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Mary Katherine Kington

INTRODUCTION

As our economy becomes more and more globalized, corporations are often pressured to choose between "doing good" in the community and "doing well" for shareholders by maximizing profit. In the coming months, Kentucky corporations may be able to incorporate as a new type of corporate legal entity that does not require choosing between these two goals. Bi-partisan support has been indicated for Bill Request 225 ("B.R. 225"), which would create a new section of Subtitle 11 of KRS Chapter 271B and amend Kentucky statutes relating to corporations. These changes would allow corporations to organize as public benefit corporations ("PBCs").

A PBC is a for-profit corporation that is also held accountable for contributing to the public good and operating in a "responsible and sustainable manner." Socially responsible companies are on the rise in today's business environment as younger entrepreneurs enter the corporate world. A growing percentage of businesses are voluntarily giving back to the community in meaningful ways by pursuing various public interest goals. These efforts range from reducing the company's carbon footprint to supporting local art and education initiatives. Public interest goals, however, are often incompatible with the corporation's responsibility to maximize shareholder profits. This creates tension for the board of directors as

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1 University of Kentucky College of Law, J.D. expected May 2016.
2 H.B. Request 225, 2016 Gen. Assemb., Reg. Sess. (Ky. 2016) (prefiled), http://www.lrc.ky.gov/record/16RS/HB50.htm. This bill has been prefilled for the 2016 General Assembly. The bill will not have a numerical "house bill" designation until it is announced on the floor of the Kentucky House of Representatives during the 2016 session. As of the publication of this note, the 2016 session has not yet begun.
4 Id.
5 Id. § 2(23).
they decide what percentage of profits should be contributed to the community as opposed to the company's bottom line.

Incorporating as a PBC allows a corporation to legally seek a dual mission of maximizing shareholder profits while simultaneously pursuing public interest goals identified in the corporation's articles of incorporation. On its face, the idea of a PBC may seem difficult to argue with, but the devil, as always, is in the details. This Note discusses the cost-benefit analysis that must be performed by shareholders and directors before deciding to organize or reorganize a corporation as a PBC under Kentucky's newly proposed legal structure.

First, the number of corporations that can realistically use the legislation to organize as a PBC may be limited. A newly formed business that registers as a PBC must be able to attract a seemingly rare group of socially responsible investors who are willing to sacrifice higher shareholder profits in exchange for increased contributions to the public good. Because the PBC concept is so new, it is unclear whether this structure will provide corporations with better access to capital or whether it will detrimentally narrow the investor pool. Existing for-profit, mission-driven corporations face a similar hurdle. The corporations that wish to reorganize as PBCs must receive approval from ninety percent of existing shareholders before adopting the new PBC structure. The supermajority shareholder vote requirement could deter many existing corporations from even initiating the process of becoming a PBC.

Second, if a company is able to attract the investor or shareholder support to organize as a PBC, the board of directors will be immediately torn between the interests of shareholders and stakeholders. These two masters have interests that are often conflicting, which is likely to cause tension as directors struggle to find the right balance between them.

Finally, corporations considering PBC status must evaluate whether becoming a PBC will actually result in positive market differentiation, increased customer loyalty, and improved public trust. It remains to be seen whether the benefits that supposedly accrue to PBCs are, in fact, realistic and substantial enough to offset the additional accountability and transparency requirements in the PBC statute. Educating the consumer base about what a PBC is and how a PBC benefits consumers and the environment is central to realizing the anticipated benefits. If Kentucky's proposed PBC legislation is adopted, this process is almost sure to be both time-consuming and costly for Kentucky PBCs.

Considering each of these concerns, incorporating as a PBC may be beneficial for certain corporations, but less advantageous for others. For example, the PBC

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6 Id.
8 Ky. H.B. Request 225 § 3(1).
9 See id. § 2(23).
structure could be valuable to an existing mission-driven corporation that is already pursuing a public benefit that is central to the corporation’s existence. PBC status may also benefit a new corporation that wants to differentiate itself in the marketplace and is willing to expend the time and money necessary to educate consumers about PBCs in general and the corporation’s specific public benefit. Established corporations that already enjoy positive customer goodwill, however, may best serve shareholders and stakeholders alike by refusing to make the switch. These corporations may instead rely on the existing protection that Kentucky’s constituency statute provides to directors who are already voluntarily pursuing a dual mission.¹⁰

To make the PBC statute most effective in Kentucky, legislators should make a few changes to the current language and requirements of the proposed PBC legislation to increase accountability and transparency. These changes would make PBC status easier for the community to understand and support, and will also help streamline the statutorily imposed assessment process for PBC shareholders and directors. First, it is vital that the bill be revised to mandate that benefit reports be drafted annually, require self-assessment under an independent and established third-party standard, and be made available to the public on the PBC’s website, instead of just to shareholders. These changes would improve transparency and increase trust between the PBC, shareholders, and the public.

Second, the ambiguous definition of “public benefit” in the statute should be clarified by adding a requirement that PBCs must explicitly prioritize the three competing interests in the articles of incorporation or list a maximum percentage of profits that shareholders are willing to contribute to the PBC’s public benefit goals. This exercise would provide directors with more clarity when making decisions. It would also prevent numerous future lawsuits questioning what constitutes proper balancing of these competing interests. If these changes are made to B.R. 225, the revised PBC legislation would benefit Kentuckians by legitimizing mission-driven corporations that actually pursue public benefits and opening the lines of communication to enhance trust between consumers and corporations.

I. WHAT IS A PUBLIC BENEFIT CORPORATION?

A. The Status and Structure of Kentucky’s B.R. 225

Kentucky’s proposed PBC legislation recognizes public benefit corporations as a new form of legal entity in Kentucky.¹¹ The new PBC section would be added into KRS Chapter 271,¹² and other existing sections of Kentucky’s corporate code would be amended. Excluding those provisions altered by the bill which would

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¹⁰ Ky. REV. STAT. § 271B.12-210(4) (West, Westlaw through the 2015 Reg. Sess.) (providing that directors may consider interests of entities and persons besides the corporation’s shareholders).

¹¹ Ky. H.B. Request 225 § 2(5).

¹² id. § 3.
relate exclusively to PBCs, Kentucky's corporate code would still apply to benefit corporations in every way. B Lab, a non-profit organization that registers and assesses benefit corporations, is the driving force behind PBC statutes nationwide. Since 2010, PBC legislation has since been adopted by thirty-one states and the District of Columbia, with bills pending in five other states, including Kentucky. Kentucky's legislation is modeled after Delaware's PBC statute, which was adopted in 2013. Due to the large number of entities that historically incorporate in Delaware, the state's adoption of a PBC statute indicates a seismic shift in the potential growth in the number of PBCs registered nationwide. Benefit corporation legislation has received bipartisan support in state legislatures across the country, and thousands of entities have subsequently registered as PBCs nationwide.

Bi-partisan support from the politically divided Kentucky legislature is necessary if Kentucky is to be added to the list of states that have adopted public benefit corporation legislation. A third attempt is being made during the 2016 Regular Session to pass PBC legislation in Kentucky. PBC legislation was first introduced in Kentucky in January 2014 when the bill (then labeled House Bill 66 ("H.B. 66")) passed in the House, with the majority of support coming from Democrats by a 58-34 vote. H.B. 66 was then referred to the Senate Committee for State and Local Government, but no further action was taken before the end of the 2014 Regular Session. Momentum for the legislation resumed in 2015 when the PBC bill (then labeled House Bill 11 ("H.B. 11")) was re-filed in the Kentucky House. H.B. 11 passed in the House on February 24, 2015 by a vote of 68-29. Although H.B. 11 was subsequently received by the Senate, it was not voted on before the end of the 2015 Regular Session. Persisting in her efforts,

14 Compare DEL. CODE ANN. tit. 8, § 362 (West, Westlaw though 80 Laws 2015, ch. 153) (creating public benefit corporations in Delaware), with Ky. H.B. Request 225 § 3 (proposing the creation of public benefit corporations in Kentucky).
16 See State by State Legislative Status, supra note 14.
18 Id.
20 Id. The 68-29 vote in 2015 indicates a seventy percent approval rate in the Kentucky House of Representatives.
21 See id.
Representative Kelly Flood (D-Fayette), the bill’s sponsor, pre-filed the bill in September 2015 for the 2016 Regular Session in hopes of having the bill approved and signed into law during 2016.\(^23\) Even if the House approves the bill in 2016, it is still uncertain whether it will be reviewed by the Republican-controlled Senate, where the bill has historically encountered lower approval rates.

**B. Defining Public Benefit Corporations In Kentucky**

If the proposed PBC legislation, in its current form, is passed, Kentucky corporations can begin registering as public benefit corporations, an emerging legal filing status that uniquely blends features of both for-profit and non-profit companies. A PBC is technically a for-profit company that, like other for-profit companies, is allowed to retain its earnings. But similar to non-profits, a PBC has “a corporate purpose broader than maximizing shareholder value.”\(^24\) This broader purpose legally binds PBCs to seek a stated public benefit goal that positively affects stakeholders and the public at large, rather than focusing solely on increasing the bottom line for shareholders.\(^25\) The goal of PBC legislation is to allow socially conscious investors and like-minded entrepreneurs to join forces to simultaneously turn a profit and make positive changes in their communities.

The first question many who are unfamiliar with this type of legislation ask is: “What is a public benefit corporation?” Kentucky’s proposed PBC legislation defines “public benefit corporation” as a “for-profit corporation that is intended to produce a public benefit and to operate in a responsible and sustainable manner, balancing the stockholders’ pecuniary interests, the best interests of those materially affected by the corporation’s conduct, and the public benefit identified in its articles of incorporation[.\(^26\)]”\(^26\) Thus, by definition the PBC must meet both a purpose requirement and balancing requirement.

The first part of the definition sets forth the PBC statute’s purpose requirement, which is the central piece of this type of legislation.\(^27\) The purpose requirement instructs a PBC to name and identify “one (1) or more public benefits” in the entity’s articles of incorporation.\(^28\) Without taking the initial step to identify a public benefit goal, a corporation cannot even begin to pursue the dual mission of maximizing profit and producing a benefit to society. The first part of the definition also sets the relevant standard for operating the PBC’s business, namely that the PBC must pursue the identified public benefit in a “responsible and

\(^{25}\) See id. § 301.
\(^{26}\) Ky. H.B. Request 225 § 2(23) (emphasis added).
\(^{27}\) See id.
\(^{28}\) Id. § 4(4)(b).
sustainable manner." This standard is intended to provide guidance to directors as they make decisions on behalf of the company. However, "responsible and sustainable" creates such a vague standard that if B.R. 225 is adopted, Kentucky courts will likely struggle to nail down what exactly this standard requires of the board of directors.

The second part of the definition creates a balancing requirement, which tells directors that they must balance competing interests when deciding how to operate in a "responsible and sustainable manner." This requirement does not tell directors how the balancing should be conducted, but merely instructs directors to weigh three competing interests when making decisions regarding the PBC's specific public benefit goals: stockholder financial interests, stakeholder interests, and the identified public benefit. Suggestions to more precisely define both the purpose and balancing requirements will be made throughout this Note.

This two-part definition is not enforced through governmental oversight. Instead, a PBC is responsible for holding itself accountable by meeting the specific statutory commands in Kentucky's proposed legislation. The statute is intended to guide PBCs in creating a public benefit purpose and balancing competing interests. Drafters attempted to provide this guidance to shareholders and directors by creating a "checklist" of requirements through the provisions of the statute. This "checklist" is intended to enable PBCs to self-enforce the purpose and balancing requirements in the "public benefit corporation" definition through the use of the three main provisions in all benefit corporation legislation: corporate purpose to create a public benefit, accountability, and transparency.

C. The Main Provisions of PBC Statutes: Corporate Purpose to Create a Public Benefit, Accountability, and Transparency

Three main provisions are always included in all PBC legislation, including the model PBC statute and statutes like Kentucky's proposed PBC legislation: the creation of a public benefit through a corporate culture of material positive impact, accountability, and transparency. Each provision is central to the proper functioning of a PBC, but also raises separate questions and unique concerns for an entity's directors and stockholders as they consider organizing or reorganizing as a PBC.

1. Creation of a Public Benefit Through a Corporate Culture of Material Positive Impact—The first and most important provision of PBC legislation is the provision

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29 Id. § 2(23).
30 Id.
31 Id.
33 See id. §§ 201, 301, 303, 401.
34 Id.
that requires the creation of a public benefit through a corporate culture of material positive impact in the community. Choosing a PBC's unique public benefit goal is a very important process, because once a public benefit is named in the articles of incorporation, the PBC will be held accountable for that goal by shareholders and society. The public benefit purpose provision obligates directors to consider the interests of stakeholders other than shareholders, which rejects the well-known holding of *Dodge v. Ford* that directors must primarily focus on maximizing shareholder profits in a corporation. Instead, the provision requires PBCs to embrace both profit maximization and social responsibility by naming a specific charitable purpose in the corporation's articles of incorporation.

How each state's bill or statute defines the required type of public benefit is the starting point for determining whether an individual PBC has satisfied the purpose provision of PBC legislation. Some states have followed the Model Legislation, which requires PBCs to list at least one "general public benefit" in the articles of incorporation but gives the option to identify one or more "specific public benefits." A "general public benefit" looks at the PBC's material positive impact on society as a whole, while a "specific public benefit" refers to a particularized benefit to a sector of the community, such as protecting the environment or promoting local art and science.

The rationale for requiring a holistic "general public benefit" and making "specific public benefit" goals optional is to prevent abuse of this new corporate form. Corporations could register as a PBC and then abuse the PBC form by naming one narrow "specific public benefit" goal that only provides a kickback to the corporation itself, but fails to benefit the public at large in any way. It seems clear that this deceptive type of scheme should not be incentivized as it would take advantage of the new corporate form and lead to more confusion for consumers and the general public who try to support socially responsible businesses.

Kentucky's bill adopts a different definition, which tracks the broad approach in the Delaware PBC statute. Kentucky's version does not make the "general" versus "specific" distinction that is used in the Model Legislation. Instead, the proposed

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35 See Ky. H.B. Request 225 § 2(22) ("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.).


38 MODEL BENEFIT CORP. LEGISLATION § 201; California is one of the states which has followed this model. CAL. CORP. CODE § 14610(b) (West, Westlaw through urgency legislation through Ch. 225 of the 2015 Reg. Sess.).

39 MODEL BENEFIT CORP. LEGISLATION § 102.

40 *Id.* The definition of "specific public benefit" in the Model Legislation provides a non-exhaustive list of the types of public benefit that would be considered specific. See *id.*


42 See *id.*
legislation requires “one (1) or more public benefits” to be listed in the articles of incorporation of a PBC.\(^4\) Using the broad phrase “public benefit” rather than the “general” or “specific” language indicates an intentional departure from the Model Legislation to give PBCs more discretion in naming public benefit goals.\(^4\) Kentucky’s bill has adopted the following definition of “public benefit:”

> “Public benefit” means a positive effect or reduction of negative effects on one (1) or more categories of persons, entities, communities, or interests other than stockholders in their capacities as stockholders, including but not limited to effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological nature.\(^4\)

Kentucky’s broad “public benefit” definition is meant to enhance flexibility and expedite the process of identifying benefit goals by providing a non-exhaustive list of interests or constituencies that a PBC can choose to consider as part of its dual mission.\(^4\) The examples listed give directors, shareholders, and the community an idea of what is practically involved in creating a public benefit. This flexible definition, however, fails to provide any concrete standards for directors and shareholders to use in determining what exactly “a positive effect or reduction of negative effects” is. Instead, the approach adopted by Kentucky and Delaware allows PBCs to engage in “private ordering” by forming their own social norms and self-regulating their public benefit purposes.\(^4\)

> “Social good” and “public benefit” mean different things to different people. Because of private ordering and the newness of the PBC structure, Kentucky’s vague definition of “public benefit” will likely lead to a significant amount of litigation if the proposed legislation is adopted. If the bill passes, Kentucky courts could be forced to determine what constitutes “a positive effect or reduction in negative effects” and what actions are required to meet this vague standard. Courts will likely look to the accountability and transparency requirements enumerated in the bill to help identify what actions are required to surpass the minimum threshold of creating a “positive effect” or “public benefit.”

2. Accountability—Accountability provisions are another central component of all PBC legislation and have been included in the proposed Kentucky statute.\(^4\)

\(^4\) Compare Ky. H.B. 11 and DEL. CODE ANN. tit. 8, § 362(b) (West, Westlaw through 80 Laws 2015, ch. 169), with MODEL BENEFIT CORP. LEGISLATION § 201.
\(^4\) See id.
\(^4\) Murray, supra note 41, at 351–54.
\(^4\) See Ky. H.B. Request § 2(23).
Once the public benefit goal is approved by a vote of the shareholders and directors and placed in the articles of incorporation, the accountability provisions help describe the role that PBC directors play in fulfilling that goal. These provisions are intended to hold PBC directors accountable for the effects their decisions have on stakeholders (such as employees, suppliers, customers, the environment, and even shareholders). The main accountability provision in Kentucky’s proposed PBC statute is the balancing requirement in the second part of the “public benefit corporation” definition.49

As mentioned previously, the statutory definition of “public benefit corporation” requires PBC directors to balance three interests as they make business decisions: “[1] the stockholders’ pecuniary interests, [2] the best interests of those materially affected by the corporation’s conduct, and [3] the public benefit identified in its articles of incorporation.”50 The balancing provision fails to provide direction to directors on how these interests should be balanced. The bill’s current form provides no guidance on the weight or priority to be assigned to each of these interests. If the bill is adopted without guidance on how to perform this statutorily required task, directors will have to rely on group norms formed by the PBCs themselves to provide the information they need to appropriately balance these important interests.

To avoid litigation and remain accountable to shareholders in a systematic way, PBCs should prioritize the three competing interests in the articles of incorporation or list a percentage range that stockholders are willing to contribute to the public benefit annually. These priority or percentage guidelines, which would be listed in the articles of incorporation, would give directors a justification for promoting one interest over another when making decisions on the direction of the company. Prioritization would also ensure that directors, shareholders, and stakeholders are unified in pursuing public benefit goals, which could prevent a number of disagreements over, or even shareholder derivative suits to enforce, the public benefit requirements.51

Because the existing bill does not tell directors how to balance these interests, directors should look at the state’s constituency statute as the floor for what is considered an appropriate level of corporate charitable contributions and build from there to estimate the heightened level of charitable contributions that would be reasonable for mission-driven PBCs. Although the PBC legislation requires corporate directors to consider non-shareholder interests when making decisions, Kentucky’s constituency statute already permits, but does not require, corporate directors in our state to consider constituencies other than shareholders even if the corporation is not registered as a PBC.52 In addition to the interests of corporate shareholders, KRS § 271B.12-210(4) allows the board of directors to consider

49 Id.
50 Id.
51 Id. § 6(7).
52 KY. REV. STAT. § 271B.12-210(4) (West, Westlaw through the end of the 2015 Reg. Sess.).
employees, suppliers, creditors, customers, state and national economies, community and societal considerations, and long and short-term corporation interests when making business decisions.\textsuperscript{53} There is a dearth of case law interpreting the constituency statute, which has limited how far directors have been willing to extend this discretionary power and has resulted in most directors choosing profit maximization over non-shareholder interests, even though they have the right to prioritize non-shareholder interests above maximizing shareholder profit.\textsuperscript{54} Although a majority of business decisions are made with shareholder profit at the forefront for corporations, there are certain instances when shareholder value takes a backseat to a non-shareholder public benefit, such as charitable contributions and community giving.

The constituency statute acts as a carve-out to the general requirement, from \textit{Dodge v. Ford}, that directors of for-profit companies must pursue shareholder maximization.\textsuperscript{55} These carve-outs that expressly allow directors of for-profit companies to consider non-shareholder interests over shareholder wealth are normally subject to a reasonableness assessment. For example, in a general for-profit company, \textit{ALI Principles of Corporate Governance} section 2.01 only allows "a reasonable amount of [corporate] resources" to be used for any purpose other than shareholder gain.\textsuperscript{56} Similarly, section 6.02 indicates that a director's decision to consider non-shareholder interests must not "significantly disfavor the long-term interests of shareholders."\textsuperscript{57} Case law lacks a quantifiable test for interpreting what a "reasonable amount" is under the current constituency statute. It is unclear whether a director's decision to allocate five, ten, or fifteen percent of profits to non-shareholder interests would be within the statute's limits and thus permissible, or outside the statute's reasonableness realm and thus a breach of duty. The uncertainty regarding the amount of charitable contributions that are considered "reasonable amounts" is why the constituency statute, while an excellent way to insulate corporate directors from backlash as they promote the public good, is underutilized by directors.

A provision in Kentucky's proposed PBC legislation states that even if a corporation is \textit{not} registered as a public benefit corporation, applying corporate assets to one or more public benefit is not evidence of a breach of any fiduciary duty by the board of directors.\textsuperscript{58} This indicates that adoption of the PBC legislation in

\begin{footnotesize}
\bibitem{53} Id.
\bibitem{54} CLARK, \textit{supra} note 7, at 10–11.
\bibitem{56} See \textit{PRINCIPLES OF CORPORATE GOVERNANCE} § 2.01(b)(3) (AM. LAW INST.1994) (stating that a corporation "may devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes" even if corporate profits and shareholder wealth are not enhanced); see also Rutheford B. Campbell, Jr., \textit{Corporate Fiduciary Duties in Kentucky}, 93 KY. L.J. 551, 557–59 (2004–05).
\bibitem{57} \textit{PRINCIPLES OF CORPORATE GOVERNANCE} § 6.02(b)(2).
Kentucky would not overrule the existing constituency statute that applies to regular for-profit companies. These companies would still be permitted to consider non-shareholder interests when making decisions. The purpose of this provision is to ensure corporations are not being penalized for wanting to help the community and participate in the culture of giving. The goal of including this provision in Kentucky’s proposed PBC legislation is to encourage for-profit directors to make more socially conscious business decisions that benefit the general public, even if shareholders do not want to take the steps necessary to reorganize as a PBC.

Under existing law, any Kentucky corporation is permitted to shift a “reasonable amount” of profits from shareholders to public benefit goals, but PBC legislation would require profits to be contributed to public benefit goals and inflate the percentage that is considered “reasonable” for corporations that register as a PBC to contribute to these goals. Again, it is difficult for directors to know what is generally considered “reasonable” due to the lack of judicial interpretations of constituency statutes. Because the constituency statute lays the groundwork for contributing profits to the non-shareholder constituencies and what is considered a “reasonable amount” is unclear, it is also unclear how high of a percentage of profits will be appropriate under the higher standard of reasonableness contemplated in the PBC statute. If five to fifteen percent would be acceptable for a general for-profit corporation to contribute to the interests of non-shareholder constituencies, would twenty-five to fifty percent be acceptable for a PBC? The lack of a standard in this area leaves directors without much guidance when determining which of the statute’s three listed competing interests should take priority at any given time.

As a result, directors will likely default to maximizing shareholder value instead of giving to the community. Because shareholders hire and fire the directors and officers, company officials have an incentive to keep shareholders happy because their job is on the line. When choosing between the two, directors will generally default to padding their shareholders’ pockets before promoting non-shareholder interests. This inescapable tension will drive down the norm among corporate directors for the percentage of profits that is considered “reasonable” to spend on the public benefit unless the PBC legislation is amended to require a prioritization of interests or percentage range of profits that the PBC shareholders consider reasonable in the articles of incorporation.

Accountability is also achieved through the threat of shareholder derivative suits. Directors are often apprehensive in their decision-making roles due to the threat of legal action by shareholders. While B.R. 225 allows shareholders holding at least two percent of outstanding shares (or $2 million in market value if a publicly traded corporation and $2 million is less than two percent of shares) to pursue a derivative suit to enforce the public benefit requirements or challenge the

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that is not a public benefit corporation to one (1) or more public benefits shall not evidence any breach of duty by the board of directors.).

59 CLARK, supra note 7, at 10.

60 Id.
balance of the three competing interests under the PBC statute, directors should be slightly reassured in knowing that a non-stockholder who claims an interest in the corporation's public benefit goals does not have standing to sue directors for their decisions regarding how to balance the competing interests. A PBC director's fiduciary duties are not really expanded from those of a general for-profit director because a PBC director is not liable to anyone but a shareholder. A PBC director is, however, held to the same "good faith" standard as a for-profit director in discharging his duties, including balancing the statute's three competing interests. Ordering interests in the articles of incorporation and discussing with shareholders the percentage of profits that would generally be considered reasonable to spend on promoting the public benefits will help shield directors from litigation and instill confidence in their decisions on how to balance the competing interests.

3. Transparency—Transparency is considered the third main provision in PBC legislation and can be found in the proposed Kentucky legislation as well. To reap the benefits of PBC status, directors and shareholders must ensure that their decisions are transparent to one another and to the general public. Whether an entity's stated benefit goals are creating a material impact for the public is generally assessed in an annual or biennial benefit report drafted by the company, which helps with transparency. The Model Benefit Corporation Legislation requires an annual benefit report, which includes information on the company's success in meeting stated public benefit objectives, to be publicly reported and judged against a credible and comprehensive third-party standard. Kentucky's bill, however, requires neither public reporting nor assessment against third-party standards.

Before PBC legislation had been proposed or adopted by any state, socially conscious businesses could voluntarily be assessed and validated for social and environmental performance, accountability, and transparency by B Lab, a third-party non-profit company. B Lab uses a set of standards that measure a

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61 Ky. H.B. Request 225 § 6(8).
62 See id. § 7(8).
63 Id. § 7(1).
64 Id. § 7(8).
65 See MODEL BENEFIT CORP. LEGISLATION § 401 (B LAB 2014); Ky. H.B. 11 § 9(2)-(3) (providing the rules imposed on corporations regarding disclosures to shareholders).
66 MODEL BENEFIT CORP. LEGISLATION § 401; Ky. H.B. 11 § 9(2).
67 MODEL BENEFIT CORP. LEGISLATION §§ 401-02. Because most state statutes have used the Model Benefit Corporation Legislation as a basis for drafting their statutes, they also have this requirement. See CLARK, supra note 7, at 14-15.
68 See Ky. H.B. Request 225 § 9(3) (providing that the articles of incorporation may make a statement regarding the corporation's promotion of the public benefit available to the public and may use a third-party standard).
corporation's social and environmental impact on stakeholders. The B Lab standards were designed to enable the marketplace to identify and support companies that meet these rigorous third-party standards. Companies that perform well against these standards and pay the required verification fees receive a certification from B Lab that is valid for two years, at which point re-certification is required.

Because third-party standards were the only known, available means for ensuring that companies were meeting or exceeding their stated public benefit goals, these standards were used as the starting point for legislatures across the country to ensure PBCs were being transparent in their methods of pursuing a public benefit. Early in the evolution of benefit corporations, various state PBC statutes (and the Model Benefit Corporation Legislation) required PBCs to meet the B Lab standards or other similar independent third-party standards to qualify for registration as a benefit corporation. These requirements were necessary because the PBC process was new and confusing to shareholders, directors, legislators, and the public at large. Some states still require entities that register as PBCs to be assessed against third-party standards to maintain status as a PBC, but Delaware's statute and Kentucky's proposed PBC statute both do not require third-party assessment. The rationale for moving away from the Model Benefit Corporation Legislation's increased certification requirements is that enough states are now registering PBCs that the benefit corporations themselves can provide a model to use in evaluating what does and does not meet the standard for creating a public benefit in their industry. But this rationale is unpersuasive because businesses can be self-interested, and the PBC form can be abused by self-interested entities.

Although third-party standards are not regulated, this assessment is fundamental to the integrity of PBCs and should be required in Kentucky's PBC legislation. The language of B.R. 225 does not require the PBC's benefit report to be assessed against a third-party standard; instead, it makes assessment against third-party standards optional. The bill requires the report to include the "standards that the board of directors has adopted to measure the corporation's progress in promoting the public benefit[.]" In fact, the third-party assessment requirement is so important that the Model Legislation mandates third-party standard assessment in the definition of "general public benefit." Allowing Kentucky PBCs to set their own assessment standards does not give the general

70 See id.
71 See id. (indicating that B Lab recognizes that its standards are rigorous).
72 Id.
73 E.g., MD. CODE ANN., CORPS. & ASS'NS § 5-6C-08(a)(2) (West, Westlaw through 2015 Regular Session of the General Assembly).
74 Ky. H.B. Request 225 § 9(3)(c); DEL. CODE ANN. tit. 8, § 366(c)(3) (West, Westlaw through 80 Laws, 2015, ch. 169).
75 Ky. H.B. Request 225 § 9(3)(c).
76 Id. § 9(2)(b).
77 MODEL BENEFIT CORP. LEGISLATION § 102 (B LAB 2014).
public the ability to judge whether a PBC is actually being more environmentally and socially responsible than other players in the industry, or whether the PBC status is being abused. Requiring PBCs to use a third-party standard would also serve as a source of guidance for benefit corporation directors in making socially conscious, balanced business decisions during the transition from a general for-profit corporation to a PBC.

Many legal scholars agree that the third-party standard requirement is essential to ensuring transparency from PBCs. According to a White Paper authored by a group of scholars, the requirement that the benefit report is assessed against a third-party standard is essential to the model legislation. Scholars say that "in many ways the third-party standard is the heart of benefit corporation legislation." The comments to the Model Legislation even say that this requirement "provides an important protection against the abuse of benefit corporation status." The success of a regular for-profit business entity is measured by its financial statements. A PBC's success in meeting public benefit goals is not apparent from these financial statements, so a benefit report is necessary for stockholders and stakeholders alike to evaluate whether a PBC is successfully pursuing the stated public benefit goals.

Additionally, PBC benefit reports are generally provided to shareholders and made available to the public online. Kentucky's bill has very low reporting requirements. Kentucky's proposed legislation, like the Delaware statute, requires the benefit report to be made available to shareholders, but makes it optional to offer the benefit report to the public. Colorado's statute, on the other hand, requires the benefit report to be drafted annually and made available to the public. Kentucky's bill should be amended to require that the annual benefit report be made available to shareholders and the public and be assessed against an independent third-party standard. Adding a few small, additional reporting requirements to the PBC legislation would be worth it to ensure that consumers and shareholders have the most accurate information to inform their buying and investing decisions.

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78 See CLARK, supra note 7, at 19.
79 Id. at 18.
80 Id.
81 MODEL BENEFIT CORP. LEGISLATION § 102 cmt.
82 See R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, BALOTTI AND FINKELSTEIN'S DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 14A.4 (3d ed. 2015) (requiring PBCs to provide to its stockholders a statement as to the promotion of the public benefit(s) identified in the certificate of incorporation).
83 MODEL BENEFIT CORP. LEGISLATION § 402.
II. HOW TO BECOME A PBC IN KENTUCKY

A. General Steps for Becoming a PBC in Kentucky

To begin the process of becoming a PBC, an existing entity must amend its articles of incorporation in various ways. Kentucky's proposed PBC legislation requires the articles of incorporation, the name of the corporation, and stock certificates to clearly indicate PBC status. The articles of incorporation must also explicitly state the public benefit purpose(s) that the PBC is formally adopting. After drafting the new proposed articles, the board of directors and shareholders must approve the new articles of incorporation. Kentucky's bill requires ninety percent support from existing shareholders to change from a traditional for-profit status to the new public benefit corporation status, while the Model Legislation only requires approval from two-thirds. If the required majority approves the changes, the last step in the process requires the new articles of incorporation to be filed with the Kentucky Secretary of State.

B. PBCs Must Attract Support From Special Investors or Ninety Percent of Existing Shareholders

An existing Kentucky entity that wishes to become a PBC cannot convert outstanding non-PBC shares into PBC shares without the approval of ninety percent of each class of existing stockholders. Ninety percent approval is also required for an entity to merge with or into another entity if the merger would result in existing shares being converted into shares in a PBC. The rationale for the super-majority requirement is to prevent existing corporations from splitting up as a result of a dispute over whether or not to become a benefit corporation. The requirement of a super-majority could be very difficult to obtain for most existing corporations because most investors are concerned that the specific public benefit goals will cut into the bottom line. It seems clear, at least in the beginning, that most registered PBCs will be newly formed corporations, with a few historically mission-driven for-profit corporations making the switch to reorganize as PBCs. Achieving this high support ratio will be difficult and could deter many existing Kentucky corporations from even taking the first steps in the process to become a PBC. The super-majority requirement could severely limit the number of PBCs in Kentucky for many years until consumers and investors more fully understand the benefits and downfalls of this corporate structure.

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86 See generally Ky. H.B. Request 225.
87 Id. §§ 3(1), 4(4), 5(3).
88 Id. § 4(4)(b).
89 Id. § 3(1).
90 MODEL BENEFIT CORP. LEGISLATION §§ 102, 104(a) (B LAB 2014).
91 Ky. H.B. Request 225 § 3(1).
92 Id.
If the ninety percent super-majority is obtained, stockholders who did not vote in favor of the change are entitled to dissenters' rights consistent with Subchapter 13 of KRS Chapter 271B.\textsuperscript{93} Dissenters' rights entitle the stockholder to the fair market value of the stock at the time it will be converted into stock of a PBC in exchange for relinquished ownership rights in the stock.\textsuperscript{94} Because PBC investing does not appeal to all investors, dissenters' rights is an important provision in Kentucky's proposed legislation that protects existing shareholders from being forced into a PBC investment unwillingly.\textsuperscript{95} While selling shares for fair market value when a PBC form is approved by a super-majority may not be the most ideal solution for investors, knowing that dissenters' rights can be exercised as a last resort should give existing shareholders additional peace of mind if the Kentucky General Assembly passes PBC legislation. Again, the goal in allowing dissenters' rights is to not split up an existing company through the process of deciding whether or not to become a benefit corporation. If a small percentage of stockholders do not want their investment to be transitioned into PBC stock, they are given the option to sell their shares to an interested, socially responsible investor and walk away.

III. THE EFFECT OF PBC STATUS ON DIRECTORS, SHAREHOLDERS, AND THE GENERAL PUBLIC

A. Directors Serve Two Masters

A PBC's board of directors must manage and direct the business "in a manner 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 . . . identified in the articles of incorporation."\textsuperscript{96} As mentioned above, the bill's language does not specify how the directors should balance these interests, so interests should be ranked or a percentage of profits that will be contributed to the public benefit goals should be listed in the articles of incorporation. While the PBC balancing requirement creates more responsibility for directors, Kentucky's proposed PBC bill also explicitly states that PBC directors do not owe "any duty" to stakeholders as a result of their interest in the PBC's public benefit.\textsuperscript{97} Although this provision limits director liability to third-parties, the PBC statute makes it clear that PBC directors are legally \textit{required} to consider both shareholder and

\begin{itemize}
\item \textsuperscript{93} Id. § 3(2).
\item \textsuperscript{94} See KY. REV. STAT. § 271B.13-020 (West, Westlaw though the end of the 2015 Reg. Sess.).
\item \textsuperscript{95} Cf. CLARK, supra note 7 at 27 (discussing the rationale for not providing dissenters rights).
\item \textsuperscript{96} Ky. H.B. Request 225 § 7(8)(a).
\item \textsuperscript{97} Id. § 7(8)(b) ("A director of the public benefit corporation shall not, by virtue of the public benefit provisions set forth in the corporation's articles of incorporation, have any duty to any person on account of any interest of such person in the public benefit or public benefits identified in the articles of incorporation . . . .")
\end{itemize}
stakeholder interests when making business decisions.98 There is no choice for PBCs like there is for general for-profit directors under the constituency statute. This tension can lead to various problems for directors as they struggle to find the appropriate balance between maximizing shareholder wealth and contributing to the public benefit goals outlined in the articles of incorporation. One problem is the added risk of a shareholder derivative suit for not appropriately balancing the three competing interests and another is shareholder pushback as a result of reduced profits.

As a result of the dual mission of PBCs, "[a]n inherent and inescapable tension exists between pursuing desirable social outcomes and striving for maximum profits."99 At common law, profitability was the only priority and directors were hamstrung into seeking purely shareholder profit.100 Although constituency statutes and PBC legislation are designed to encourage companies to pursue social benefit purposes, the risk of lawsuit is still engrained in the minds of directors. "Whatever the letter of the law, these fears, combined with both prevailing business culture and advice of counsel about the risk of litigation if one fails to maximize shareholder value, have a chilling effect on corporate behavior as it relates to pursuit of a social mission."101 As a result, there is still a tension between profit and public benefit that even PBC directors, who are legally required to consider the public benefit, cannot escape.

B. Reporting Requirements Significantly Add to Directors' Workloads

While enacting the PBC legislation costs nothing to society, becoming a PBC does cost corporations, both initially as they restructure the business and later as they strive to meet statutory accountability and transparency requirements. The reporting requirements in Kentucky's proposed legislation come with a price tag. Kentucky's PBC statute would require benefit corporations to report biennially to stockholders about the status of the corporation's public benefit goals.102 This report must include the standards adopted by the directors to measure progress, the specific objectives established to promote the corporation's public benefit, factual information about the standards implemented, and an assessment of the success in promoting the public benefit.103 If the PBC, as recommended above, chooses to publish an annual (rather than a biennial) report and additionally chooses to make that report available to the public, the PBC will face additional costs, and directors

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98 Id. § 7(8).
101 CLARK, supra note 7, at 6.
102 Ky. H.B. Request 225 § 9(2).
103 Id.
will be are obligated to perform additional work on top of their regular, everyday tasks.104

Producing a benefit report is necessary to remain a PBC in good standing with
the state, but this task creates a significant amount of work for the directors in
charge of preparing the benefit report. Compiling relevant data on the public
benefit goals, assessing and comparing new data to data from past years (and
hopefully assessing it against a third-party standard), drafting and editing the
report, and publishing the report to shareholders (and hopefully the public) takes a
significant amount of time. The time spent on the benefit report annually will
reduce the amount of time directors can spend on running the general business of
the corporation.

To help with the workload, some states identify a benefit director whose role it
is to oversee the benefit report, meet the statutory reporting requirements, and
address any issues related to pursuing the benefit goals.105 Kentucky’s bill does not
require a specific benefit director,106 so all directors must ensure that a responsible
party is identified and the report is completed according to the statutory
requirements, plus any additional reporting requirements the corporation has
elected in the articles of incorporation. Entities considering making the switch to a
PBC should decide who will be responsible for each task associated with the
reporting requirement at the beginning of the process to avoid surprises down the
road. Ultimately, for the right type of mission-driven corporation, the additional
responsibility and costs associated with creating and publishing the benefit reports
will be outweighed by the accelerated growth of the company and the legitimacy of
PBCs statewide.

C. Public Perception Implications of Electing into PBC Status

Kentucky’s history is agrarian and community-based, so an idea that benefits
the public, like the PBC legislation, would traditionally be supported in a state like
Kentucky. The difficulty is in educating the community about what the PBC
designation actually means in a way that will influence their buying and investing
decisions.107 The newness of this type of legislation puts additional pressure on the
PBCs themselves to create awareness of how a PBC works in the community. To
do so, the PBC will likely be required to contribute to substantial marketing efforts
that will eat up additional profits before the company sees any direct benefit from
its PBC status.

Terena Bell, owner of In Every Language, a B Lab certified B-Corp in
Kentucky, said, “[Our company] has had to prove itself repeatedly.”108 In 2011,
after six years in the business, Bell said she was still explaining social

104 Id. § 9(3)(a)–(b).
105 See MODEL BENEFIT CORP. LEGISLATION § 302 (B LAB 2014).
106 Ky. H.B. Request 225 § 9(3).
107 See CLARK, supra note 7, at 2–3.
108 Terena Bell, Being the Only B, STAN. SOC. INNOVATION REV., Summer 2011, at 27, 28.
entrepreneurship to community members. But Bell thinks that being one of the few certified B-Corps in Kentucky is better than not being one because “being a B means that you as a customer have proof that our mission is not just self-serving.” Bell’s statement is true, but customers first have to understand what exactly a benefit corporation is and have the information necessary to evaluate whether a specific benefit corporation is meeting those standards before the customer knows for sure that the benefit corporation is interested in more than just maximizing shareholder profit.

Raising awareness about PBCs in the community is absolutely imperative to their success. Society does not currently have the knowledge necessary to identify and support PBCs and ultimately align their purchases with their values. This is another reason why the statutorily required benefit report should be published on an annual basis and made available to the public. If current information is not made available to interested parties, the PBC is not giving consumers the ability to hold it accountable for the public benefit goals it voluntarily elected to pursue. If Kentucky passes its proposed PBC legislation, PBCs must join together to inform consumers in the early stages about how benefit corporations work, as well as provide information about the individual PBC’s public benefit goals. Otherwise, the new corporate form will be seen purely as a marketing ploy for companies who want to talk the talk, but not walk the walk.

Informing the community will also help PBCs attract talented employees. A new breed of businessperson is emerging as young millennials enter the work force. Millennials desire to work for socially responsible companies, which is leading to workers, managers, and owners with a new set of priorities. According to the White Paper, sixty-nine percent of employees consider the environmental and social track record of a business when deciding where to work. Attracting and hiring this type of employee will help PBCs to gain a competitive advantage that will benefit the company for decades to come as young people work their way up the corporate ladder.

Ultimately, PBCs need to provide clarification to consumers. Adopting this new corporate form could be good for new corporations trying to establish a unique brand, as well as for existing corporations who are consistently pursuing public benefits. Alternatively, the PBC statute could help companies that have come under fire in the past for not actually doing what they say they are regarding environmental objectives or community giving. Re-organizing as a PBC will signal to potential customers, employees, and the community that the corporation is serious about being held accountable for giving back to the community. But PBCs

\[109\] Id.
\[110\] Id.
\[111\] See CLARK, supra note 7, at 2 (describing the frustration experienced by many socially conscious corporations when businesses misleadingly advertise themselves as “green” or “responsible” and the confusion created for customers when buying from companies with these values).
\[112\] See id. at 3.
\[113\] Id.
must be willing to educate the general public and provide more disclosures than are currently required to help speed up this learning process and see results.

IV. THE ATTORNEY'S ROLE

Corporate attorneys have an important role to play in advising clients considering registering as a PBC. Restructuring as a PBC would bring changes to management's priorities and responsibilities and would require redrafting many important corporate documents.

A. Attorneys Should Help Existing Corporations Devise a Plan to Earn the Votes of Ninety Percent of Shareholders

If a company's directors do decide to bring the idea of becoming a PBC to the attention of shareholders, the corporation's attorney should help ensure that the directors approach the topic in a careful, intentional way. Because ninety percent shareholder approval is necessary to become a PBC and the proposed legislation allows dissenters' rights, directors should tread lightly if shareholder response is uncertain. The attorney should help the directors decide whether existing shareholders are the type of special investors who are looking for a values-aligned investment opportunity, or if the shareholders are most interested in increasing their bottom line.

An existing corporation trying to switch to a PBC should look to see if shareholders have overwhelmingly supported the company in pursuing major public benefit projects in the past. If so, ninety percent of investors may be willing to support a vote to reorganize as a PBC. Otherwise, even discussing the possibility of becoming a PBC with shareholders could result in shareholders liquidating stock or losing confidence in the corporation's directors or legal counsel. If the shareholders are likely to be supportive, attorneys and directors should also make sure there are no potential mergers in the near future. In the reverse scenario, if shareholders vote to become a PBC and subsequently attempt to merge with a non-PBC entity or amend back into a non-PBC entity, two-thirds of shareholders must approve converting the shares back into non-PBC shares for the merger or amendment to occur. The same two-thirds vote is required to re-amend the articles of incorporation to remove the election to be a benefit corporation. Because of the super-majority vote requirements that surround the decision, electing to become a PBC is not a decision to be taken lightly by shareholders, directors, or the attorneys helping to facilitate the process.

115 Id. § 3(3).
116 Id.
B. New Benefit Corporations Should Consider Additional Disclosures, Investor Appeal, and Market Differentiation Goals

Most PBCs (at least in the beginning) will likely be newly-formed corporations because of the super-majority votes required to change an existing corporation into a PBC. If a new corporation is organizing for the very first time as a PBC, the corporation’s stated mission must appeal to investors interested in values-based investments. While the values-based equity market is growing, investors of this type could have many options to choose from as the number of registered PBCs grows. A new PBC must be attractive to this small, yet committed, group of investors by differentiating itself in the marketplace from day one. Differentiation can be accomplished by offering additional public disclosures to potential investors and consumers about the corporation’s social responsibility objectives and standards above those required in Kentucky's proposed PBC legislation.

The currently proposed Kentucky bill requires the biennial benefit report to be made available to shareholders, but gives PBCs the option to make the report available to the public. Attorneys should advise both new and existing corporations considering PBC status to elect to make the benefit report available to the public. If not, consumers, investors, and the public at large have no way of knowing whether the stated objectives are being met. By voluntarily offering the benefit report to the public, a PBC signals that its directors and shareholders are serious about the mission-driven approach and are willing to be held accountable to the standards set forth in the articles of incorporation. Current corporate leaders like Terena Bell, owner of a B Lab certified business in Kentucky, echo this approach, saying, “We want to be held accountable.”

Even if a company falls short of comparable benchmarks, full disclosure alone sends an important message to the community and makes values-based investors more comfortable placing their dollars in the hands of PBC directors. Voluntary disclosure will help the benefit corporation capitalize on increases in actual, rather than just perceived, goodwill of customers as consumers learn more about what a PBC is and the mission for which individual benefit corporations stand. For both new and re-organizing benefit corporations, increasing the amount of disclosures about public benefits above statutory minimums during the early stages of the PBC revolution is essential.

C. Attorneys Should Help Mitigate the Risk of a Derivative Suit by Carefully Drafting the Articles of Incorporation

Attorneys should advise corporate clients considering PBC status on three main issues. If a company does become a PBC, the proposed Kentucky bill authorizes shareholders to bring a derivative suit against directors to enforce the proper

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117 CLARK, supra note 7, at 28.
118 Ky. H.B. Request 225 § 9(3).
119 Bell, supra note 108, at 28.
balancing of the three competing interests of stockholders, stakeholders, and the public benefit.\textsuperscript{120} Because PBCs are new, there is little case law to help judges determine whether the director's actions to balance the three interests were made in good faith, on an informed basis, and in a manner believed to be in the corporation's best interest.\textsuperscript{121} This will lead to varying judicial interpretations and uncertainty for judges, attorneys, and corporate directors alike. First, corporate attorneys should advise their clients of the risk of a derivative suit and mitigate the risk of one being filed by ensuring that directors keep shareholders abreast of efforts to balance the three interests.

Second, attorneys should also advise the corporation's shareholders and directors to be very specific in the articles of incorporation about what the public benefit goals are and what they are not in order to limit grounds for potential derivative suits. Kentucky's proposed PBC legislation is extremely broad, merely requiring the articles of incorporation to "include one (1) or more public benefits," and it does not specify whether a general or specific interest must be pursued.\textsuperscript{122} Corporations can insulate against a lawsuit by ranking interests in the articles of incorporation based on the order they will be pursued if two interests are conflicting. In fact, prioritizing these interests should be required by statute to prevent copious amounts of future litigation asking what constitutes proper balancing of competing interests. Alternatively, or in addition, shareholders and directors can specify the percentage of profits that will be contributed to the public benefit goals. These practices allow shareholders and directors to be aware of and agree on what interests are most important to the company. This exercise also helps insulate the company from a derivative suit in the event of a dispute over the priority between the three interest groups.

Finally, attorneys should take advantage of the proposed Kentucky bill's option to limit the venue for derivative suits in the articles of incorporation.\textsuperscript{123} This provision would give the company more control in the event of a derivative suit and would likely reduce litigation costs for the company.

CONCLUSION

As the proposed Kentucky bill makes its way through the state legislature, lawmakers must decide whether to adopt the bill or leave the existing list of corporate structures untouched. The bill looks promising in some respects, like in its express provision requiring PBC directors to consider both shareholder and stakeholder interests,\textsuperscript{124} but there are some important requirements left out of Kentucky's proposed PBC legislation that could doom the success of benefit corporations in the state.

\textsuperscript{120} See Ky. H.B. Request 225 § 6(8).
\textsuperscript{121} See id. § 7(1).
\textsuperscript{122} Id. § 4(4)(b).
\textsuperscript{123} Id. § 6(9).
\textsuperscript{124} Id. § 7(8)(a).
Existing legislation lacks enforcement mechanisms. Therefore, the legislature should adapt the language of the bill to include the following changes. First, the legislature should require PBCs to draft a benefit report on an annual, rather than a biennial basis and also mandate that the report to be made available to the public. Both annual reporting and public reporting are optional under the current bill, but should be made mandatory to further the PBC statute goals of transparency and accountability.\(^{125}\) Second, benefit reports should be required to be evaluated against a trusted and comprehensive third-party standard each year. Third-party evaluation would allow potential investors, future employees, and the general public to better compare and contrast the company's performance with others in the industry to make informed investing and buying decisions. This will also eliminate companies who are not truly pursuing public benefit goals and reward those who are through growth in market share, positive product differentiation, and increased public trust. Third, the proposed bill should require PBCs to prioritize competing interests in the articles of incorporation, or at least list a range of profits that will be contributed to public benefit goals each year.

If these changes are made, Kentucky lawmakers should support the modified bill. The PBC structure will be useful for new corporations who want to differentiate in the market, and PBC status gives directors greater flexibility to apply a higher percentage of corporate assets to the pursuit of public benefits without surpassing the traditional "reasonableness" standard.\(^{126}\)

If the bill is adopted, corporations should seriously assess the benefits and costs before deciding to adopt the new PBC form. For corporations who have already acquired the good will of the general public, the switch is likely not necessary and would just increase responsibilities of the board of directors. Instead, these companies should continue to publicize the contributions the corporation is making to society. But for new corporations, or those known for being harsh on the environment in the past, publicly committing to maintaining public benefit standards by becoming a PBC could increase market share, adapt consumer attitudes, and improve the community in a significant way. Ultimately, attorneys will play a huge role as corporations decide whether or not to become a PBC because the decision is unique for each company.

PBC legislation is intended to track the changing marketplace that we live in today by evolving to suit changing consumer and investor demands. But unless Kentucky's PBC statute is easy to understand and includes all of the most important requirements, it will simply further confuse officers and directors, stockholders, employees, and the general public. Whether B.R. 225 will be successful in bringing public benefit corporations to Kentucky as a new form of corporate entity remains unsure.

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\(^{125}\) Id.

\(^{126}\) PRINCIPLES OF CORPORATE GOVERNANCE § 2.01(b)(2) (AM. LAW INST. 1994).