

Elimination of Statutory Barriers May Lead to New Wave of Public Benefit Corporations

On Aug. 1, 2013, a new subchapter of the General Corporation Law of the State of Delaware (the DGCL) was added to enable Delaware for-profit corporations to be incorporated as or to become a Delaware public benefit corporation, or “PBC.”

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On August 1, 2013, a new subchapter of the General Corporation Law of the State of Delaware (the “DGCL”) was added to enable Delaware for-profit corporations to be incorporated as or to become a Delaware public benefit corporation, or “PBC.” Rather than being operated solely to maximize value for stockholders, like traditional corporations, PBCs are required to be managed in a manner that balances the interests of three constituencies: the stockholders’ pecuniary interests, the best interests of those materially affected by the corporation’s conduct, and a specific public benefit identified in the certificate of incorporation. 8 *Del. C.* §§ 361-368. After a few years of experience with PBCs, and with interest in sustainability and corporate environmental and social responsibility on the rise, many of the statutory barriers relating to PBCs have been reduced or eliminated, making it easier for existing Delaware corporations to become PBCs.

The most recent amendments to the DGCL provisions relating to PBCs became effective on July 16, 2020. These amendments, among other things, (i) reduced the required stockholder vote to become a PBC from two-thirds of the corporation’s outstanding stock entitled to vote thereon to a majority of the outstanding stock entitled to vote thereon, (ii) eliminated appraisal rights resulting from an amendment of a certificate of incorporation that converts a conventional corporation to a PBC, (iii) made clear that stock ownership by a director will not, in and of itself, create a conflict of interest for that director with respect to his/her obligation to balance the interests of the various constituencies, and (iv) added that, absent a conflict of interest, a director’s failure to comport with his/her balancing obligations will not, for purposes of the indemnification and exculpation provisions of the DGCL, constitute an act or omission not in good faith, or a breach of the duty of loyalty. Since the effectiveness of the 2020 amendments, the number of PBCs has increased significantly. As of January 26, 2018, 1,194 PBCs were incorporated in Delaware; following the 2020 amendments, the number increased to 2,860 by October 28, 2020 and further increased to 3,320 by February 10, 2021.

In addition, there has been an uptick in the number of publicly traded PBCs following the effectiveness of the 2020 amendments. Prior to the effectiveness of the 2020 amendments, only two publicly traded PBCs existed: Laureate Education, Inc. and Lemonade, Inc. Since the 2020 amendments, three additional publicly traded PBCs have appeared: one, Vital Farms, Inc., by virtue of completing an initial public offering; the second, AppHarvest, Inc., by virtue of its acquisition by a public special purpose acquisition company; and the third, Veeva Systems Inc., by virtue of seeking and obtaining stockholder approval of an amendment to its certificate of incorporation to become a PBC. Additionally, Broadway Financial Corporation, a publicly traded Delaware corporation, is currently seeking stockholder approval of a merger with CFBanc Corporation at a special meeting scheduled to be held in March 2021 that, if approved, will result in Broadway Financial Corporation becoming a publicly traded PBC.

The public disclosures of companies that have sought or are seeking approval from stockholders relating to becoming a PBC state that such an undertaking will result in financial and reputational benefits, alignment of legal

responsibilities with core values, and strengthened relationships with employees and customers. Significantly, these public disclosures note such companies' belief that becoming a PBC will not diminish the rights of their investors and could possibly make such companies more attractive investment options given the rapidly growing category of sustainability-focused investors. Conversely, companies have also noted certain risk factors that are associated with becoming a PBC, including the possibility of negative short-term financial performance, action taken by directors that does not necessarily maximize stockholder value due to their duty to balance other interests, and increased derivative litigation concerning the directors' duty to balance its obligations to additional stakeholders.

Another byproduct of the 2020 amendments is that stockholders have started to submit proposals calling for the corporations they own stock in to consider becoming a PBC. According to The Shareholder Commons, an organization that advocates for the advancement of sustainability and corporate environmental and social responsibility, stockholder proposals have been submitted in late 2020 and early 2021 to corporations in a wide variety of industries, including the likes of BlackRock, Inc., Caterpillar Inc., Yelp Inc., Alphabet Inc., salesforce.com, inc., Facebook, Inc., United Parcel Service, Inc., Tractor Supply Company, and 3M Company. January/February Newsletter, THE SHAREHOLDER COMMONS, Feb. 4, 2021,

https://archive.aweber.com/awlist5404792/7z7Fh/h/The_Shareholder_Commons_.htm. These stockholder proposals call on the board of directors of each company to take the steps necessary to amend their respective certificates of incorporation to become PBCs, noting that such companies' commitments to constituencies other than their stockholders have no binding effect under Delaware law unless such companies become a PBC. Companies have sought to exclude such stockholder proposals for a variety of reasons, pointing to the costs of implementing such a proposal, the company's purported implementation of the proposal in other ways, the company's lack of power to implement such a proposal without stockholder approval, and the uncertainty surrounding the long-term success of PBCs. See, e.g., Letter from Tractor Supply Company to the SEC Requesting to Exclude a Shareholder Proposal (December 31, 2020), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/mcritchietractor123120-14a8-incoming.pdf>.

To date, none of these stockholder proposals have been voted on at a stockholder meeting, so it remains to be seen whether they will be widely supported by stockholders. At this point, leading proxy advisory firms, such as Glass Lewis and Institutional Shareholder Services ("ISS"), do not appear to have taken an official position on stockholder proposals relating to PBCs. However, Glass Lewis and ISS both evaluate stockholder proposals relating to environmental and social issues on a case-by-case basis, specifically noting, in the case of Glass Lewis, that Glass Lewis may recommend against the election of certain directors if a company has not properly considered environmental and social issues, which could indicate some degree of support for PBC proposals depending on the specific public benefit identified.

Takeaways

Overall, the 2020 DGCL amendments have made it easier for Delaware corporations to become PBCs, which is good news for corporations that are already public and wish to ingrain in their corporate purpose a commitment to sustainability and environmental and social responsibility. At the same time, more established and highly regulated corporations that have historically taken a more conservative position on these issues may face increasing pressure from stakeholders to consider a shift to a PBC as a result of the elimination of structural barriers to doing so. If pressure continues to build from various investors and other stakeholders, we may see a new wave of PBCs appearing in the coming years. Continued engagement with and continued education of stockholders and potential investors on the advantages and disadvantages of becoming a PBC will be critical for any traditional Delaware corporation that is

considering becoming a PBC or that may find itself the target of stockholder activists advocating for such a change.

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