PURPOSE OR PROFIT?: THE RISE OF PUBLIC BENEFIT CORPORATIONS IN THE TECHNOLOGY INDUSTRY

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ABSTRACT

Over the last several years, the demand for socially responsible companies has exploded. Many states have responded to this demand by offering a new corporate form, the public benefit corporation ("PBC"), which arguably allows companies to prioritize social benefit in a way that traditional corporations cannot. The technology industry has adopted the PBC structure at higher rates than corporations in other industries. This Note offers reasons for the appeal of PBCs to corporations generally and to the technology sector in particular. This Note also explores why technology companies may be able to achieve the goals discussed without the need for PBCs.

INTRODUCTION

Over the last two decades, the demand for socially conscious companies has skyrocketed.[1] Traditional corporations arguably lack the ability to focus on social benefit over the pursuit of shareholder return. While these corporations have leeway to make decisions under the business judgment rule, they are still ultimately beholden to shareholders.[2] As consumers began to seek out socially responsible companies, companies claiming to deliver social benefits proliferated.[3] But, as more companies claimed to be socially responsible, consumer trust in those

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[1] *See* Maxime Verheyden, *Public Reporting by Benefit Corporations: Importance, Compliance, and Recommendations*, 14 HASTINGS BUS. L.J. 37, 42–43 (2018) (noting the growing market for socially responsible investing and that consumers choose to patronize and employees choose to work for companies with greater social and environmental action).

[2] *See* Leo Strine, *Making it Easier for Directors to Do the Right Thing*, 4 HARV. BUS. REV. 235, 238 (2014) (stating that even if directors can theoretically consider all constituencies, they are ultimately beholden to shareholders because shareholders are the only constituents who vote for directors, vote on mergers and acquisition transactions, have the right to inspect the books and records, and have the right to sue).

[3] *See* Verheyden, *supra* note 1, at 47 ("Since companies are aware of the value of corporate social responsibility, all claim to act this way, causing a decline in trust by the public.").

claims faded.[4] The lack of standards surrounding such claims created a need for a legal entity with a duty to pursue public benefits on which consumers could rely.[5] Public benefit corporation legislation was developed to fulfill this need.[6] Since 2009, PBC legislation has multiplied. As of 2020, 37 states and the District of Columbia had adopted statutes authorizing PBCs.[7]

The legislation and adoption of PBCs may accelerate as more business leaders advocate for pursuing stakeholder value along with shareholder returns. For example, in 2019 the Business Roundtable issued a statement that replaced its previous commitment to shareholder primacy[8] with a commitment to all stakeholders, including customers, employees, suppliers, and the communities in which the corporations operate.[9] Similarly, the World Economic Forum's 2020 Davos Manifesto echoed the same sentiment.[10] And, private equity giant KKR was one of the

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[4] *Id.*

[5] *Id.* (stating that legislators created an entity with a legal duty to pursue a public benefit to establish reliability for companies' claims of their social and environmental benefit).

[6] Strine, *supra* note 2, at 242 ("Rather than ignore the importance of the accountability structure within which corporate managers operate, the benefit corporation movement set out to change it.").

[7] DAN BROWN ET AL., GRUNIN CTR. FOR L. & SOC. ENTREPRENEURSHIP, THE STATE OF SOCIAL ENTERPRISE AND THE LAW 2019-2020 7 (2020), https://socentlawtracker.org/wp-content/uploads/2021/02/ICBRSSEL21.1-Grunin-Tepper-Report_Web.pdf.

[8] *See Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans,'* BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans (stating that each version of the Business Roundtable's Principles of Corporate Governance since 1997 has affirmed shareholder primacy).

[9] *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationJuly2021.pdf. *But see* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 130–131, 134–135 (2020) (questioning whether the Business Roundtable Statement was intended to have significant governance consequences considering that CEOs joined the statement without, for example, approval from their boards or updating their corporate governance guidelines to incorporate commitments to stakeholders).

[10] *See* Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, WORLD ECONOMIC FORUM (Dec. 2, 2019), https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/ ("The purpose of a company is to engage all its stakeholders in shared and sustained

biggest investors in the first PBC to go public.[11] Such statements and actions indicate the growing acceptance of corporations pursuing social benefit alongside shareholder returns.

Under the Delaware code,[12] a PBC is a for-profit corporation organized under and subject to Delaware corporate law "that is intended to produce a public benefit."[13] In addition to focusing specifically on at least one public cause, the corporation has a general responsibility to "operate in a responsible and sustainable manner."[14] This requirement prevents the PBC from "otherwise acting irresponsibly toward others affected by the corporation's conduct . . . . Thus, a Delaware benefit corporation must be an overall good corporate citizen . . . ."[15] In its certificate of incorporation, the corporation must identify one or more specific public benefits to pursue.[16]

The statute defines "public benefit" broadly as "a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders)" in a wide range of areas including education, science, and religion.[17] The board of directors has the duty to manage the PBC in a way "that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation."[18] To provide stakeholders with information about the PBC's compliance with its goals and obligations, the PBC must issue a statement at least every other year that provides the details of the corporation's promotion of the public benefit, including objectives established, standards used to measure progress, and information indicating the corporation's success.[19]

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value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees, customers, suppliers, local communities and society at large.").

[11] Brad Edmondson, *The First Benefit Corporation IPO is Coming, and That's a Big Deal*, TRIPLE PUNDIT (Feb. 4, 2016), https://www.triplepundit.com/story/2016/first-benefit-corporation-ipo-coming-and-thats-big-deal/28586.

[12] This Note will focus primarily on the Delaware PBC statute because of its popularity.

[13] DEL. CODE ANN. tit. 8, § 362(a) (West 2021).

[14] *Id.*

[15] Strine, *supra* note 2, at 244.

[16] DEL. CODE ANN. tit. 8, § 362(a)(1) (West 2021).

[17] DEL. CODE ANN. tit. 8, § 362(b) (West 2021).

[18] DEL. CODE ANN. tit. 8, § 365(a) (West 2021).

[19] DEL. CODE ANN. tit. 8, § 366(b) (West 2021).

The PBC structure is particularly popular in the technology industry. Dorff et al. found that the plurality of dollars in PBC investments are going to the technology space.[20] And other categories of PBC investment dollars also involve technology. For example, the finance sector, which includes both traditional financial institutions and financial technology and related platforms, accounted for nearly 25% of all PBC investment dollars. [21] Furthermore, Dorff et al. found that several of the top 10 PBC investors, in number of deals and in total amount invested, are early-stage accelerators and technology startup investors, such as Techstars and Google Ventures.[22] Plus, some of the recent notable PBCs are in the technology space. In February 2021, Veeva, a cloud-based business service, became the first public company to convert to a PBC.[23] And in 2020, the insurance-technology startup PBC, Lemonade, became the best IPO debut of the year.[24]

This Note explores why companies in the technology sector are more likely than those in other sectors to adopt the PBC form. First, investors could reasonably think that PBCs are more financially lucrative in the long term because consumers are demanding that companies deliver a social benefit and technology companies tend to be consumer-facing. Second, millennials and people from Generation Z ("Gen Z-ers") are driving the demand for socially conscious brands, and they are also the biggest consumers of and employees in technology. Third, companies may adopt the PBC structure to forestall regulation; and because technology is especially embroiled in regulation debates, such a technique could have an outsized effect on the industry. Finally, companies may use the PBC structure to entrench managers and avoid Revlon duties. This strategy may be especially salient in the technology industry, which stands to gain from long-term horizons.

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[20] Michael B. Dorff et al., *The Future or Fancy? An Empirical Study of Public Benefit Corporations*, 11 HARV. BUS. L. REV. 113, 145 (2021) (showing over $1 billion investment in information technology PBCs).
[21] *Id.* at 144 (stating that finance "includes fin-tech services and platforms, as well as more traditional lenders and insurers.").
[22] *Id.* at 146.
[23] *Veeva: A Public Benefit Corporation*, VEEVA, https://www.veeva.com/pbc/ (last visited Nov. 7, 2021).
[24] Wallace Witkowski, *Lemonade IPO: 5 Things to Know About the Online Insurer*, MARKETWATCH (July 2, 2020, 5:23 PM), https://www.marketwatch.com /story/lemonade-ipo-5-things-to-know-about-the-online-insurer-2020-07-01.

I. REASONS FOR TECHNOLOGY SECTOR ADOPTION OF THE PBC FORM

A. Taking Stakeholder Considerations into Account Is More Financially Lucrative

Taking stakeholder considerations into account can lead to a more financially lucrative business. Subsection 1 will show that PBCs may be able to realize the gain from stakeholder consideration more readily compared to a traditional corporation due to their ability to focus more on stakeholders rather than shareholder returns. Subsection 2 will explain that technology PBCs in particular may benefit financially from stakeholder consideration.

1. PBCs May Realize More Financial Gain than Traditional Corporations Due to Their Increased Ability to Consider Stakeholders

There is evidence that taking stakeholder considerations into account is more financially lucrative in the long term. Dorff et al. theorized that PBCs could earn greater profits than traditional corporations despite investing resources in social good for five reasons.[25]

First, some investors assume that a managerial team that must balance pecuniary interests with other stakeholder interests might engender behavior that maximizes long-term profits.[26] This assumption is based on the following four factors. 1) PBCs must consider all of their stakeholders, including their employees, when making decisions.[27] A PBC, therefore, might be more likely to invest in employee well-being, which studies suggest leads to increased long-term profitability.[28] While focusing on employee well-being is not necessarily directly tied to profit-maximization, the authors point out that an investor could believe that it is and thus be more likely to invest.[29] 2) A PBC will likely focus on customers' welfare.[30] Thus the PBC is likely to develop a customer base that is happy with the business, more likely to bring repeat business, and more likely to recommend the business to friends.[31] 3) Investors may believe that PBCs are less likely to violate the law.[32] A company that does

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[25] Dorff et al., *supra* note 20, at 124.
[26] *Id.*
[27] *See* § 362(a) (West) (stating that PBCs must consider the best interests of those materially affected by the corporation's conduct, which would include employees).
[28] Dorff et al., *supra* note 20, at 125.
[29] *Id.* at 126.
[30] *Id.* at 127.
[31] *Id.*
[32] *Id.*

not cut corners regarding, for example, safe working conditions is less likely to face large fines and is thus likely to be seen as a less risky investment.[33] While all corporations are supposed to abide by laws, PBCs are also legally required to consider the impact of their actions on stakeholders. Legal violations often, if not always, impact stakeholders, so PBCs in effect have a greater duty to comply with laws and regulations.[34] 4) PBCs may have less exposure to future environmental regulation.[35] Because PBCs must consider all who are materially affected by their conduct, they must consider their impact on the environment.[36] PBCs may therefore be more likely to go beyond currently required environmental regulations. Those regulations may become stricter over time, which means traditional corporations would have to increase compliance expenses, whereas PBCs would not.[37]

The second reason investors may expect greater profits from a PBC is that the company's status as a socially conscious company may "garner goodwill from important constituencies, which the compan[y] can translate into greater profits."[38] The PBC structure signals to consumers that the corporation values more than profits, which attracts customers and in turn creates growth. This idea is supported by Dorff et al.'s finding that most investor dollars are being funneled into consumer-facing industries.[39] Similarly, corporations are finding that their sustainable brands are driving their growth.[40] Almost half of Unilever's 40 brands are sustainable living brands, and those brands grew 50% faster than their other brands and accounted for 60% of the company's growth in 2016.[41]

Third, the PBC designation can help brands attract customers. The PBC structure will attract a subset of customers interested in a generally

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[33] *Id.* at 127–28.
[34] *Id.* at 128.
[35] *Id.*
[36] *Id.* at 128–29.
[37] *Id.* at 129.
[38] *Id.* at 125.
[39] *Id.* at 116 ("Moreover, we find that PBCs are being funded over a wide range of mostly consumer-focused industries . . . .").
[40] See RACHEL BARTON ET. AL., ACCENTURE, TO AFFINITY AND BEYOND: FROM ME TO WE, THE RISE OF THE PURPOSE-LED BRAND 9 (2018), https://www.accenture.com/_acnmedia/thought-leadership-assets/pdf/accenture-competitiveagility-gcpr-pov.pdf (finding that a majority of consumers said factors that attract them to a brand, beyond price and quality, include whether the company treats its employees well, believes in reducing plastics and improving the environment, and has ethical values).
[41] *How to Boost Business Growth through Brands with Purpose*, UNILEVER (Aug. 8, 2017), https://www.unilever.com/news/news-and-features/Feature-article/2017/how-to-boost-business-growth-through-brands-with-purpose.html.

responsible business, and it can attract more customers by selecting a public benefit that aligns with the consumers' values. Particularly relevant, one study found that 21% of consumers did not currently buy sustainable brands but wanted to do so.[42] One of the three factors that inhibited their adoption was that they do not believe what brands say about sustainability.[43] Here, the PBC structure can alleviate concerns about unreliable sustainability claims because of the requirements for the company to conduct itself responsibly, consider all stakeholders, and have a sustainable mission built into the structure of the company.[44]

Fourth, PBCs may also gain a financial advantage through subsidies from suppliers providing privileged terms, especially if the suppliers themselves are PBCs or socially conscious.[45] Likewise, socially conscious investors or other parties may invest in PBCs while providing the PBC with more favorable terms.[46] For example, the City of San Francisco provided benefit corporations with an advantage equivalent to a four percent discount on contract bids.[47]

Finally, Dorff et al. suggested that investors may be so hard-pressed for good investments that they are willing to overlook the weaknesses of the PBC form.[48] Venture capital ("VC") has multiplied, and venture capitalists are fighting for good deals. In 2010, there was a little over $10 billion in U.S. startup financing deals.[49] In 2021, that number hit $150 billion by July.[50] Meanwhile, the gains VC firms realize have dropped.[51] In this increasingly competitive VC environment lacking in high-growth potential, investors may be willing to overlook the

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[42] *Id.*
[43] *Id.*
[44] *See supra* notes 13–16 and accompanying text.
[45] Dorff et al., *supra* note 20, at 132.
[46] *Id.* at 131.
[47] S.F., CAL., ADMIN. CODE ch.14C, § 14C.3. (2013) (expired 2015).
[48] Dorff et al., *supra* note 20, at 124.
[49] Heather Somerville, *Tech Startup Financing Hits Records as Giant Funds Dwarf Venture Capitalists*, WALL ST. J. (Aug. 1, 2021, 7:14 PM), https://www.wsj.com/articles/tech-startup-financing-hits-records-as-giant-funds-dwarf-venture-capitalists-11627822800.
[50] *Id*.
[51] *See US Venture Capital Index Selected Benchmark Statistics*, CAMBRIDGE ASSOCIATES 11 (Dec. 31, 2017), https://www.cambridgeassociates.com/wpcontent/uploads/2018/05/WEB-2017-Q4-USVC-Benchmark-Book.pdf (showing that in the second half of the 1990s, VC returns averaged over 88% per year, but fell to 14.9% in the five years ending in 2017).

disadvantages of the PBC form because of the promise of the underlying business model.[52]

2. Stakeholder Consideration May Lead to Financial Gain Particularly in Technology PBCs

Investors may expect greater financial returns from technology PBCs in particular because technology is generally a consumer-facing industry, presents high-growth opportunities, and research already shows that corporate social responsibility ("CSR") spending is correlated with higher growth in the technology industry.[53] First, as noted above, Dorff et al. found that most of the PBC investment dollars were flowing into consumer-facing industries, including technology.[54] Consumer-facing companies involve customers directly interacting with a business service feature.[55] Many technology companies are consumer-facing because of society's increasing technological integration. It is now hard to imagine life without interactions with technology-based service features. Consumer-facing technology permeates our lives—from the computers on our desks and the phones in our pockets, the apps we order our coffee on, and the programs we use at work. Companies in technology may therefore be more likely to adopt the PBC form than those in industries with fewer consumer-facing options.

Second, technology PBCs may be attractive to investors who believe that any negative implications of the PBC legal form are overshadowed by potential returns on their investment, especially in the recent environment where too much cash was spent chasing few high-growth potential businesses.[56] Technology superstars like Apple, which has posted an average sales growth of 23% for almost two decades,[57] pose the extreme example of high-growth business potential. But outside even

[52] This phenomenon may be shifting as the economic downturn of 2022 has resulted in a 42% drop in VC funding globally. Lisa Du & Jane Zhang, *Venture Capital Deals Set for Worst Drop in Over Two Decades*, BLOOMBERG (Dec. 7, 2022, 7:00 AM), https://www.bloomberg.com/news/articles/2022-12-07/venture-capital-deals-set-for-worst-drop-in-over-two-decades?leadSource=uverify%20wall#xj4y7vzkg.
[53] Anthony Okafor et al., *Corporate Social Responsibility and Financial Performance: Evidence from U.S. Tech Firms*, 292 J. CLEANER PROD. 1, 8 (2021).
[54] *Id.* at 116.
[55] *Customer Facing*, TECHOPEDIA, https://www.techopedia.com/definition/23325/customer-facing (last visited Nov. 8, 2021).
[56] Dorff et al., *supra* note 20, at 124.
[57] Felix Richter, *Apple's Incredible 21st Century Growth*, STATISTA (Nov. 10, 2020), https://www.statista.com/chart/17862/apples-annual-revenue-by-operating-segment/.

the most notable examples of high-growth technology companies, the once-rare unicorn startups have become more commonplace. Unicorns, so called because of their perceived rarity, are private companies valued at over $1 billion. Many unicorn companies are in the technology space[58] and a startup is added to the unicorn list every three days.[59] While Silicon Valley initially drew adrenaline-junkie venture capitalists willing to make risky bets, now even conservative giant money-management firms participate in early-stage startup financing.[60] The advent of Amazon Web Services has allowed companies to cut operating expenses; people became more adept at building software and taking it to market; and the rise of software-as-a-service ushered in longer-lasting and more dependable revenue at the same profit margins.[61] As the risk and, consequently, the price of venture capital has come down, the world of technology startups has opened up to nontraditional technology investors like hedge funds and mutual funds.[62] This lower risk combined with good returns on technology companies can make investment in technology PBCs attractive in the current investing climate.

Third, technology company spending on corporate social responsibility has already been found to be correlated with higher profitability. One study found that in technology companies, firm profitability is positively correlated with higher spending on CSR.[63] The study, which assessed 97 technology firms on the S&P 500,[64] found that the more a technology firm spends on CSR, the greater the increase in firm value.[65] The study also found a positive impact on the firms' return on assets, return on equity, stock value, and revenue growth.[66] While increasing spending on CSR initiatives is not necessarily correlated with

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[58] *See The Complete List of Unicorn Companies,* CB INSIGHTS, https://www.cbinsights.com/research-unicorn-companies (last visited Dec. 20, 2021) (listing firms in software services, online education, fintech and e-commerce).

[59] Gené Teare, *Private Unicorn Board Now Above 600 Companies Valued at 2T,* CRUNCHBASE (June 29, 2020) https://news.crunchbase.com/news/private-unicorn-board-now-above-600-companies-valued-at-2t/

[60] Somerville, *supra* note 49 (noting that Fidelity Investments Inc. and Tiger Global Management are "among the top 10 investors in startups by dollar amount.").

[61] Alex Wilhelm, *Venture Capital Probably isn't Dead*, TECHCRUNCH (Aug. 6, 2021, 2:40 PM) https://techcrunch.com/2021/08/06/venture-capital-probably-isnt-dead/

[62] *Id.*

[63] Okafor et al., *supra* note 53, at 8.

[64] *Id.* at 9.

[65] *Id.* at 8.

[66] *Id.* at 9.

PBC adoption, PBC adoption could theoretically entail increased spending on CSR measures, like ensuring employee well-being, environmental initiatives, and customer satisfaction. Therefore, a corporation organized as a PBC will likely spend more money on CSR, which may lead to greater profits.

However, PBC adoption does not necessarily equate to stakeholder consideration. PBC legislation may be insufficient to prevent corporations from adopting the PBC form only for greenwashing.[67] For one, the Delaware code does not require companies to use an independent third-party standard to evaluate compliance with their goals,[68] so PBCs have some autonomy in presenting, and perhaps misrepresenting, their compliance to the public. Second, despite the reporting requirement, PBCs do not always comply.[69] Third, the only mechanism in place to ensure PBCs are properly balancing the public benefit they purport to promote is shareholder litigation.[70] But the only shareholders eligible to bring suits are those holding at least 2% of a corporation's outstanding shares.[71] The elements of the PBC therefore do not "provide sufficient assurance that firms that adopt it have incentives to pursue social missions effectively."[72] So if companies are using the PBC designation for greenwashing, the gains anticipated from decreased risk and increased employee well-being may not materialize.

B. Generational Demand and Technology Employee Activism

Millennials and Gen Z-ers value social conscientiousness. Subsection 1 will discuss how the demand for socially conscious businesses from consumers and employees of these generations is driving

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[67] Greenwashing is "the act or practice of making a product, policy, activity, etc. appear to be more environmentally friendly [. . .] than it really is." *Greenwashing*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/greenwashing (last visited Dec. 17, 2022).

[68] § 366 (West 2021) (listing no requirement for using a third-party standard, though providing that a PBC "*may* require" one (emphasis added)).

[69] *See* J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25, 34 (2015) (finding only 8% of benefit corporations produced a benefit report, though none of the BCs were incorporated in Delaware (Table A)).

[70] DEL. CODE ANN. tit. 8, § 367 (West 2021) (listing shareholders as the only parties in suits to enforce requirements of the statute).

[71] DEL. CODE ANN. tit. 8, § 367 (West 2021) ("or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of the corporation with a market value of at least $2,000,000 as of the date the action is instituted.").

[72] Ofer Eldar, *Designing Business Forms to Pursue Social Goals*, 106 VA. L. REV. 937, 967 (2020).

more corporations to adopt the PBC structure. Subsection 2 will explore how that dynamic is even more salient in the technology industry, where millennials and Gen Z-ers make up a significant portion of both consumers and employees. The subsection will conclude by showing that technology employees have the particular power to make demands on their employers.

1. Millenial and Gen-Z Demand for Social Responsibility is Driving PBC Adoption

As described in Section A.1., companies are finding that adoption of the public benefit structure may be a way to gain consumer trust and loyalty through PBC requirements for companies to conduct themselves responsibly and consider all constituents when making decisions.[73] Millennials in particular demand corporate responsibility, and one study found that Gen Z-ers are 72% more likely to buy from a company that contributes to social causes.[74] Similarly, a Nielsen study found that 80% of Gen Z-ers and 85% of millennials said it was "extremely" or "very" important that companies implement programs to improve the environment.[75] Another study found that 80% of millennials believe that business has the potential to address climate change and protect the environment.[76] Further, research shows that millennials are less interested in investment returns than previous generations and "are more interested in their investments reflecting their social values."[77] These demands are becoming more salient as the world is "undergoing the largest transfer of wealth in history: $24 trillion from baby boomers to millennials."[78] Corporations with the PBC designation can appeal to millennials and Gen Z-ers because they require companies to conduct themselves responsibly

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[73] DEL. CODE ANN. tit. 8, § 362(a) and § 365(a) (West 2021).

[74] *See Generation Influence: Gen Z Study Reveals a New Digital Paradigm*, BUSINESS WIRE (July 7, 2020, 1:00 AM), https://www.businesswire.com/news/home/20200706005543/en/Generation-Influence-Gen-Z-Study-Reveals-a-New-Digital-Paradigm (summarizing the findings of a study by The Center for Generational Kinetics).

[75] *Global Consumers Seek Companies that Care About Environmental Issues*, NIELSEN (Sep. 11, 2018), https://www.nielsen.com/eu/en/insights/article/2018/global-consumers-seek-companies-that-care-about-environmental-issues/.

[76] DELOITTE, BIG DEMANDS AND HIGH EXPECTATIONS: THE DELOITTE MILLENNIAL SURVEY 4 (Jan. 2014), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-dttl-2014-millennial-survey-report.pdf.

[77] Michal Barzuza et. al., *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1250 (2020).

[78] *Larry Fink's 2019 Letter to CEOs*, BLACK ROCK, https://www.blackrock.com/americas-offshore/en/2019-larry-fink-ceo-letter (last visited Oct 30, 2021).

and consider all constituents, as well as adopt public benefit missions that focus on issues that appeal to these generations, such as environmental initiatives.

Additionally, the PBC structure may attract millennial and Gen Z employees. Individuals who subscribe to the ideas about social responsibility listed above may be more likely to apply to companies that engage in corporate responsibility. Further, companies that score higher on corporate social performance attract more potential applicants,[79] and a little over half of the entrepreneurs forming PBCs stated that their prosocial mission made it easier to attract and retain applicants.[80]

2. Technology Companies are Vying for Millenial and Gen-Z Customers and Employees by Adopting the PBC Structure and Responding to Social Justice Activism

Demand for corporate social responsibility interacts with millennials and Gen Z-ers in three ways. First, millennials and Gen Z-ers make up technology's biggest consumer base. Second, they make up technology's employee base. Third, technology employees are better positioned than employees in other industries to demand change. Technology corporations may find it easier to attract socially minded consumers and employees from the millennial and Gen Z generations with a PBC structure. The PBCs may also use the designation as a signal that they will respond to employee demands.

Millennials and Gen Z-ers are the biggest technology consumers because together they comprise more than half of the U.S. population[81] and because they are more likely than older generations to use technology.[82] They are also more likely than older generations to value

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[79] Daniel B. Turban & Daniel W. Greening, *Corporate Social Performance and Organizational Attractiveness to Prospective Employees*, 40 THE ACAD. OF MGMT. J., 658, 666 (1997).

[80] Michael B. Dorff, *Why Public Benefit Corporations*, 42 DEL. J. CORP. L. 77, 93 (2017).

[81] William Frey, Now, *More than Half of Americans are Millennials or Younger*, THE BROOKINGS INST., (July 30, 2020), https://www.brookings.edu/blog/the-avenue/2020/07/30/now-more-than-half-of-americans-are-millennials-or-younger/ (noting that more than half of Americans are now millennials or Gen Z-ers).

[82] Emily Vogels, *Millennials Stand Out for Their Technology Use, But Older Generations Also Embrace Digital Life*, PEW RSCH. CTR. (Sep. 9, 2019), https://www.pewresearch.org/fact-tank/2019/09/09/us-generations-technology-use/ (noting that 93% of millennials use a smartphone and 86% are on social media, which is higher than the rates for older generations); Kim Parker & Ruth Igielnik, *On the Cusp of Adulthood and Facing an Uncertain Future: What We*

purpose-driven brands.[83] Demand for socially responsible business activities is going to have an outsized effect on industries, like technology, where millennials and Gen Z-ers make up the bulk of the consumers.[84] Thus, technology companies may be more likely to adopt the PBC structure because it signals a commitment to social responsibility and distinguishes them from technology companies that have a standard corporate form.

Similarly, millennials and Gen Z-ers also make up the bulk of the technology industry's potential employees. A 2019 analysis of UN population data predicted that by 2020, millennials and Gen Z-ers would make up almost 60% of the workforce.[85] This mass of individuals is highly interested in working in the technology industry. The online job application website Glassdoor found that the majority of job applications Gen Z-ers complete are for the technology industry.[86] Because these socially conscious generations comprise the technology industry's largest number of employees and employee pools, technology companies are likely to advertise their socially conscious initiatives and practices in order to attract these applicants. PBCs may have an advantage over non-PBC companies by providing some guarantee of their claims regarding social responsibility through the PBC social benefit requirements.

Additionally, technology workers have a unique ability to pressure their employers to pursue more socially beneficial actions.[87] First,

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Know About Gen Z So Far, PEW RSCH. CTR. (May 14, 2020), https://www.pewresearch.org/social-trends/2020/05/14/on-the-cusp-of-adulthood-and-facing-an-uncertain-future-what-we-know-about-gen-z-so-far-2/ (noting that of Gen Z-ers age 13 to 17, 95% said they have access to a smartphone and 97% said they use one of the major online platforms).

[83] *See* Barton et. al, *supra* note 40 (finding that 60% of millennials and Gen Z-ers believe companies should take a stand on social issues, compared to only about 50% of Gen X-ers and Boomers).

[84] *See supra* notes 81–82 and accompanying text.

[85] *See* MANPOWER GROUP, MILLENNIAL CAREERS: 2020 VISION 3 https://www.manpowergroup.com/wps/wcm/connect/660ebf65-144c-489e-975c-9f838294c237/MillennialsPaper1_2020Vision_lo.pdf?MOD=AJPERES (2016) (showing the data predicts that by 2020, millennials and Gen Z will make up 35% and 24% of the total global workforce, respectively).

[86] *See* Amanda Stansell, *The Next Generation of Talent: Where Gen Z Wants to Work*, GLASS DOOR (Feb. 20, 2019). https://www.glassdoor.com/research/gen-z-workers/ (finding that the top job Gen Z-ers applied for during one period was software engineer, comprising a full 19% of the applications, while the second most popular job application was for software developer, at 2% of applications).

[87] *See* Anat Alon-Beck, *Times They Are A-Changin': When Tech Employees Revolt!*, 80 MD. L. REV. 120, 135 (2021) (stating that technology employees are

technology workers are generally highly educated, trained, and paid.[88] Therefore, these employees have more bargaining power than similarly situated employees that are less expensive to replace.[89] Second, technology companies are engaged in a war for talent.[90] The lightning speed of technological innovation means that a new startup can threaten even a well-funded, innovative company.[91] Thus, "the key to maintaining a sustainable advantage in today's economy is talent."[92] Companies may be more likely to accede to employee demands in order to retain talent.

The power of technology employees and their willingness to use that power to push their employers towards social good is already playing out. Kickstarter employees explained that they unionized so they will be able to push back when management harms the community.[93] Microsoft and Salesforce employees protested their respective employers' business relationship with ICE.[94] Google employees pressured the company to abandon a contract that would use Google's AI technology to improve drone strikes on the battlefield.[95] And Amazon employees voiced concerns about facial recognition software being sold to police departments.[96]

Granted, the results of such activism are mixed. Microsoft, Salesforce, and Amazon did not accede to employee demands.[97] But Google did relent to the employee demands regarding the use of the AI technology to improve drone strikes.[98] A PBC structure may benefit the

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"leading by activism" and then describing the ways technology employees differ from employees in other industries).

[88] *Id.* at 136.

[89] *Id.*

[90] *Id.*

[91] Atta Tarki, *How Tech's War for Talent Will Forever Redefine Business Strategy*, FORBES (Feb. 22, 2021, 8:00 AM) https://www.forbes.com/sites/forbesbusinesscouncil/2021/02/22/how-techs-trillion-dollar-war-for-talent-will-forever-redefine-business-strategy/?sh=74cb52a32498.

[92] *Id.*

[93] April Glaser, *Kickstarter Workers Vote to Form First Union in Tech Industry*, NBC NEWS (Feb. 18, 2020, 11:07 AM), https://www.nbcnews.com/tech/tech-news/kickstarter-workers-vote-form-first-union-tech-industryn1138006.

[94] Matt Lavietes, *Silicon Valley Firms Are Facing a Rise in Anger From a New Source: Their Own Employees*, CNBC (July 8, 2018, 11:58 AM), https://www.cnbc.com/2018/07/05/tech-ceos-are-losing-unilateral-power-rapidly-in-a-newunexpected-way.html.

[95] *Id.*

[96] *Id.*

[97] *See id.* (stating that Microsoft denied ICE uses its software at the border and that Salesforce opted to donate $1 million to families affected by the immigration policies but did not disrupt its relationship with ICE).

[98] *Id.*

corporation in terms of employee activism in two ways. First, the PBC designation may signal to employees that their voices will be listened to regarding social issues, thereby attracting or retaining more employees. Second, the PBC designation may signal to employees that the corporation is already engaged in social-benefit activities, thereby reducing the need for employees to pressure the executives to act on social issues.

However, a company does not necessarily need to adopt the PBC structure to attract millennial and Gen Z consumers and employees. Companies can appeal to these generations without sacrificing the traditional corporate structure. B Corp certification, a third-party designation certifying that a corporation meets stringent standards for categories such as employee treatment and supply chain practices,[99] is a good alternative to signal a commitment to stakeholders. One empirical study found that companies that become B Corp certified experience increased growth and that growth increases over time.[100] Plus, B Corps in the UK are growing 28 times faster than other firms.[101] Such numbers indicate that adopting the PBC form may be unnecessary to gain the favor of millennials and Gen Z-ers.

C. Technology Companies May Seek to Forestall Regulation Through PBC Adoption

Companies generally abhor regulation but showing some internal regulation may be one method by which companies attempt to delay governmental regulation. Subsection 1 will briefly explain why the PBC structure may provide that internal regulation. Subsection 2 will explore how big tech, and consequently the technology industry, are at greater risk for regulation and thus are more incentivized to adopt such a strategy.

1. Widespread Adoption of the PBC Structure May Forestall Greater Regulation by Displaying Self-Regulation

Corporations often disdain regulation, which imposes restrictions, increases oversight, and makes it harder to make money. Global socioeconomic changes are possibly ushering in a new era of increasing regulation. The imminence of the climate crisis, the economic turmoil

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[99] B LAB, *About B Corp Certification*, https://www.bcorporation.net/en-us/certification (last visited Oct. 28, 2022).
[100] *See* Valerie Paelman & Heidi Vander Bauwhede*, The Impact of B Corp Certification on Growth*, SUSTAINABILITY*,* June 2021, at 13 (Finding increased growth for European certified B Corps on a matched sample of 258 firms).
[101] *B Corp Analysis Reveals Purpose-Led Businesses Grow 28 Times Faster than National Average*, SUSTAINABLE BRANDS, (March 1, 2018, 7:00 AM), https://sustainablebrands.com/read/business-case/b-corp-analysis-reveals-purpose-led-businesses-grow-28-times-faster-than-national-average.

wrought by the COVID-19 pandemic, and the increasing awareness of inequality in Western economies may provide fertile ground for new policies to germinate. Some business leaders and politicians are calling for greater environmental social governance ("ESG") regulation on corporations. Elizabeth Warren introduced the Accountable Capitalism Act, which would require very large corporations to consider all corporate stakeholders.[102] And in 2021 the SEC Chair said he wants mandatory disclosure on climate risk by the end of the year.[103] Corporations voluntarily undertaking ESG measures "may be an attempt to forestall regulation at a time when corporate practice is under scrutiny; 'No need to regulate us, we're already doing what you want us to.'"[104] Widespread adoption of a PBC structure may provide enough accountability or an illusion of accountability to satisfy pro-regulation critics.[105]

2. Technology Companies are Currently a Big Target for Increased Regulation and May Be More Likely to Adopt the PBC Structure to Forestall Regulation

With technology firms making up 32% of the total market capitalization, any trend in corporate law is going to have an outsized effect on the technology industry.[106] Therefore, any general push to forestall regulation will show a pronounced push from technology firms, which could translate into a higher percentage of technology PBC structures. While the technology giants have been the primary challengers to regulation, small tech also benefits from the lack of regulation. As long

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[102] *Accountable Capitalism Act*, ELIZABETH WARREN, https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%CC20Act%20One-Pager.pdf (last visited Nov. 1, 2021); Elizabeth Warren, *Companies Shouldn't Be Accountable Only to Shareholders*, WALL STREET J. (August 14, 2018, 7:01 PM), https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687.

[103] Bob Pisani, *SEC Chair Gensler says investors want mandatory disclosure on climate risks*, CNBC (July 28, 2021), https://www.cnbc.com/2021/07/28/sec-chair-gensler-says-investors-want-mandatory-disclosure-on-climate-risks.html.

[104] George Milano, *The Return on Purpose: Before and During a Crisis*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Nov. 9, 2020), https://corpgov.law.harvard.edu/2020/11/09/the-return-on-purpose-before-and-during-a-crisis/.

[105] Eldar, *supra* note 72, at 940.

[106] *See* Okafor et al., *supra* note 53, at 2. ("In the U.S, technology firms account for 32% of the market capitalization of listed firms on the S&P 500 Index, and they represent the largest components of the Nasdaq Composite and Nasdaq-100 indices."); *see also id.* at 4 (presenting a figure that shows the next biggest industry per market capitalization is health care, at 14%).

as big tech is unencumbered by restrictions, small tech can take advantage of the same lax rules.[107]

The idea of voluntary self-regulation in the technology industry may be laughable to anyone who has witnessed Facebook CEO Mark Zuckerberg testifying before Congress.[108] For the most part, technology companies have little regulatory oversight.[109] For example, in the United States, technology companies have almost unlimited ability to gather and use personal data.[110] Further, they are shielded from a lot of liability by the Digital Millennium Copyright Act, which provides immunity for Internet providers when third parties upload infringing material onto their platforms.[111] In their early days, now-ubiquitous start-ups took advantage of loopholes to avoid costs and gain market share.[112] For example,

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[107] *But see* Marietje Schaake, *Big Tech Calls for 'Regulation' But is Fuzzy on the Details*, FINANCIAL TIMES (July 26, 2021), https://www.ft.com/content/a0a7f8de-f365-4e4e-a755-284df91c6e3a ("Small and medium-sized enterprises . . . often have a harder time competing or complying, especially when these measures can carry significant costs. Regulatory capture not only erodes trust in legitimate policymaking but erects high barriers to entry, further cementing Big Tech's dominance.").

[108] *See e.g*. Kurt Wagner, *Live Updates from Mark Zuckerberg's Testimony to Congress*, VOX (Apr. 10, 2018 7:30 PM), https://www.vox.com/2018/4/10/17216734/live-facebook-mark-zuckerberg-testimony-senate-hearing-data (reporting on Zuckerberg's testimony to Congress regarding the Cambridge Analytica breach); Lisa Eadicicco, *Lawmakers Just Grilled Mark Zuckerberg About His Company's Big Plan to Upend the Way We Send Money Around the World – But the Questions He Didn't Answer Dominated the Conversation, Business Insider* (Oct. 23, 2019, 3:46 AM), https://www.businessinsider.com/facebook-ceo-mark-zuckerberg-testifies-congress-libra-cryptocurrency-2019-10 (covering Zuckerberg's testimony to the House Financial Services Committee regarding Libra, Facebook's digital currency).

[109] *See*, *e.g.*, David Watts, *How Big Tech Designs its Own Rules of Ethics to Avoid Scrutiny and Accountability*, THE CONVERSATION (Mar. 28, 2019, 1:18 AM), https://theconversation.com/how-big-tech-designs-its-own-rules-of-ethics-to-avoid-scrutiny-and-accountability-113457 (explaining that one of Al Gore's five principles for managing the "global information superhighway" was a "flexible regulatory framework" that in practice created a framework of self-regulation).

[110] *See id.* ("[Big tech] does not want its unlimited ability to harvest personal information to be restricted . . . .").

[111] *Cf.* David Pierson & Tracey Lien, *Silicon Valley Played by a Different Set of Rules. Facebook's Crisis Could Put an End to That*, L.A. TIMES (Mar. 23, 2018 3:00 AM), https://www.latimes.com/business/technology/la-fi-tn-silicon-valley-reckoning-20180323-story.html (comparing the favorable legal treatment of technology companies relative to traditional publishers).

[112] *Id.*

Amazon evaded sales taxes; Uber and Lyft operated without obtaining transportation licenses; and Airbnb avoided occupancy taxes.[113]

Notwithstanding the subversive tactics mentioned above, some technology companies have adopted data ethics policies to appear compliant with wider trends and regulations.[114] These companies do this by "appropriating the virtues of ethics but . . . emptying them of content or consequence."[115] For example, Google adopted ethics for its artificial intelligence program that are vague and virtually unmeasurable, such as "Be socially beneficial."[116] Similarly, awash in scandal, Facebook instituted an Oversight Board to "help Facebook answer some of the most difficult questions around freedom of expression online: what to take down, what to leave up, and why."[117] However, some experts commented that the creation of the board seemed like a stunt to avoid regulation.[118] And though the Board strongly reprimanded Facebook in its first set of quarterly reports,[119] Facebook is not required to comply with its recommendations, and there are no legal ramifications for failure to impress the Board.[120] This means Facebook can point its critics to this non-governmental regulation method while quietly pushing for the recusal of the top regulator in the ongoing antitrust lawsuit against the technology giant.[121]

Despite these self-regulatory efforts, governmental regulation is starting to come for technology, and it is in part welcomed by technology leaders themselves.[122] The Senate cracked down on sites that facilitate

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[113] *Id.*

[114] *See id.* ("Data ethics is one of the means [big tech] has developed to fight regulation.").

[115] *Id.*

[116] *Artificial Intelligence at Google: Our Principles*, GOOGLE, https://ai.google/principles/ (last visited Dec. 19, 2021).

[117] OVERSIGHT BD., oversightboard.com (last visited Nov. 1, 2021).

[118] Nick Huber, *Content Moderation Dilemma Tests Big Tech's Reach*, FIN. TIMES (Dec. 3, 2019, 11:30 PM), https://www.ft.com/content/70ecbf18-f972-11e9-a354-36acbbb0d9b6.

[119] Cat Zakrzewski, *Facebook Oversight Board Sternly Criticizes the Company's Collaboration in First Transparency Reports*, WASH. POST (Oct. 21, 2021, 8:02 AM), https://www.washingtonpost.com/technology/2021/10/21/facebook-oversight-board-transparency/.

[120] *Id.*

[121] Lauren Feiner, *Facebook Asks for FTC Chair Lina Khan to Be Recused From Its Antitrust Case*, CNBC (July 14, 2021, 12:02 PM), https://www.cnbc.com/2021/07/14/facebook-asks-for-ftc-chair-lina-khan-to-be-recused-from-its-antitrust-case.html.

[122] *See, e.g.,* Marietje Schaake, *Big Tech Calls for 'Regulation' But Is Fuzzy on the Details*, FIN. TIMES (July 26, 2021, 7:48 AM), https://www.ft.com/

prostitution by passing the Fight Online Sex Trafficking Act.[123] In response, Craigslist removed its personals section,[124] and Reddit implemented new rules banning transactions involving physical sexual contact.[125] Most recently, the federal judge overseeing the FTC's antitrust suit against Facebook denied Facebook's motion to dismiss the claim,[126] setting the stage for regulatory action against Facebook's alleged monopolization of personal social networking.

PBC adoption could be another tool for technology to use in its strategy of adopting informal regulation to forestall formal regulation. As described in the introduction, the PBC statute requires the corporation to consider all stakeholders when making decisions and to pursue a public benefit. Plus, the statute provides for some accountability through the use of reporting requirements and the allowance of shareholder litigation. Such accountability mechanisms, though possibly inadequate, provide more consequences than, for example, Facebook's Oversight Board. Therefore, PBC adoption may satisfy both lay critics and federal regulators.

Similarly, PBC adoptions could allow companies to appear socially conscious without taking significant substantive action. In this way, the PBC form could both give the appearance of some internal regulation and help pump the brakes on outside regulation. A PBC structure could easily just be smoke and mirrors if a company implemented it for the masquerade of self-regulation. As discussed in Section A.2., the reporting requirement is rarely complied with or enforced.[127] And a company could specify a public benefit that is unrelated to the issues that are generally pushed for enforcement in technology. For example, in its certificate of incorporation, the insurance company Lemonade stated its public benefit "is to harness novel business models, technologies and private-nonprofit partnerships to deliver insurance products where charitable giving is a core feature, for the benefit of communities and their

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content/a0a7f8de-f365-4e4e-a755-284df91c6e3a ("'There is no question in my mind that artificial intelligence needs to be regulated,' Alphabet's [CEO Sundar] Pichai said."); *cf.* Pierson & Lien, *supra* note 111("'I actually am not sure we shouldn't be regulated,' [Zuckerberg] said.").

[123] Pierson & Lien, *supra* note 111.

[124] *Id.*

[125] *New Addition to Site-Wide Rules Regarding the Use of Reddit to Conduct Transactions*, REDDIT, https://www.reddit.com/r/announcements/comments/863xcj/new_addition_to_sitewide_rules_regarding_the_use/ (last visited Nov. 2, 2021).

[126] FTC v. Facebook, Inc., 581 F. Supp. 3d 34, 40 (D.D.C. 2022).

[127] Haskell Murray, *supra* note 69.

common causes."[128] Essentially, its public benefit is to donate to charity. Technology companies could implement a similarly vague public benefit or one that does not address the issues associated with technology.

The other downfall of implementing a PBC structure to feign self-regulation is that the structure lacks accountability. Only stockholders who individually or collectively own at least 2% of the company can bring suit,[129] and in states that follow the Model PBC legislation, the only remedy available is injunctive relief.[130] The weak accountability of the PBC structure means that it may not give an adequate appearance of self-regulation. But the surging popularity of investments in PBCs and consumer purchases from PBCs indicate at least some belief in the idea that PBCs are actually pursuing socially beneficial strategies.

D. PBC Adoption as a Way to Avoid Revlon Duties

Companies may want to adopt the PBC structure in order to avoid *Revlon* duties. Section 1 will explain the legal basis for the PBC subversion of *Revlon* duties. Section 2 will explore the idea that technology companies are more likely to want to avoid *Revlon* duties in order to maintain long-term horizons to maximize research and technological development.

1. PBCs Are Not Subject to Revlon Duties

Where PBCs are involved, selling a corporation may set up a situation where the interests of stakeholders and shareholders conflict. Under a traditional corporate structure, when the sale of a company is inevitable, the board of directors has a duty to maximize shareholder benefit when the company is eventually sold.[131] In contrast to traditional *Revlon* duties, PBCs have "the legal authority to reject buy-out offers that would harm their social mission or non-shareholder constituencies . . . by

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[128] Lemonade, Inc., Amendment No. 1 to Registration Statement Under the Securities Act of 1933 (Form S-1/A) Exhibit 3.1 (July 1, 2020).

[129] DEL. CODE ANN. tit. 8, § 367 (West 2021) ("or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of the corporation with a market value of at least $2,000,000 as of the date the action is instituted.").

[130] MODEL BENEFIT CORP. LEGIS. § 305(b) (B LAB 2017) ("[a] benefit corporation shall not be liable for monetary damages.").

[131] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("The duty of the board [changes] from the preservation of Revlon as a corporation entity to the maximization of the company's value at a sale for the stockholders' benefit.").

requiring them to balance these interests with those of shareholders."[132] In fact, the board of directors must "choose the best sale partner based on a consideration of *all* corporate constituencies."[133] Therefore, PBCs have room to consider all stakeholders and are not bound by the *Revlon* duties to sell at the highest price. Granted, shareholders might pressure the board to sell at the highest price despite the social mission, but, theoretically, the threat of accountability would prevent such an action.

Therefore, in the world of *Revlon* duties, corporations are more likely to be geared toward short-term gains rather than long-term horizons.[134] The focus on short-term gains is inconsistent with managers' ability to focus on practices necessary for long-term growth, such as "develop[ing] new products and services, bring[ing] them to market, and deliver[ing] values to consumers."[135] But PBCs can skirt *Revlon* duties, "providing breathing room to corporate executives from short-term pressures" so they can make business decisions aimed at long-term growth.[136]

2. Technology Companies May Be Particularly Interested in Avoiding Revlon Duties in Order to Maximize the R&D Necessary to Succeed in the Technology Industry

Technology in particular can benefit from long-term time horizons, which leads to a longer period of research and development ("R&D"). As Larry Page explained when addressing the benefit of the dual-class share ("DCS") structure, "[t]echnology products often require significant investment over many years to fulfill their potential. For example, it took over three years just to ship our first Android handset, and then another three years on top of that before the operating system truly reached critical mass."[137] Similarly, Goshen and Hamdani posit that "control matters because business ideas take time to implement."[138]

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[132] Dorff, *supra* note 80, at 93; *see also* DEL. CODE ANN. tit. 8, § 365 (West 2021) (requiring boards to balance the pecuniary interests of stockholders with other stakeholders and the public benefit identified in the certificate of incorporation).
[133] Strine, *supra* note 2, at 246.
[134] Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 272
(2012) (explaining that managers may act short-sightedly in order to prevent takeovers).
[135] Strine, *supra* note 2, at 251.
[136] *Id.*
[137] Larry Page & Sergey Brin, *2011 Founders' Letter,* ALPHABET (Apr. 2012), https://abc.xyz/investor/founders-letters/2011/.
[138] Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 565 (2016).

Because a corporation not beholden to *Revlon* duties has a longer-term horizon, it can invest more in R&D.[139] This idea is bolstered by research finding that firms with strong takeover defenses spend more on R&D.[140] Standard corporations, on the other hand, are often hesitant to trade short-term gain for the long-term benefit of R&D.[141]

However, many technology companies do not have to worry about *Revlon* duties because they have a DCS structure, which means the founders retain control of the company. In a DCS structure, the corporation typically issues stock with two or more classes of differentiated voting rights. The founders retain multiple-voting shares, whereas other investors receive the traditional one-stock-one-vote share.[142] The structure allows the founders to retain control with less than fifty percent of the ownership stake in the company.[143]

As described in Section A.2., the rise of Amazon Web Services and other shock factors in the technology sector lowered the risk of investing in technology companies and caused a drop in price for private equity capital.[144] As Aggarwal et al. note, "[t]he more outside opportunities founders have and the less money they need to operate the business, the greater their bargaining power when raising capital."[145] Technology companies therefore often retain more bargaining power, which they use to negotiate for the DCS structure.[146] Technology companies can often continue to use cloud computing services for years

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[139] *But see* Onur Arugaslan et al., *On the Decision to Go Public with Dual Class Stock*, 16 J. CORP. FIN. 170, 174 (2010) (finding in an empirical study that compared to single-class firms, dual-class firms, which are also not subject to hostile takeovers, do not invest more in R&D after their IPO over either a one-year or three-year horizon).

[140] William N. Pugh et al., *Antitakeover Charter Amendments: Effects on Corporate Decisions*, 15 J. FIN. RES. 57, 65–66 (1992) (finding evidence that R&D expenditures in firms increases in firms that pass antitakeover amendments).

[141] *See* Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 580 (2006) (arguing that a corporation can bolster short-term earnings by, inter alia, cutting R&D expenses).

[142] Min Yan, *A Control-Accountability Analysis of Dual Class Share (DCS) Structures*, 45 DEL. J. CORP. L. 1, 2 (2020).

[143] *Id.*

[144] Wilhelm, *supra* note 61.

[145] Dhruv Aggarwal et al., *The Rise of Dual-Class Stock IPOs* 33 (Duke L. Sch. Pub. L. & Legal Theory Series Working Paper No. 2020-78, 2021), https://ssrn.com/abstract=3690670.

[146] *See id.* at 16 (explaining that the decreased cost of VC money increases the bargaining power of founders and allows them to "maintain their control for the rest of the life of the firm.").

after the early financing stage, which maintains the decreased need for capital into the period when corporations are securing their governance structure.[147] This allows these corporations to maintain their bargaining power to secure the DCS structure.[148]

Google first popularized the DCS structure by going public with it in 2004 to keep the founding group in control.[149] As co-founder Larry Page put it, "[n]ew investors will fully share in Google's long-term economic future but will have little ability to influence its strategic decisions through their voting rights."[150] The structure is particularly popular with technology companies compared to other industries. In 2019, thirteen of the thirty-six technology IPOs (36.1%) that went public utilized the DCS structure, while twelve of the seventy-six non-technology IPOs (15.8%) did.[151] The popularity of the DCS structure helps explain why technology companies without this structure would be interested in adopting the PBC structure to avoid *Revlon* duties.

Companies that have a DCS structure share PBCs' ability to focus on a long-term plan: "Supporters of DCS structures view markets and investors as essentially myopic, where multiple-voting rights can help controllers overcome the temptation of short-termism and thereby create long-term value for both the firm and the society."[152] This is in large part because these companies are unlikely to experience a hostile takeover,[153] so the corporations do not need to worry about a hostile takeover as the result of a short-term drop in share price in exchange for a long-term growth plan. Plus, founders who retain control under the DCS structure do not need to be concerned that they might be fired if their short-term performance is inconsistent with an investor's expectations.[154] However, there will still be founders who lose control in the VC process. Those founders may be able to achieve the same type of long-term control

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[147] *Id.* at 17.
[148] *Id.*
[149] *See* Dorothy S. Lund, *Nonvoting Shares and Efficient Corporate Governance*, 71 STAN. L. REV. 687, 704 (2019) (describing Google's early use of the DCS structure).
[150] Larry Page & Sergey Brin, *2004 Founders' IPO Letter*, ALPHABET, https://perma.cc/REE7-RA9K (archived Jan. 26, 2019).
[151] Yan, *supra* note 142, at 12.
[152] *Id.* at 3.
[153] *See id.* ("With multiple-voting shares in hand, these firms are unlikely to be a takeover target because DCS structures a very successful takeover defense.").
[154] *See* Goshen & Hamdani, *supra* note 130, at 582–83 (arguing that agency costs increase the importance investors attach to control, which allows them to mitigate agency costs, such as by ousting the founder).

as those who retain that control through the DCS structure by adopting the PBC structure.

But PBC adoption may be unnecessary in the takeover context for four reasons. First, *Revlon* duties do not inhibit a board from taking a long-term strategy that involves substantial R&D expense. As the court explained in *Paramount Communications, Inc. v. Time Inc.*, "the fiduciary duty to manage a corporate enterprise includes the selection of a time frame for achievement of corporate goals . . . . Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy."[155] But while directors are not legally obliged to pursue short-term profits, shareholders interested in short-term profits could oust them from the board. This fear would help explain the unwillingness of most directors to risk even minor short-term gain for long-term R&D expense.[156] Second, boards also have substantial leeway under the business judgment rule to assess sale offers. *Revlon* conveniently compared two cash sale offers,[157] but where an offer is more nuanced, such as in a stock-for-stock offering, the board will likely have more deference from the court to assess the terms of the sale.

Third, while PBCs may not be subject to *Revlon* duties, the board may still feel pressure from stockholders to sell to the highest bidder. Typically, stockholders in a company being sold lack the long-term interest to advocate for more than the highest price. Theoretically, shareholders in a PBC would support the inclusion of stakeholder interest in the sale context. But because shareholders who own 2% of the corporation are the only ones who can bring suit for violating the requirement to consider stakeholders,[158] it is possible that shareholders

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[155] Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1154 (Del. 1989).

[156] *See* William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 703 n.154 (2010) ("[O]nly fifty-nine percent of [a] group of executives would approve a high net present value project if it entailed missing earnings by $0.10.") (citing John R. Graham et al., *Value Destruction and Financial Reporting Decisions* 9-10 (Sept. 6, 2006) (unpublished manuscript), available at http:// ssrn.com/abstract=871215 (on file with the *Columbia Law Review*)).

[157] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 178–179 (Del. 1986) (stating that one offer was "$56 cash per share" before being raised to $57.25 and that the other party made "a cash offer of $58 per share.").

[158] DEL. CODE ANN. tit. 8, § 367 (West 2021) ("[O]r, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of the corporation with a market value of at least $2,000,000 as of the date the action is instituted.").

may stay silent while the board searches for the highest bidder, regardless of the cost to the relevant stakeholders. While an ESG fund could theoretically sue to force the PBC company to consider its stakeholders, the state of incorporation would impact that decision. In states that follow the Model PBC legislation, the plaintiff can seek only injunctive relief,[159] and such a suit would likely not be cost-efficient. However, the Delaware PBC statute does not restrict liability to purely injunctive relief, so an ESG fund may have more incentive to enforce the provision to consider all stakeholders in a sale. Finally, a standard corporation does not have to adopt the PBC structure just to avoid *Revlon* duties. It could avoid those duties by incorporating in a state that does not follow *Revlon*, such as Wisconsin.[160]

CONCLUSION

Consumers, employees, and investors are driving the demand for socially responsible companies. Technology companies in particular have been eager to adopt the PBC structure for four reasons. First, taking stakeholder considerations into account may be more financially lucrative in the long term, especially in technology, which tends to be a consumer-facing industry and has more high-growth opportunities than other industries. Second, millennials and Gen Z-ers are driving the demand for socially responsible companies, and they make up technology's consumer and employee base. Technology companies may adopt the PBC structure in order to attract and retain these consumers and employees. Third, technology is a target for increasing regulation, so PBC adoption may be an attempt to forestall that regulation by providing the appearance of self-regulation. Finally, technology companies may adopt the PBC structure to avoid *Revlon* duties and pursue long-term strategies involving substantial R&D, which is especially necessary for growth in the technology space.

However, there are two primary reasons why this adoption may be ineffective or unnecessary. First, the accountability structure may be too weak to protect against greenwashing or provide substantial consequences for failure to consider all stakeholder needs. Second, PBC adoption may be unnecessary because corporations have substantial leeway under the business judgment rule to pursue corporate strategies.

While there are reasons PBCs are unnecessary or ineffective, their popularity in the technology space is an encouraging sign that those in the industry are moving toward being good global citizens.

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159 MODEL BENEFIT CORP. LEGIS. § 305(b) (B LAB 2017).

160 WIS. STAT. § 180.0827 (LEXIS through 2022 Sess.) (granting directors and officers of Wisconsin corporations the ability to consider stakeholders beyond shareholders when exercising their duties).