENT (JAN. 5, 2014), <http://www.grassrootscap.com>.

⁷² Handup allows users to directly give to homeless people; the crowdfunded donations are redeemed for the recipient for basic needs such as food, clothing, and medical care through partnered nonprofits. HANDUP, <https://handup.us/> (last visited Jan. 5, 2014).

⁷³ HeroX allows users to sign up, define a social goal, and solicit others to solve the problem. Users who solve the problem are rewarded with donative prizes that are crowdfunded. HEROX, <https://www.herox.com/> (last visited Jan. 5, 2014).

⁷⁴ AMARA, <http://amaradesignbuild.com/> (last visited Jan. 5, 2014).

⁷⁵ INTERNATIONAL WELL BUILDING INSTITUTE, <http://wellbuildinginstitute.com/> (last visited Jan. 5, 2014).

⁷⁶ UMEWIN, PBC created a mobile application for coupons that generates money through advertisements and allows users to donate a portion of the funds to three charitable causes. Umewin, iTunes Preview, <https://itunes.apple.com/nz/app/umewin/id758301885?mt=8> (last visited Jan. 5, 2014).

⁷⁷ VenturePilot provides web hosting and donates twenty percent of its profits to charities that “encourage youth in science, technology, engineering, and math”. VENTUREPILOT (Jan. 5, 2014), <http://venturepilot.org>.

⁷⁸ Amended and Restated Certificate of Incorporation of Unifi Communications, Inc., filed with State of Del., Sec’y of State (Aug. 23, 2013, 12:47 ET).

⁷⁹ CANSURROUND, <http://www.cansurround.com/> (last visited Jan. 5, 2014).

⁸⁰ BODYMAP+, <https://www.bodymapplus.com/about-profile-health-systems/> (last visited Jan. 5, 2014).

⁸¹ CONSULI, <http://consuli.net/the-problem/> (last visited Jan. 5, 2014).

The public benefit corporations involved in the educational sector illustrate a range of diverse operations within that sector. Arist Medical Sciences University is developing a medical school and graduate-level nursing school;⁸² Athentica PBC is an online learning platform;⁸³ Good Life Alliance PBC's mission is to provide educational and cultural activities to youth in underserved communities;⁸⁴ Start Up Learning PBC's mission is to provide educational programs to students of all income levels consistent with Common Core requirements;⁸⁵ Scholarly Learning PBC provides tutoring and supplemental education;⁸⁶ and Ojooido.com PBC is "a blended multimedia curriculum that develops core study skill habits for Latino students."⁸⁷

Overall, companies in the technology, healthcare, and education sectors easily meet the minimal requirements of the public benefit corporation form, because positive "educational," "medical," and "technological" effects are each considered a "public benefit" by the Delaware statutory provisions governing public benefit corporations.

11% of public benefit corporations within the cohort analyzed in this article produce or sell non-perishable consumer products. Alltham, PBC is developing an online marketplace and catalog for American-made products;⁸⁸ New Leaf Paper produces environmentally responsible paper;⁸⁹ Raven + Lily PBC sells fair trade and eco-friendly clothing and apparel handmade by women in Ethiopia, Cambodia, India, and the United States;⁹⁰ and Rustic Mango similarly sells fair trade home décor handmade in India.⁹¹ Notably, two of the most profitable and perhaps most well-known public benefit corporations fall into the consumer retail product category: Method Products, PBC⁹² reported \$100

⁸² ARIST MEDICAL EDUCATION CORPORATION, <http://www.arist.com/why-arist/organization-model/> (last visited Jan. 5, 2014).

⁸³ ATHENTICA, <http://athentica.com/> (last visited Jan. 5, 2014).

⁸⁴ Certificate of Incorporation of Good Life Alliance PBC, filed with State of Del., Sec'y of State (Oct. 31, 2013, 16:04 ET).

⁸⁵ Certificate of Incorporation of Startup Learning, PBC, filed with State of Del., Sec'y of State (Aug. 5, 2013, 19:55 ET).

⁸⁶ Certificate of Incorporation of Scholarly Learning PBC, filed with State of Del., Sec'y of State (Sept. 18, 2013, 14:36 ET).

⁸⁷ OJOOIDO, <http://www.ojooido.com/> (last visited Jan. 5, 2014).

⁸⁸ "Alltham" stands for All Things American Made." MADE IN AMERICA. AGAIN. <http://www.miaa.us/about-us.shtml> (last visited Jan. 5, 2014).

⁸⁹ NEW LEAF PAPER, <http://www.newleafpaper.com/about/mission-history> (last visited Jan. 5, 2014).

⁹⁰ RAVEN + LILY, <http://www.ravenandlily.com/our-mission/> (last visited Jan. 5, 2014).

⁹¹ RUSTIC MANGO, <http://rusticmango.com/pages/about-us#TheAboutUs> (last visited Jan. 5, 2014).

⁹² METHOD, <http://methodhome.com/> (last visited Jan. 5, 2014).

million in revenue in 2012;⁹³ and Plum, PBC reported \$93 million in gross sales in 2012.⁹⁴

5% of public benefit corporations operate in the food and agricultural sector, producing and selling fair trade food products,⁹⁵ providing communities with access to fresh food;⁹⁶ and harvesting surplus food from businesses to reduce food waste.⁹⁷ 4% of public benefit corporations operate in the energy sector, specifically the production of solar power and the reduction of energy consumption.⁹⁸ Finally, employment and job training accounted for 4% of public benefit corporations.⁹⁹ However, despite the percentages of public benefit corporations within each industry, this cohort of public benefit corporations is small, and no public information was available for 14% of the public benefit corporations researched. The number (rather than the percentage) of public benefit corporations is shown in the below graph, to provide a perspective on the overall analysis—there are very few public benefit corporations in existence.

⁹³ Rod Kurtz, *A Soap Maker Sought Compatibility in a Merger Partner*, NY TIMES, (Jan. 16, 2013), http://www.nytimes.com/2013/01/17/business/smallbusiness/a-founder-of-the-soap-maker-method-discusses-its-sale.html?_r=0.

⁹⁴ BUSINESS WIRE, *Campbell to Acquire Plum Organics, a Leading Premium, Organic Kids Nutrition Company* (May 23, 2013), <http://www.businesswire.com/news/home/20130523006411/en/Campbell-Acquire-Plum-Organics-Leading-Premium-Organic#.UyFQ21FdXVs>.

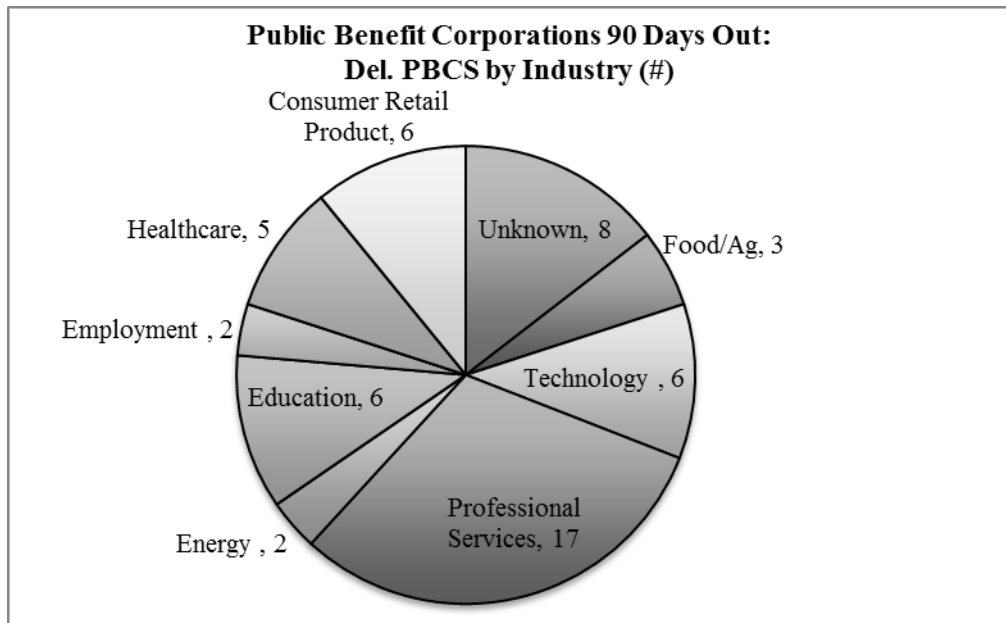
⁹⁵ ALTER ECO, <http://www.alterecofoods.com/sustainability/socially-just> (last visited Jan. 5, 2014).

⁹⁶ Farmigo uses an online platform to connect workplaces, schools, and community centers with farmers that provide community supported agriculture subscriptions. FARMIGO, <http://www.farmigo.com/about> (last visited Jan. 5, 2014).

⁹⁷ ZERO PERCENT, <http://www.zeropercent.us/> (last visited Jan. 5, 2014).

⁹⁸ HomeLab, PBC seeks to “improve residential resource efficiency, reduce residential carbon emissions, and enable residents to live more sustainably” Certificate of Incorporation of HomeLab, PBC filed with State of Del., Sec’y of State (Sept. 18, 2013, 17:56 ET). Slingshot Power PBC designs and installs solar panels. SLINGSHOT, <http://www.slingshotpower.com/> (last visited Jan. 5, 2014).

⁹⁹ Ian Martin Inc., Public Benefit Corporation is a staffing firm that assists people in finding meaningful employment. IAN MARTIN GROUP, <http://ianmartin.com/about#services> (last visited Jan. 8, 2014). Plexx is a global mobile job training platform. PLEXX, <http://www.plexx.co/> (last visited Jan. 8, 2014). *See also* MIT Ideas Global Challenge, <http://globalchallenge.mit.edu/teams/view/362> (last visited Jan. 8, 2014) (describing Plexx’s operations and founders).



C. Alternative to Charitable Nonprofit

Public benefit corporations, benefit corporations, flexible purpose corporations, and social purpose corporations are often called *hybrid* entities because they can choose to pursue profits and a public purpose. The definition of “public benefit” that public benefit corporations must pursue is remarkably similar to the exempt purposes of an organization exempt from federal income taxes under Section 501(c)(3) of the Internal Revenue Code (I.R.C).¹⁰⁰ Such exempt purposes include religious, charitable, scientific, literary, and educational purposes.¹⁰¹ Given their edict to produce a public benefit, it is possible that some public benefit corporations could have alternatively incorporated as a charitable nonprofit corporation and received tax-exempt recognition under Section 501(c)(3).¹⁰²

¹⁰⁰ A public benefit is “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.” DEL. CODE ANN. tit. 8, § 362(b) (2013).

¹⁰¹ To receive tax-exempt recognition from the Internal Revenue Service (“I.R.S.”) under Section 501(c)(3) of the Internal Revenue Code, an organization must be organized and operated exclusively for an exempt purpose. I.R.C. § 501(c)(3)-1(d)(1)(i).

¹⁰² Note that some would argue that any business could incorporate as a taxable nonprofit corporation under state law so long as it does not distribute profits to insiders. A taxable nonprofit corporation is not exempt from income taxes under federal law.

Admittedly, whether a public benefit corporation could have alternatively incorporated as a nonprofit corporation and received recognition of tax-exempt status from the Internal Revenue Service (“IRS”) is subjective and speculative, because the alternative cannot be tested and the lack of publicly available information on many of the public benefit corporations makes it difficult to conduct a comprehensive legal analysis of whether the entity could be a 501(c)(3) tax-exempt organization. When an organization applies for tax-exemption, the IRS does not simply look at the stated mission of the organization but instead applies a two-part organizational and operational test.¹⁰³ The two-part test cannot be applied without more detailed information about each public benefit corporation. Therefore, this analysis is not comprehensive; it is based solely on the stated missions of the public benefit corporation (where such information was available) and whether that mission would qualify as one of the exempt purposes listed in Section 501(c)(3). I included only entities with missions that would clearly fall within the scope of exempt purposes of Section 501(c)(3).¹⁰⁴ My own competency to analyze tax-exempt qualifications lies in my experience as a practicing lawyer and the director of the Social Enterprise & Nonprofit Law Clinic at Georgetown University Law Center, through which I frequently advise clients and apply for 501(c)(3) tax-exempt recognition from the IRS on their behalf.

Based solely on whether the public benefit corporation’s stated mission would qualify as an exempt purpose, 19 of the 55 (34.5%) public benefit corporations could have incorporated as a nonprofit corporation and received tax-exempt recognition from the IRS.¹⁰⁵ For example, Handup is a crowdfunding platform for donations to homeless people in the donor’s neighborhood.¹⁰⁶ California Coalition for Families and Children, PBC promotes the health and success of families experiencing marital dissolution. It also lobbies, advocates through litigation, educates, and does public outreach.¹⁰⁷ Athentica, PBC is an online learning site where the underemployed can choose paths towards their career goals, take online courses to acquire employable skills, and can then search for a job.¹⁰⁸ Arist Medical Sciences University is in the process of creating a medical and nursing school.¹⁰⁹ Each of these public benefit corporations likely

¹⁰³ I.R.C. § 501(c)(3)-1.

¹⁰⁴ Where I questioned whether the stated mission would qualify the public benefit corporation for tax-exempt recognition, I did not count that corporation as one that could qualify.

¹⁰⁵ Note that there is little publicly available information on the operations of eight public benefit corporations.

¹⁰⁶ HANDUP, *supra* note 72.

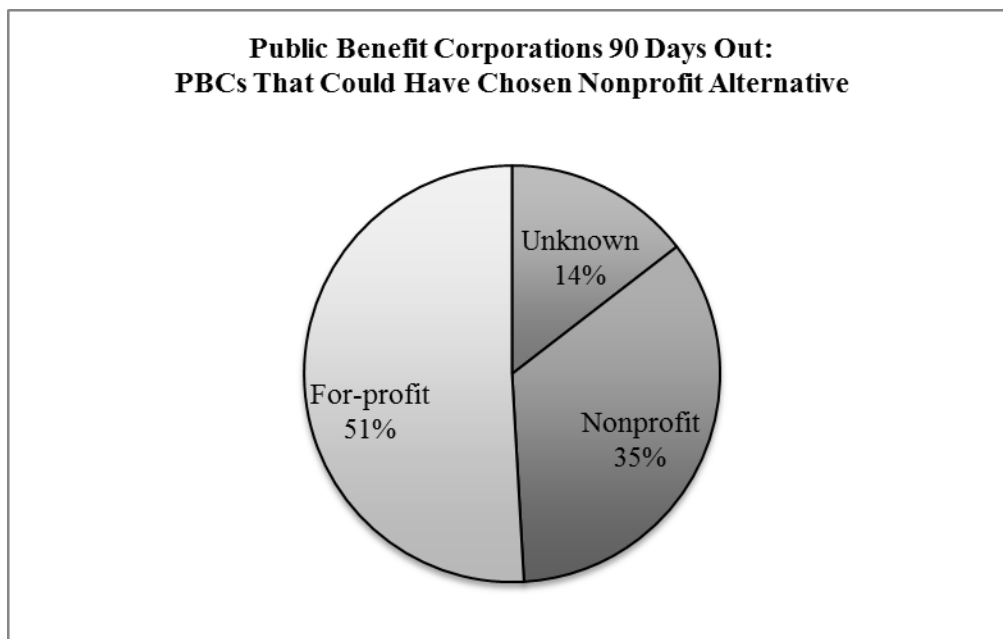
¹⁰⁷ CALIFORNIA COALITION FOR FAMILIES AND CHILDREN, PBC, <http://croixsd.adsblog.wordpress.com/about/> (last visited Jan. 5, 2014).

¹⁰⁸ ATHENTICA, <http://athentica.com/athentica-b-corp/> (last visited Jan. 5, 2014).

¹⁰⁹ Arist Medical Education Corporation, *supra* note 82.

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could have become a tax-exempt organization, and yet their incorporators opted into the for-profit public benefit corporation form.



This result begs that question as to why a firm that could become a nonprofit organization with 501(c)(3) tax-exempt recognition would choose to become a public benefit corporation. The public benefit corporation is often discussed as an alternative to a traditional for-profit corporation and couched in terms of improving the for-profit sector through combating short-termism and encouraging social and environmental sustainability.¹¹⁰ However, the new corporate form also may attract social entrepreneurs seeking to make their charitable endeavors financially sustainable and not reliant on tax-exempt donations. The nondistribution constraint is the key characteristic of a nonprofit corporation.¹¹¹ Nonprofit corporations cannot distribute net earnings to insiders.¹¹² Fundamentally, nonprofit corporations do not have investors that expect a return on their investments; nonprofits rely on capital from donors and

¹¹⁰ See, e.g., Daniel Fisher, *Delaware 'Public Benefit Corporation' Lets Directors Serve Three Masters Instead of One*, *Forbes* (July 16, 2013) <http://www.forbes.com/sites/danielfisher/2013/07/16/delaware-public-benefit-corporation-lets-directors-serve-three-masters-instead-of-one/>; Gov. Jack Markell, *A New Kind of Corporation to Harness the Power of Private Enterprise for Public Benefit*, *Huffington Post* (July 22, 2013), http://www.huffingtonpost.com/gov-jack-markell/public-benefit-corporation_b_3635752.html.

¹¹¹ Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 *YALE L.J.* 835, 838 (1980) (coining and defining the term "nondistribution constraint").

¹¹² I.R.C. § 501(c)(3).

grantors (with no expectation of private return), debt financing, or fees charged for goods and services (i.e., earned income). Earned income is constrained by federal restrictions imposed on a nonprofit's commercial activities. Commercial activities unrelated to the exempt purpose of the nonprofit are subject to the unrelated business income tax, and if too large, can put the tax-exempt status of the nonprofit in jeopardy.¹¹³ There are exceptions: Goodwill stores maintain their tax-exemption because most of the goods that Goodwill sells are donated goods, and volunteers provide much of the labor.¹¹⁴ Likewise, tax-exempt organizations can offer consulting services, but only if such services are provided substantially below cost.¹¹⁵ However, if a firm's business model requires the use of commercial activities to pursue a social or environmental mission, federal restrictions on tax-exempt organizations may be too onerous to permit a social entrepreneur's vision of financial sustainability.¹¹⁶

Indeed, nonprofit organizations might begin to use public benefit corporations to their advantage—i.e., as wholly or partially-owned subsidiaries to house the commercial operations of the parent nonprofit in order to shield the nonprofit from unrelated business income tax or the risk of tax-exemption revocation.¹¹⁷ While any for-profit form can be used as a subsidiary for this purpose, the public benefit corporation might prove useful to a nonprofit parent organization because of its branding as a company required to produce a public benefit.

¹¹³ I.R.C. § 512(a)(1) (imposing a tax on unrelated business income). For an overview of how the I.R.S. treats commercial activities of a 501(c)(3) tax-exempt organization, see Robert A. Wexler, *Unrelated Business Income Tax: A Primer* (Jan. 2012), available at http://www.adlercolvin.com/pdf/revenue_generating_activities/UBIT%20Primer%20Handout%20%2800384527%29.PDF.

Goodwill can also likely make the case that the sale of the donated goods furthers Goodwill's exempt purpose of job training disadvantaged individuals, and therefore is not an unrelated commercial activity. GOODWILL, <http://www.goodwill.org/find-jobs-and-services/get-training/> (last visited Apr. 18, 2014).

¹¹⁴ I.R.C. §§ 513(a)(1) & 513(a)(3) (excepting goods and services produced by volunteers and donated goods and services from the definition of "unrelated business").

¹¹⁵ Rev. Rul. 71-529, 1971 C.B. 234 (ruling that a nonprofit that manages university investment funds for a fee that represents just 15% of costs and is therefore "substantially below cost" qualifies for tax-exemption under I.R.C. § 501(c)(3)). For a comprehensive overview of how the I.R.S. treats consulting services performed by tax-exempt organizations, see Loren D. Prescott, Jr., *Management and Consulting Services: The Impact on Exempt Status and UBIT*, 42 THE EXEMPT ORG. TAX REV. 209 (2003).

¹¹⁶ A full exploration of the issue of entity choice is beyond the scope of this article, but would be a worthwhile future examination.

¹¹⁷ Robert A. Wexler & David Levitt, *Using New Hybrid Legal Forms: Three Case Studies, Four Important Questions, and A Bunch of Analysis*, 69 THE EXEMPT ORG. TAX REV. 63, 70 (2012) (providing a legal analysis for public charities and private foundations that want to establish a hybrid corporate form as a subsidiary or affiliate instead of a traditional corporation).

D. Specific Public Benefit

The DGCL requires that the public benefit corporation's specific public benefit be stated in its certificate of incorporation. Traditional for-profit corporations do not have to specify their corporate purpose. With some exceptions, Delaware corporations can engage in "any lawful act or activity" without liability under the *ultra vires* doctrine for conducting activities outside the scope of the corporate charter.¹¹⁸ The specific public benefit requirement aligns a public benefit corporation more closely with a nonprofit corporation, the charter of which typically limits the nonprofit's activities and states that it is organized for charitable and tax-exempt purposes under the Internal Revenue Code.

Some of the filed charters of the 55 public benefit corporations fail to include a specific public benefit, despite the statutory requirement. These charters instead simply recite statutory language regarding the stakeholder governance management of the public benefit corporation—i.e., that the corporation will be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct—or restate the statutory language regarding the general public benefit—i.e., that the specific public benefit is the creation of a material positive impact on society and the environment.¹¹⁹ Proponents of the public benefit corporation and the legislature intended that the statement of a specific public benefit would focus directors in carrying out the specified mission and also give stockholders notice (and control over) the specified public benefit.¹²⁰ The omission of a specific public benefit from some public benefit corporation's charters may be accidental, given the novelty of and misconceptions surrounding the DGCL amendments, or intentional, to allow founders and directors to retain flexibility over mission and operations.

Many of the public benefit corporations' charters do, however, contain specific public benefits. A sampling of specific public benefits is provided below.

¹¹⁸ DEL. CODE ANN. tit. 8, § 124 (2013).

¹¹⁹ For a discussion of whether a general public benefit suffices as a specific public benefit under Delaware law, see J. Haskell Murray, *Delaware Public Benefit Corporations: Specific Public Benefit Purposes*, THE CONGLOMERATE (Oct. 31, 2013), <http://www.theconglomerate.org/2013/10/delaware-public-benefit-corporations-specific-public-benefit-purposes.html>.

¹²⁰ Murray, *supra* note 18.

| Delaware Public Benefit Corporations 90 Days Out | |
|--|--|
| Table 2 | |
| Public Benefit Corporation | Specific Public Benefit as stated in Certificate of Incorporation |
| aimwith PBC | Scale innovative nonprofits and social enterprises' projects with a focus on sustainable development ¹²¹ |
| Arist Medical Sciences University, Public Benefit Corporation | Promote medical and health sciences education ¹²² |
| FIDE PBC | Increase the flow of capital to entities with a purpose to benefit society or the environment ¹²³ |
| Global Uprising, PBC | Inspire social and environmental change that results in the improvement of the human condition, increased social consciousness and the amelioration of poverty ¹²⁴ |
| Good Life Alliance PBC | Provide educational and cultural activities to youth in underserved communities ¹²⁵ |
| Homelab PBC | Establish and commercialize a residential energy data service with the dual mission to provide an attractive return for shareholders and to advance the understanding of residential resource use (e.g. energy, water, waste) and to identify market-based opportunities to improve residential resource efficiency, reduce residential carbon emissions, and enable residents to live more sustainably ¹²⁶ |

¹²¹ Certificate of Incorporation of aim with PBC, *supra* note 69.

¹²² Amended and Restated Certificate of Incorporation of Arist Medical Sciences University, Inc., filed with State of Del., Sec'y of State (Aug. 12, 2013, 13:01 ET) (on file with author).

¹²³ Amended and Restated Certificate of Incorporation of FIDE PBC, filed with State of Del., Sec'y of State (Oct. 28, 2013, 14:38 ET) (on file with author).

¹²⁴ Certificate of Incorporation of Global Uprising, PBC, filed with State of Del., Sec'y of State (Oct. 02, 2013, 12:57 ET) (on file with author).

¹²⁵ Certificate of Incorporation of Good Life Alliance PBC, filed with State of Del., Sec'y of State (Oct. 31, 2013, 16:04 ET) (on file with author).

¹²⁶ Certificate of Incorporation of HomeLab PBC, filed with State of Del., Sec'y of State (Sept. 31, 2013, 17:56 ET) (on file with author).

| <i>Delaware Public Benefit Corporations 90 Days Out</i> Table 2 | |
|--|--|
| Influential PBC | Achieve positive cultural and educational effects on the democratic process within user communities through dissemination of information and the provision of a forum to discuss current events ¹²⁷ |
| Kairos Society PBC, Inc. | Accelerate high-impact innovating in business, science and technology with the potential to make a positive social or environmental impact on the world ¹²⁸ |
| Profile Health Systems, PBC. | Give people access to, and the benefit of, health knowledge that is as complete and unbiased as possible ¹²⁹ |
| Scholarly Learning PBC | Provide tutoring and supplemental education ¹³⁰ |
| Startup Learning, PBC | Promote public benefits of an educational nature, including, educational programs to students in grades K through 12 of all income levels consistent with the common core requirements ¹³¹ |
| The National Institute For Coordination of Health Care, PBC | Advance equality in health care by helping health care institutions provide the highest quality, more cost-efficient care to their chronic, low income, limited English proficient and uninsured patients ¹³² |

¹²⁷ Certificate of Incorporation of Influential, PBC, filed with State of Del., Sec'y of State (Aug. 19, 2013, 14:23 ET) (on file with author).

¹²⁸ Certificate of Incorporation of Kairos Society PBC, Inc., *supra* note 67.

¹²⁹ Amended and Restated Certificate of Incorporation of Profile Health Systems, PBC, filed with State of Del., Sec'y of State (Aug. 1, 2013, 8:00 ET) (on file with author).

¹³⁰ Certificate of Incorporation of Scholarly Learning PBC, filed with State of Del., Sec'y of State (Sept. 18, 2013, 14:36 ET) (on file with author).

¹³¹ Certificate of Incorporation of Startup Learning, PBC, filed with State of Del., Sec'y of State (Aug. 5, 2013, 19:55 ET) (on file with author).

¹³² Certificate of Incorporation of The National Institute For Coordination of Health Care PBC, filed with State of Del., Sec'y of State (Sept. 9, 2013, 18:56 ET) (on file with author).

| Delaware Public Benefit Corporations 90 Days Out Table 2 | |
|---|--|
| The New New Ages, P.B.C. | Positively impact the public health and natural environmental of the community by offering avenues of meaningful connection to the natural environmental that nurture the human mind, body, and spirit; providing access to healthy food and medicinal herbs; hosting events and educational workshops that encourage health and nutrition, toxic-free clean living, environmental conservation, sustainability, meditation, self-awareness through communion with nature ¹³³ |
| Travel Massive Global, P.B.C. | Provide education, mentorship, business development and community building for travel industry professionals on global basis ¹³⁴ |
| Unifi Communications, PBC | Further universal access to the Internet ¹³⁵ |

E. Opting Into Voluntary Standards

Although the Delaware statute does not require (or even refer to) the use of a third party standard in defining, assessing, and reporting the corporation's pursuit and achievement of a public benefit,¹³⁶ a few of the public benefit corporations have opted into a third party standard by referencing the standard in their charters. Six of the public benefit corporations whose charters were reviewed as a part of this analysis¹³⁷ opted into a third party standard.¹³⁸

¹³³ Certificate of Incorporation of The New New Ages, P.B.C., filed with State of Del., Sec'y of State (Sept. 3, 2013, 18:50 ET) (on file with author).

¹³⁴ Certificate of Incorporation of Travel Massive Global, P.B.C., filed with State of Del., Sec'y of State (Oct. 7, 2013, 9:17 ET) (on file with author).

¹³⁵ Certificate of Incorporation of Unifi Communications, PBC, filed with State of Del., Sec'y of State (Aug. 23, 2013, 12:47 ET) (on file with author).

¹³⁶ See *infra* note 39 and accompanying text.

¹³⁷ 25 charters of the 55 public benefit corporations were reviewed as a part of this research. See *supra* note 53.

¹³⁸ Farmigo, Method Products, New Leaf Paper, People Against Dirty Manufacturing, Profile Health Systems, and RSF Capital Management each opted into the third party standard in their charters. Third Amended and Restated Certificate of Incorporation of Farmigo, Inc., filed with State of Del., Sec'y of State (Aug. 1, 2013, 8:00 ET) (on file with author); Certificate of Amendment to Amended and Restated Certificate of Incorporation of Method Products, Inc., *supra* note 60; Third Amended and Restated Certificate of Incorporation of New Leaf Paper, Inc., filed

Likewise, the Delaware statute does not require a public benefit corporation to make its benefit report available to the public. Five public benefit corporations opted into this voluntary standard.¹³⁹ Notably, these cohorts do not overlap completely. Method Products and People Against Dirty Manufacturing opted into the third party standard but will forgo making their benefit report public. Kairos Society PBC opted into making its benefit report public but did not opt into the third party standard. This could indicate that the managers or founders of these companies considered and made distinct choices between the two voluntary standards. The model voluntary standards need not be adopted wholesale.

V. CONCLUSION

This article has presented early, yet important research about the companies that have opted into the public benefit corporation form in Delaware. Future research on public benefit corporations must continue. Such research should be conducted to assess whether and how a public benefit corporation's choice to incorporate in Delaware and adopt Delaware's version of this hybrid corporate form impacts its financial returns as well as its achievement of public benefits and other social or environmental outcomes. Specifically, one could analyze the benefit reports and impact assessment scores of Delaware public benefit corporations as compared to benefit corporations from states that adopted the model legislation, or to other hybrid corporate forms such as the flexible purpose corporation or social purpose corporation.

Other essential, unanswered questions remain: What governance mechanisms and policies are public benefit corporations employing to reflect and invoke stakeholder governance management? What public benefits are they *actually* producing? How are public benefit corporations financed? How do public benefit corporations attract investors given their adoption of stakeholder governance management and pursuit of a public benefit? Will these public benefit

with State of Del., Sec'y of State (Aug. 1, 2013, 8:00 ET) (on file with author); Certificate of Incorporation of People Against Dirty Manufacturing, PBC, filed with State of Del., Sec'y of State (Aug. 2, 2013, 15:59 ET) (on file with author); Amended and Restated Certificate of Incorporation of Profile Health Systems, Inc., *supra* note 132; Amended and Restated Certificate of Incorporation of RSF Capital Management, Inc., filed with State of Del., Sec'y of State (Aug. 1, 2013, 8:00 ET) (on file with author).

¹³⁹ Farmigo, Kairos Society PBC, Inc., New Leaf Paper, Profile Health Systems, and RSF Capital Management will make their benefit reports public, according to their charters. Third Amended and Restated Certificate of Incorporation of Farmigo, Inc., *supra* note 142; Certificate of Incorporation of Kairos Society PBC, Inc., *supra* note 67; Third Amended and Restated Certificate of Incorporation of New Leaf Paper, Inc., *supra* note 142; Amended and Restated Certificate of Incorporation of Profile Health Systems, Inc., *supra* note 132; Amended and Restated Certificate of Incorporation of RSF Capital Management, Inc., filed with State of Del., Sec'y of State (Aug. 1, 2013, 8:00 ET) (on file with author).

corporations scale and be successful or fail like most new businesses do? Will any additional major companies—other than Method Products and Plum—opt into the public benefit corporation form? Will a public benefit corporation ever “go public,” which would yield diversified ownership? In addition to unanswered questions concerning the financing of public benefit corporations, legal uncertainties also remain with respect to how courts will interpret directors’ actions to balance stakeholder interests or pursue a public benefit. The first shareholder derivative suit brought by a jilted impact investor will be watched closely.

Finally, an important area of inquiry illuminated by this early examination relates to entity selection by founders who could have alternatively incorporated as a nonprofit corporation with 501(c)(3) tax-exempt recognition from the IRS. The finite set of legal entities has been expanded, giving founders a new choice. Longitudinal research should examine the factors that lead to the selection of a for-profit public benefit corporation over a nonprofit corporation, as well as to any conversions from a nonprofit corporation to a for-profit corporation.

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APPENDIX

DELAWARE PUBLIC BENEFIT CORPORATIONS
INCORPORATED OR CONVERTED BETWEEN AUGUST 1, 2013 AND OCTOBER 31, 2013

| Corporate Name | Del. File # | Original Incorporation Date | File Date as PBC |
|--|--------------------|------------------------------------|-------------------------|
| AIMWITH PBC | 5394050 | 9/5/13 | 9/5/13 |
| ALLTHAM, P.B.C. | 5410006 | 10/4/13 | 10/4/13 |
| ALTER ECO AMERICAS PBC | 3792329 | 4/19/04 | 8/1/13 |
| AMARA DESIGN BUILD, PBC | 5384655 | 8/16/13 | 8/16/13 |
| AMERICAN PRISON DATA SYSTEMS PBC | 5174660 | 6/25/12 | 8/1/13 |
| ARIST MEDICAL SCIENCES UNIVERSITY, PUBLIC BENEFIT CORPORATIONS | 4997934 | 6/16/11 | 8/12/13 |
| ATHENTICA, P.B.C. | 5383912 | 8/15/13 | 8/15/13 |
| BETTER THAN WE FOUND IT, PBC | 4847114 | 7/12/10 | 8/1/13 |
| CALIFORNIA COALITION FOR FAMILIES AND CHILDREN PBC | 5385710 | 8/19/13 | 8/19/13 |
| CANSURROUND, PBC | 5374564 | 8/1/13 | 8/1/13 |
| CLOSE TO HOME, PBC | 5411326 | 10/7/13 | 10/7/13 |
| CONSULI, PBC | 4935103 | 2/25/11 | |
| EHUUB, PBC | 5387182 | 8/13/13 | 8/13/13 |
| ELEUSIS BENEFIT CORPORATION, PBC | 5399488 | 9/16/13 | 9/16/13 |
| EXEMPLAR COMPANIES, PBC | 4334611 | 4/13/07 | 8/1/13 |
| FAIR PARENTING PUBLIC BENEFIT CORPORATION | 5374509 | 8/1/13 | 8/1/13 |
| FARMIGO, PBC | 4716757 | 8/4/09 | 8/1/13 |
| FIDE PBC | 5403583 | 9/23/13 | 10/28/13 |
| GLOBAL UPRISING, PBC | 5408509 | 10/2/13 | 10/2/13 |
| GOOD LIFE ALLIANCE PBC | 5424873 | 10/31/13 | 10/31/13 |

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| | | | |
|--|---------|----------|----------|
| GRASSROOTS CAPITAL MANAGEMENT CORP., PBC | 4435496 | 10/5/07 | 8/1/13 |
| HANDUP PBC | 5386924 | 8/21/13 | 8/21/13 |
| HEROX, PBC | 5392160 | 8/30/13 | 8/30/13 |
| HOMELAB PBC | 5386912 | 9/18/13 | 9/18/13 |
| IAN MARTIN PBC | 3122819 | 11/8/99 | 8/1/13 |
| IMPACT DIRECTLY PBC | 5413531 | 10/10/13 | 10/10/13 |
| INFLUENTIAL, PBC | 5385267 | 8/19/13 | 8/19/13 |
| INTERNATIONAL WELL BUILDING INSTITUTE PBC | 5416143 | 10/16/13 | 10/16/13 |
| KAIROS SOCIETY PBC, INC | 5411624 | 10/16/13 | 10/16/13 |
| METHOD PRODUCTS, PBC | 3710482 | 9/30/03 | 8/1/13 |
| MOBILE EMPOWERS, P.B.C. | 5413191 | 10/10/13 | 10/10/13 |
| NEW LEAF PAPER, PUBLIC BENEFIT CORPORATION | 4600789 | 12/11/08 | 8/1/13 |
| OJOIDO.COM PBC | 5403384 | 9/23/13 | 9/23/13 |
| PEOPLE AGAINST DIRTY MANUFACTURING, PBC | 5377947 | 8/2/13 | 8/2/13 |
| PEOPLE AGAINST DIRTY, PBC | 5196414 | 8/9/12 | 8/1/13 |
| PLEXX, PBC | 5374479 | 8/1/13 | 8/1/13 |
| PLUM PBC | 4635949 | 12/18/08 | 8/1/13 |
| PROFILE HEALTH SYSTEMS, PBC | 5373007 | 8/1/13 | 8/1/13 |
| RAVEN + LILY PBC | 5377392 | 8/1/13 | 8/1/13 |
| RSF CAPITAL MANAGEMENT, PBC | 4541697 | 6/10/08 | 8/1/13 |
| RUSTIC MANGO PUBLIC BENEFIT CORPORATION | 5407942 | 10/1/13 | 10/1/13 |
| SCHOLARLY LEARNING PBC | 5400971 | 9/18/13 | 9/18/13 |

| | | | |
|--|---------|----------|----------|
| SLINGSHOT POWER, PBC | 5323528 | 4/23/13 | 8/16/13 |
| SOCRATIC LABS, PBC | 5374462 | 8/1/13 | 8/1/13 |
| STARTUP LEARNING, PBC | 5378651 | 8/5/13 | 8/5/13 |
| THE NATIONAL INSTITUTE FOR COORDINATION OF HEALTH CARE PBC | 5396052 | 9/9/13 | 9/9/13 |
| THE NEW NEW AGES, P.B.C. | 5392843 | 9/3/13 | 9/3/13 |
| TRAVEL MASSIVE GLOBAL, P.B.C. | 5410482 | 10/7/13 | 10/7/13 |
| UMEWIN, PBC | 5384115 | 8/15/13 | 8/15/13 |
| UNIFI COMMUNICATIONS, PBC | 5340549 | 5/24/13 | 8/23/13 |
| URBAN US PUBLIC BENEFIT CORPORATION | 5409941 | 10/4/13 | 10/4/13 |
| VENTUREPILOT PBC | 5354287 | 8/1/13 | 8/1/13 |
| VETERAN FRANCHISE INITIATIVE PBC | 5420523 | 10/24/13 | 10/24/13 |
| WOMEN'S PROJECT FOR LONG TERM CARE, P.B.C. | 5397585 | 9/11/13 | 9/11/13 |
| ZERO PERCENT, PBC | 5407123 | 9/27/13 | 9/27/13 |