

COMPETING INTERESTS OF A GOVERNMENT APPOINTED
PUBLIC-PRIVATE PARTNERSHIP BOARD OF A NONPROFIT CORPORATION

JOSEPH FARRIS*

ABSTRACT

Since the 1970s, the United States federal government has used partnerships as a tool to coordinate federal initiatives in regional economic development and to stimulate private investment in inner-city infrastructure.¹ Traditional notions for public-private partnerships were embodied in ideas of shrinking government through privatization, leveraging private capital for public policy initiatives, or management reform of traditional governance.² Cooperation is the distinctive feature of these partnerships, connected as joint ventures to distribute both financial and other risks between public and private sectors, where the government must think and act as an entrepreneur and businesses must adopt public interest concerns and expect greater public accountability.³

* J.D. Candidate, May 2019.

¹ Stephen H. Linder, *Coming to Terms with the Public Private Partnership: A Grammar of Multiple Meanings*, 43 AM. BEHAV. SCI., 35, 35 (1999).

² *Id.* at 37–8.

³ *Id.* at 36–7.

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INTRODUCTION

In this article, I will discuss several ways in which public-private partnerships (“P3”) are used in society and how these P3s can be useful for governments to achieve development efforts but also require a balance of oversight and regulation to ensure the public purpose or benefit is accomplished. Part I provides alternative definitions of these partnerships in the context of varying viewpoints or desired outcomes. Part II discusses the role of the P3 in society and explores how they have been developed and employed in different regions and countries. Part III explores the nonprofit sector and the associated fiduciary duties and standard of care required for the nonprofit board of directors and whether the business judgment rule (applying a gross negligence standard) or an ordinary negligence standard is appropriate. Part IV reviews the report by the governor-sanctioned Delaware Economic Development Working Group that recommended the creation of the recently formed Delaware Prosperity Partnership (“DPP”), its statutory authorization, and the subsequent ongoing process of its implementation. Part IV also applies Parts II and III and examines potential options available for the nonprofit board to address potential conflicts of interest that may arise between the P3 and its government or business partners and what standard of care is proper to ensure sufficient public participation and accountability of the nonprofit P3.

I. ALTERNATIVE VIEWS OF PUBLIC-PRIVATE PARTNERSHIPS

During the final decade of the twentieth century, an increasing number of countries—both inside and outside the Organisation for Economic Co-operation and Development (“OECD”)⁴ area—began using public-private partnerships in public service that resulted in an evolving perspective that “public services are no longer confined to the state.”⁵ Nevertheless, the public-private partnership phenomenon is perceived and

⁴ The Organisation for Economic Co-operation and Development (“OECD”), with origins dating back to 1960, is an intergovernmental economic organization dedicated to improving the economic development and social well-being of people, and currently comprised of thirty-five member countries spanning the Americas, Europe, and Asia. OECD, *Members and Partners*, <http://www.oecd.org/about/membersandpartners/> (last visited Oct. 29, 2017).

⁵ Sergiu Cornea & Valentina Cornea, *Public-Private Partnership: Between Legal Requirements and the Real Needs*, 2 JURIDICAL TRIB. 186, 186 (2012).

defined differently depending on which perspective is applied.⁶ As mentioned, some have viewed P3s as a political tool aimed toward privatization, while others have viewed P3s as a retreat from the hardline advocacy of privatization with the strategic goal of ensuring lucrative joint ventures with the state.⁷ Yet, viewing P3s in context of privatization is only one perspective as there are “at least six distinctive uses of the term,” each invoking ideological and strategic aims, including: 1) **management reform**—collaboration through mentoring aimed at transforming the government agency to resemble a profit-seeking business;⁸ 2) **problem conversion**—through baiting the marketplace and commercializing problems to “attract profit-seeking collaborators” and induce them into “perform[ing] government tasks for less money”;⁹ 3) **moral regeneration**—where “[g]overnment managers are drawn into entrepreneurial activities via partnerships that strengthen their characters and stimulate their creative problem-solving skills”;¹⁰ 4) **risk shifting**—exhorting businesses to engage in collaborative ventures to “leverage government’s resources”;¹¹ 5) **restructuring public service**—such that partnerships alleviate some of the administrative procedures or “control labor standards” by using formal contractual agreements for wages and noncommercial concerns;¹² and 6) **power sharing**—based on the values of cooperation and trust where the partners mutually benefit by sharing of knowledge, responsibility, and risk in a deal-making consociation.¹³

Using an American and Anglo-Saxon perspective, a P3 is an agreement between public and private services offered to the public with the “essential feature of . . . sharing investment risks, responsibilities and benefits between the partners.”¹⁴ For comparison, in the European Union (“EU”), there is a general understanding that the term public-private partnership generically describes the relationship between the public and private sector and between the public sector and non-profits with basic components of those relationships characterized in three factors: 1) an

⁶ *Id.* at 187.

⁷ Linder, *supra* note 1, at 41–42.

⁸ *Id.* at 41–43.

⁹ *Id.* at 43.

¹⁰ *Id.* at 44–45.

¹¹ *Id.* at 45–46 ([I]n some cases funneling public funds in support of business interests, while in other cases the “business partners help bring fiscal restraint to these projects and insure their financial viability.”).

¹² Linder, *supra* note 1, at 46–47.

¹³ *Id.* at 47–48.

¹⁴ Cornea & Cornea, *supra* note 5, at 187.

actor's voluntary willingness to work even if not an equal partner; 2) the existence of a genuine public purpose—not just a desire to increase private profits at the expense of public funds; and 3) the partners' ability to achieve something resulting from a collaborative outcome that could not be achieved separately.¹⁵

Thus, the phrase “public-private partnership” is often used to describe relationship variations that are “much more complex than the term implies.”¹⁶ One succinct way of defining P3s is as a contractual relationship between a government agency and a business through which both sides accept “substantial financial, technical, and operational risk.”¹⁷ Because many countries treat P3s as “government-business endeavors” focused on economic and market collaborations,¹⁸ the term does not typically indicate a nonprofit's involvement as a key stakeholder.¹⁹ However, most P3s in the United States are often tri-party in nature, with nonprofit organizations serving as intermediaries and mission-stewards between public and private entities, facilitating the work of the partnerships.²⁰

II. PUBLIC-PRIVATE PARTNERSHIPS AND THEIR ROLE IN SOCIETY

Public-private partnerships “can be a very effective tool for development,”²¹ and offer many potential benefits. For instance, by allowing private industry partners to take the lead on projects, it could limit cities and states from taking on significant debt, and in most cases,

¹⁵ *Id.* (“[T]he tendency approach between public law and private law, . . . seeking agreement partners, accepting the need for cost effectiveness, and in some cases, there is competition, placing their intervention into the market economy.”).

¹⁶ Susan Ross, *Why Nonprofits Deserve More Credit for Public-Private Partnerships*, DEVEX INTERNATIONAL DEVELOPMENT NEWS (Aug. 23, 2013), <https://www.devex.com/news/why-nonprofits-deserve-more-credit-for-public-private-partnerships-81684>.

¹⁷ *Id.*

¹⁸ Stuart C. Mendel & Jeffrey L. Brudney, *Putting the NP in PPP: The Role of Nonprofit Organizations in Public-Private Partnerships*, 35 PERFORMANCE & MGMT REV. 617, 618 (2012), available at https://www.academia.edu/7397762/Putting_the_NP_in_PPPs_the_role_of_nonprofit_organizations_in_public-private_partnerships.

¹⁹ Ross, *supra* note 16.

²⁰ Mendel & Brudney, *supra* note 18, at 618.

²¹ Ross, *supra* note 16 (“[I]n many cases this is how drugs are developed, jobs are created, and development innovation takes place.”).

companies can finish projects quicker and more cheaply than governments.²² Over the last decade, P3s have become quite popular and many government and donor agencies have considered these partnerships as effective solutions to efficiently leverage and manage declining resources.²³

“Variations of public-private partnerships—known as P3 deals on Wall Street—are more common in Canada and some European countries than in the United States” because America provides federal tax exemption to interest on local and state bonds, which results in a bigger national municipal bond market.²⁴ That market is “more developed than in most other countries,” and makes public financing of infrastructure and other development projects more attractive, mitigating the need for partnerships with the private sector.²⁵ For example, in infrastructure spending in the United States, P3s have been used most extensively on toll roads, but they only account for a “tiny fraction”—one percent—of all spending between 1989 and 2011.²⁶ Even though P3s have been around for almost half a century, the P3 market in the United States is still in its early stages of development, but expanding significantly.²⁷

In the EU, national legislation was designed to establish an institutional framework to govern the public-private partnership and the cooperation between the public and private actors based on each partner’s capacity to properly allocate benefits, risks, and resources, in carrying out activities of public interest.²⁸ Legal regulation of the P3 is promoted either by adopting a special law for the P3 or adjusting existing legal framework to accommodate the partnership.²⁹

²² Matthew Goldstein and Patricia Cohen, *Public-Private Projects Where the Public Pays and Pays*, N.Y. TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/business/dealbook/trump-infrastructure-plan-privatized-taxpayers.html>.

²³ Ross, *supra* note 16.

²⁴ Goldstein & Cohen, *supra* note 22.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Cornea & Cornea, *supra* note 5, at 188 (stating that European directives on public contracts and P3s must adhere to principles of “transparency, equal treatment, proportionality, and mutual recognition.”).

²⁹ *Id.* (A substantive question to consider is if the new regulation is really needed and whether it accomplishes its purpose, or if adjusting an existing legal framework would have been enough).

Given the important contextual problem-solving purpose of P3s, one EU nation adopted a methodology considering four key issues as applied to the framework of the P3: policy, legal, institutional, and regulatory.³⁰ The adopted policy considerations were based on the public benefit to the state and asked questions related to decision making, such as how the P3 would be received by the public and private sector and what public or private interests would be promoted.³¹ The legal framework served as a basic premise for which public and private actors could act in the context of defined roles, responsibilities, and obligations between public and private sectors providing a basis for developing cooperation and trust between private and public partners.³² Institutional design of the P3 was needed with the state acting both as a promoter of the partnership and as an advisory body established to strengthen efforts in ensuring its effectiveness.³³ With regard to capacity and expertise, implementing P3 projects involves a complex process that requires sufficient financial capital, human resources, and time, in addition to various regulatory procedures to ensure effective management and transparency.³⁴ Regulations implemented as “rules limiting business operations” to achieve government goals can be “a complicated network of restrictions” that affect “all aspects of business and [are] a specific approach to balancing public and private interests,” such that the aim of the regulatory framework should not only be that the project create a mutual benefit, but also that it maintains this benefit if changes occur during project implementation.³⁵ Such regulatory provisions may include general principles for selecting private partners using a fair, competitive process, and procedures for awarding P3 contracts and reviewing compliance.³⁶

³⁰ *Id.* at 189.

³¹ *Id.* (“In general, the term ‘policy’ refers to decisions made for the good of the city and/or state.”).

³² *Id.* at 191.

³³ *Id.* at 193.

³⁴ Cornea & Cornea, *supra* note 5, at 194.

³⁵ *Id.* at 195.

³⁶ *Id.* at 195–96.

III. PUBLIC-PRIVATE PARTNERSHIPS AS NONPROFITS AND ENFORCEMENT OF FIDUCIARY DUTIES

Although P3s have not yet become widespread in the United States, nonprofit organizations have historically acted as facilitating agents for P3s in bridging the interests between the public and private arenas.³⁷ In some instances, public managers and private grant-makers expect nonprofits to establish and manage the partnership relations before and during the project work.³⁸

Although the nonprofit sector is diverse, nonprofit corporations, as a legal entity, are generally governed by state law and can commonly be formed for any lawful purpose.³⁹ However, nonprofit corporations must adhere to “the nondistribution constraint,” where members do not receive profits from the organization, but instead the organization reinvests them in furtherance of its mission.⁴⁰ For its part, federal tax laws complement state rules by offering tax incentives to qualified nonprofit organizations meeting specified criteria including that the nonprofit be organized in furtherance of promoting charitable, health care, education, scientific research, advocacy, or mutual benefit purposes, and, as a result, most nonprofits limit their purposes to achieve federal tax exemption and receive charitable contributions.⁴¹

Funding for nonprofit organizations is always a significant consideration in whether they can accomplish their stated goals. While most nonprofits depend upon public sector funding and tax breaks, the government also depends on the nonprofits to provide important services to its constituents.⁴² Nevertheless, government financial support has been declining over time, causing nonprofits to engage in more market-focused

³⁷ Mendel & Brudney, *supra* note 18, at 622.

³⁸ Stuart Mendel, *Achieving Meaningful Partnerships with Nonprofit Organizations: A View from the Field*, URBAN PUBLICATIONS, 1, 7 (2013), https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1674&context=urban_facpub.

³⁹ Denise Ping Lee, *The Business Judgment Rule: Should It Protect Nonprofit Directors?*, 103 COLUM. L. REV. 925, 930 (2003).

⁴⁰ Joseph Mead & Michael Pollack, *Courts, Constituencies, and the Enforcement of Fiduciary Duties in the Nonprofit Sector*, 77 U. PITT. L. REV. 281, 288 (2016).

⁴¹ *Id.* at 288–89.

⁴² Sarah L. Pettijohn, *Nonprofits and Government: A Mutually Dependent Relationship*, URBAN WIRE (June 10, 2013), <https://www.urban.org/urban-wire/nonprofits-and-governments-mutually-dependent-relationship>.

operational efforts that also causes questions to be raised about the legitimacy of the special privileges and tax exemptions afforded to them.⁴³ And, many nonprofits derive income from fees for services, largely driven by massive scale tuition-charging nonprofit colleges and health-oriented commercial nonprofits that often directly compete with their for-profit counterparts, charging similar rates for in-kind services.⁴⁴

Organizationally, some nonprofits have formal membership rolls and allow members to elect the organization's board of directors, but most choose not to have voting members or internal democracy, resulting in control over the organization being vested exclusively in a self-perpetuating board. This can be viewed as problematic because “private-regarding for-profit corporations are required to have more democratic internal governance structures than are supposedly public-regarding public benefit [member-less] nonprofit corporations.”⁴⁵

Compounding that concern is the decline in the level of care expected by nonprofit directors. They were historically considered to be trustees who operated under a strict standard of care in their management of a public trust and were expected to exercise reasonable skill and care, such that instances of ordinary negligence resulted in personal liability.⁴⁶ However, as the nonprofit laws evolved, legislatures and courts replaced trustee principles with corporate governance guidelines.⁴⁷ The difference is that nonprofit directors gained greater flexibility in exercising reasonable care without the additional “duty of caution” or “duty to preserve capital.”⁴⁸ Additionally, in judicially enforcing the fiduciary duty of care, some courts have applied the more lenient business judgment rule standard of review to nonprofits under the corporate duty of care,⁴⁹ thereby providing a safe harbor for directors who make informed, rational decisions, in good faith, absent self-dealing.⁵⁰

⁴³ Lee, *supra* note 39, at 929.

⁴⁴ Mead & Pollack, *supra* note 40, at 291.

⁴⁵ *Id.* at 290 (“[T]he absence of any external political check on most nonprofit boards often leads to lower quality board members, which then serves as a strong argument against giving board members unchecked discretion to manage the organization's affairs.”).

⁴⁶ Lee, *supra* note 39, at 935–36.

⁴⁷ *Id.* at 932, 937.

⁴⁸ *Id.* at 938.

⁴⁹ *Id.* at 939.

⁵⁰ *Id.*

Legislation on nonprofit rules of governance typically follows rules applicable to its for-profit counterpart, and Delaware, as the recognized leader in corporate law, applies the general corporation code to its nonprofit sphere rather than creating a distinct chapter for nonprofit corporations.⁵¹ Under these corporate laws, nonprofits are governed by boards of directors who are responsible for guiding the organization, selecting management, ensuring financial integrity, and complying with fiduciary duties of **care**—requiring that each director be fully informed to exercise the care a reasonably prudent person would in similar circumstances; **loyalty**—requiring directors act to further the organization’s best interests;⁵² and **obedience**—requiring that directors adhere to requirements of law and the nonprofit organization’s governing documents, including the mission described in its corporate charter.⁵³ But these rules are simply default standards that can be overridden by a nonprofit’s charter.⁵⁴

Nevertheless, when a fiduciary fails, courts have limited power to remedy the failing; and most states tend to restrict, via statute and case law, who has standing to challenge a nonprofit’s board decision, therefore limiting who can file suit against a director for a breach of fiduciary duty claim.⁵⁵ The Delaware Supreme Court has previously explained the doctrine of standing as it relates to a plaintiff’s ability to bring a lawsuit:

The concept of “standing,” in its procedural sense, refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or redress a grievance. It is concerned only with the question of *who* is entitled to mount a legal challenge and not with the merits of the subject matter of the controversy. In order to achieve standing, the plaintiff’s interest in the controversy must be distinguishable from the interest shared by other members of a class or the public in general. Unlike the federal courts, where standing may be subject to stated constitutional limits, state courts apply the concept

⁵¹ Mead & Pollack, *supra* note 40, at 294; see DEL. CODE ANN. tit. 8 § 114 (effective as of Jan. 28, 2019).

⁵² The duty of good faith is part of the duty of loyalty. *Id.* at 302.

⁵³ *Id.* at 302, 307.

⁵⁴ *Id.* at 302.

⁵⁵ *Id.* at 297.

of standing as a matter of self-restraint to avoid the rendering of advisory opinions at the behest of parties who are “mere intermeddlers.”⁵⁶

Generally, judicial enforcement of fiduciary duties may be accomplished when either the nonprofit’s governing board or the state’s attorney general files an action with the court, or in some instances through a derivative lawsuit.⁵⁷ Recognizing that many nonprofits do not have members and standing is not typically available for donors, customers, or the beneficiaries of the nonprofit programs, bringing suit against a director or nonprofit board is difficult.⁵⁸ In many states, the state attorney general, who is responsible for protecting the public interests, is solely responsible for enforcing nonprofit law; but given limited staffing, time, and resources, monitoring of nonprofits typically have low priority for the attorney general’s office.⁵⁹ But, many believe that other political and financial interests trump state enforcement.⁶⁰ On the other hand, in circumstances when the attorney general may pursue enforcement, the business judgment rule can heighten the evidentiary burden upon the state.⁶¹

Some scholars have proposed internal accountability metrics similar to those used in the for-profit context to assess how accountable the nonprofit corporation is to its constituents and how important accountability is to the institution as a basis of tailoring judicial review to fit the needs of the organization and its constituents.⁶² These metrics include internal accountability mechanisms that assess (1) the opportunities to exit from the organization and (2) the ability to effectively exercise one’s voice for change within the institution; exit and voice are important primary indicators of an organization’s degree of responsiveness to constituents.⁶³

⁵⁶ *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991) (internal citations omitted).

⁵⁷ Mead & Pollack, *supra* note 40, at 297–98.

⁵⁸ *Id.* at 298–99.

⁵⁹ Lee, *supra* note 39, at 932–33.

⁶⁰ Mead & Pollack, *supra* note 40, at 298.

⁶¹ Lee, *supra* note 39, at 942.

⁶² Mead & Pollack, *supra* note 40, at 282, 315–17 (nonprofit constituents may include directors, members, donors/patrons, employees, customers, and beneficiaries).

⁶³ *Id.* at 318–19.

In general, constituent exit for shareholders and customers, in the for-profit arena, is easy because a dissatisfied shareholder can simply divest his investment and completely dissociate from the company.⁶⁴ Likewise, a customer constituent can vote with her feet by patronizing a competitor with a better product or preferred company policy.⁶⁵ Similarly for nonprofits, donors and members can stop donating and volunteering with the organization when dissatisfied with decisions of a nonprofit board and discontinue association and support of that organization, though there may be emotional costs associated with the exit not present for the corporate shareholder.⁶⁶ However, for the beneficiary who relies on the services and support provided by the nonprofit, exit is usually difficult and not a practical mechanism of accountability, and exercising of voice can be similarly constrained. Apart from those options of internal accountability are metrics that either weigh the expertise of the institution against the court's expertise to determine the question of deference, consider the range of constituent impact, or examine the homogeneity of constituent interests.⁶⁷

IV. DELAWARE'S NONPROFIT PROSPERITY PARTNERSHIP AND POTENTIAL CONFLICTS OF INTEREST

Upon taking office in January 2017 as Delaware's seventy-fourth governor, John Carney issued an executive order that established an economic development working group charged with creating a report detailing how the state government could work with the private sector to improve Delaware's economic development efforts by creating a new P3.⁶⁸ The report was to include policy recommendations to foster

⁶⁴ *Id.* at 319–20.

⁶⁵ *Id.*

⁶⁶ *Id.* at 320–23 (discussing that ease of exit may be more difficult when additional donor/member interest exists).

⁶⁷ *Id.* at 318–19, 331–36.

⁶⁸ *Governor John Carney Takes Oath as Delaware's 74th Governor*, DELAWARE.GOV (Jan. 17, 2017), <https://news.delaware.gov/2017/01/17/governor-john-carney-takes-oath-as-delawares-74th-governor/>; *Rethinking Economic Development in Delaware: A Report from the Delaware Economic Development Working Group* 1, 9–10 (April 7, 2017), <https://governor.delaware.gov/wp-content/uploads/sites/24/2017/04/2017-04-06-Delaware-Economic-Development-Working-Group-Report-FINAL.pdf> [hereinafter *DEDWG Report*];

Joey Davidson, *Here's the Proposal for a \$2.5M Effort to Spur Delaware's Economy*, TECHNICAL.LY DEL. (April 13, 2017, 12:57 PM), <https://technical.ly/delaware/2017/04/13/carneys-economic-development-working-group-recommends-public-private-partnership/>.

economic development and strengthen the entrepreneurial environment, a proposal of the P3's governance structure, a proposal for the process and timeline for implementing the recommendations, and a draft of any needed legislation.⁶⁹ After holding four public meetings, the group approved a final report that proposed the formation of the new P3 with provisional name Delaware Prosperity Partnership ("DPP"), between the business community and the state's economic development efforts.⁷⁰

Five guiding principles served as the foundation for the creation of the P3: (1) **transparency**—open and transparent funding and operational management; (2) **co-investment**—joint co-investments from the public and private sectors;⁷¹ (3) **measures-driven**—clear and realistic measures to evaluate success and reflect outcomes of job creation, higher wages, expanding talent and tax bases, and formation of new businesses; (4) **strategic**—anticipating trends and economic conditions; and (5) **co-governance**—direction and management responsibility shared by public and private sectors.⁷²

The working group primarily considered either 501(c)(3) or 501(c)(6) as viable options for the legal tax structure and, ultimately, recommended the organizational structure be a public-private entity formed as a 501(c)(3) because of its capacity to receive charitable contributions and its flexibility in raising non-public funds.⁷³ This choice may be surprising to some because the 501(c)(6) allows a wide range of lobbying and may be used to promote and improve business conditions in the industry, whereas the 501(c)(3) is only used exclusively in charitable, educational, religious, literary, or scientific purposes with significantly restricted lobbying and political activity.⁷⁴ Yet the working group used a balancing approach to consider that the P3 as a 501(c)(3) could still prominently educate the public on state economic development issues, and if needed in the future, the P3 could be reclassified as a (c)(6) or a new (c)(6) sub-entity could be formed.⁷⁵

⁶⁹ *DEDWG Report, supra* note 68, at 9–10 (Executive Order One).

⁷⁰ Davidson, *supra* note 68; *DEDWG Report, supra* note 68, at 1.

⁷¹ *DEDWG Report, supra* note 68, at 3 (including finances, expertise, networks, facilities, and time).

⁷² *Id.*

⁷³ *Id.* at 3–4.

⁷⁴ See *Exempt Purposes – IRS Code Section 501(c)(3)*, <https://www.irs.gov/charities-non-profits/charitable-organizations/exempt-purposes-internal-revenue-code-section-501c3> (last updated June 22, 2018).

⁷⁵ *DEDWG Report, supra* note 68, at 3–4.

The report shows that DPP would assume various economic development duties that were not being addressed along with some then-existing functions handled by the Delaware Economic Development Office (“DEDO”), including: expanding business recruitment through targeted marketing; building a diverse and innovative entrepreneurial ecosystem that promotes ideas, talent, and capital; addressing the state’s economic competitiveness by raising issues of attracting, developing, and retaining talent; and conducting creative and forward-looking market intelligence research and analysis.⁷⁶ While other functions and responsibilities would remain with the DEDO, they could be transferred to the DPP in the future if the state determined that the partnership would better manage and implement them.⁷⁷

Funding of DPP’s operations would be achieved by both public and private sector contributions—with private sector targets comprising 40–60 percent of the total budget, raised by a combination of campaign fundraising⁷⁸ and membership fees,⁷⁹ and the remainder allocated by the state via a dedicated funding stream of public money.⁸⁰ The initial estimated budget of the P3 includes 1.5 million dollars from state funding and 1 million dollars from private contributions for a total of 2.5 million dollars.⁸¹

The working group considered examples of several other state’s economic development P3s and advisory councils including Enterprise Florida and the Indiana Economic Development Corporation, both of which has the state governor as the board chair.⁸² As a reference, the Indiana Economic Development Corporation (“IEDC”), explored further in this section, is the State of Indiana’s lead economic development

⁷⁶ *Id.* at 5–6.

⁷⁷ *DEDWG Report, supra* note 68, at 6 (including the Capital Resources Unit that administers the Delaware Strategic Fund with DPP in an advisory role, the Tourism Office, the Workforce Development Training Fund Administration, business development, and various other initiatives).

⁷⁸ *Id.* (showing that potential targeted private funders include businesses, healthcare and educational institutions, foundations, organized labor, and business associations).

⁷⁹ *Id.* (showing that the three levels of membership include board member, general member, and advisory body).

⁸⁰ *Id.*

⁸¹ *Id.* at 8 (assuming the P3 fulfills the identified functions and with no increase in state funding for the identified economic development activities).

⁸² *Id.* at 7, 18–19 (including examples advisory councils in Texas, North Carolina, and Oregon; and examples of other state economic development PPPs in Florida, Indiana, Missouri, and Virginia).

agency, officially established in February 2005 to replace the former Department of Commerce, is organized as a P3 that operates like a business, and is governed by a twelve-member board chaired by the governor who appointed the CEO that also serves as the Secretary of Commerce.⁸³ The IEDC has been functioning over a decade and is a great source of information and best practices that Delaware would do well to follow.

Ultimately, the group recommended that DPP's board of directors be comprised of fifteen members, two co-chairs—the governor as a public official and a prominent business leader as a private representative—and board appointments allocated as such: five (5) appointments by the governor, four (4) appointments by the legislature, and six (6) appointments by the private sector.⁸⁴ The board, responsible for creating a CEO position and establishing advisory councils to offer recommendations on specific economic competitive issues, should have its agenda determined by an executive committee comprised of up to five members.⁸⁵ As a nonprofit, the staff of DPP should be considered private sector employees and the CEO should be responsible for all decisions related to staff selection and management.⁸⁶ The recommended timeline suggested that private sector funding should have been completed by the third quarter in 2017, and the DPP should have hired its chief executive and began developing a strategic plan by the first quarter in 2018, and transitioned identified programs from state agencies by the end of the second quarter in 2018.⁸⁷

As an update, between August 15 to December 31, 2017, the DPP received contributions and grants totaling over 1.3 million dollars,⁸⁸ and

⁸³ *IEDC Agency Overview for FY 2014-2015 Biennial Budget*, at 1, https://www.in.gov/sba/files/BC_Hearing_2012_260_IEDC_Agency_Overview.pdf (last visited Nov. 20, 2017).

⁸⁴ *DEDWG Report*, *supra* note 68, at 7.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 8.

⁸⁸ <https://choosedelaware.com/wp-content/uploads/2018/12/DPP-990Report-2017.pdf>.

in 2018, the eighteen-member board hired William Kurt Foreman as its permanent CEO.⁸⁹ To date, the board has nineteen members.⁹⁰

A. Statutory Authority

In response to the working group's report and the governor's leadership, the Delaware State Legislature, in July 2017, established its legislative findings in 29 *Del. C.* § 8701A in support of the P3 and stated that:

(a) The General Assembly finds and declares that the good order of the State depends upon the steady employment in useful occupations of the citizens of the State. Such steady and useful employment can be made available by encouraging the economic development of the State through the inducement of a full range of commercial, industrial, agricultural and other enterprises to locate, remain and expand in the State. . . .

(c) The General Assembly further finds that promotion and assistance to small and minority-owned businesses is vital to the overall balance between large and small firms, and that it is in the State's interest to insure a strong and diversified business community.

(d) The General Assembly further finds and declares that the creation of a public/private partnership to attract large employers, innovative enterprises and international business opportunities while transferring duties formerly performed by the Delaware Economic Development Office to a division within the Department of State is in the best interest of the State to foster development in an increasingly competitive economy.⁹¹

⁸⁹ Jeff Neiburg & Scott Goss, *Delaware Prosperity Partnership Hires Permanent CEO*, THE NEWS J. (Mar. 1, 2018), <https://www.delawareonline.com/story/money/business/2018/03/01/delaware-prosperity-partnership-hires-permanent-ceo-behind/385055002>

⁹⁰ *Delaware Prosperity Partnership Board of Directors*, <https://choosedelaware.com/about-us/board-of-directors> (last visited Mar. 22, 2019).

⁹¹ The Delaware Legislature also found that “[u]ncontrolled industrialization and expansion, . . . may contribute to possible dangers to the public health and welfare through the pollution of the air, water and soil of the State”; and that “[t]he reduction, abatement and prevention of” environmental pollution and protection of natural resources “are important concerns to be considered in the process of encouraging the economic development of the State”;

Additionally, in July 2017, the Delaware State Legislature passed 29 *Del. C.* § 8702A, under Chapter 87A governing economic development and characterized the P3 as a nonprofit with the following purpose:

(3) ‘Public/Private Partnership’ means a nonprofit corporation not established by the General Assembly consisting of business and community leaders and public officials formed to enhance the State’s ability to attract, grow and retain businesses; facilitate the development of a stronger entrepreneurial and innovative economic system within the State; coordinate with the Division of Small Business, Development and Tourism; and, support private employers within the State in identifying, recruiting and developing talent for the operation of their business within the State.⁹²

B. Implementation

Given the legislative support, Delaware’s economic development efforts underwent a major transformation on Monday, August 14, 2017, when Governor John Carney signed a bill that replaced DEDO with a “public-private partnership partially run by some of the state’s largest companies.”⁹³ “Carney said, ‘[t]he hard work starts now and that’s working together in partnership . . . to market our state more aggressively and think out of the box about how to develop our entrepreneurial economy.’”⁹⁴ The newly minted nonprofit P3 is tasked with investing in workforce development programs, which includes vetting and endorsing companies that seek state taxpayer grants and loans, recruiting new employers to the state, and supporting the state’s burgeoning startup community; while the former cabinet-level agency previously responsible

and that promoting the State as a tourist destination would “help to enhance the State’s economy and provide employment and recreational opportunities for [its] citizens.” DEL. CODE ANN. tit. 29 § 8701A (effective as of Jan. 28, 2019).

⁹² DEL. CODE ANN. tit. 29 § 8702A (effective as of Jan. 28, 2019).

⁹³ Scott Goss, *Big Changes Planned for Economic Development Efforts in Delaware*, THE NEWS J. (Aug. 14, 2017), <https://www.delawareonline.com/story/news/politics/2017/08/14/new-day-delaware-economic-development/564198001/>.

⁹⁴ *Id.*

for those tasks, DEDO, was dissolved.⁹⁵ Additionally, a new state agency named the Division of Small Business Development and Tourism has acquired approximately forty former DEDO employees with anticipation that almost half of those positions will be cut by the end of 2017, promising an annual cost savings of \$2 million planned to be redirected to the partnership's operating budget, with another projected annual allocation of \$1 million supplied by the business community.⁹⁶

In general, nonprofits in Delaware should adopt policies that help the organization avoid conflicts of interest, ensure its board is well-managed, place proper financial controls on officers and employees, and help ensure success in fulfilling the nonprofit's mission.⁹⁷ Numerous other states have specific statutory regimes that govern nonprofits to help ensure they are well-managed and responsive to taxpayers, donors, and their other constituents.⁹⁸ But Delaware has no such regulatory scheme.⁹⁹ Nevertheless, the DPP P3 should adopt a conflict of interest policy requiring that any board members with a conflict or potential conflict disclose it and also prohibit interested board members from voting on any matter in which there is a conflict.¹⁰⁰ Beyond that, the nonprofit should have a written conflict of interest policy describing the process the nonprofit uses to manage conflicts and how the nonprofit determines whether board members have a conflict of interest.¹⁰¹ Furthermore, board meeting minutes should reflect when a board member discloses a conflict of interest and how the conflict was managed.¹⁰² Conflicts that go unmanaged may result in significant penalty taxes, called intermediate sanctions, assessed against the organization and person who improperly

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Jeremy T. Coffey, *Why Delaware – The Most Popular State for New Businesses and New Nonprofits*, PERLMAN & PERLMAN LLP BLOG (May 2, 2017), <http://www.perlmanandperlman.com/why-delaware-the-most-popular-state-for-new-businesses-is-also-the-state-we-recommend-for-new-nonprofits/#.WhDeZrVV6dM.gmail>.

⁹⁸ *Id.* (providing an example where New York's internal governance requirements include audit requirements, restrictions on who may serve as board chairperson, and mandatory procedures for managing conflicts of interest).

⁹⁹ *Id.*

¹⁰⁰ *Conflict of Interest*, NAT'L COUNCIL OF NONPROFITS (Oct. 7, 2017), <https://www.councilofnonprofits.org/tools-resources/conflict-of-interest>.

¹⁰¹ *Id.*

¹⁰² *Id.*

benefits from transactions with public charities or engages in impermissible self-dealing type transactions.¹⁰³

For its part, the working group established *transparency* as one of the principles for Delaware's new economic development P3.¹⁰⁴ Notwithstanding that fact, during the week of September 22, 2017, the DPP's eighteen-member¹⁰⁵ board comprised of elected officials and local business leaders, announced its first hire, the interim CEO, before the public was informed that the board had been established.¹⁰⁶ In response, open government advocates asserted that the new P3's board should have followed open meeting laws and announced the first meeting in advance, prompting concerns that the secret meeting and the delayed announcement of the interim CEO's hiring belie the new organization's commitment to transparency and accountability.¹⁰⁷ Some critics fret that giving business leaders direct input into economic develop decisions increases the risk of self-dealing.¹⁰⁸

These concerns are valid because they show the necessity for independent oversight of this new entity to ensure proper safeguards are in place, including public access in accordance with Delaware's open records laws, conflict of interest disclosures, and defined metrics that can be measured against the nonprofits stated mission, to assure protection of the public's trust. Furthermore, the presumption in Delaware is that business decisions made by a nonprofit's board will be informed and in good faith. In most cases, absent evidence of self-dealing, the courts will use a gross negligence standard applying the business judgment rule to breach of duty claims. Given the constraints of judicial standing, many of the nonprofit's public constituency will have very limited options

¹⁰³ *Id.*; Janet Rickershauser, *Intermediate Sanctions*, 2014 ABA Annual Meeting CLE Materials (Aug. 9, 2014), https://www.americanbar.org/content/dam/aba/events/gpsolo/2014/08/2014_aba_gpsolo_annual/gpsolo_2014_annual_cle_materials.authcheckdam.pdf.

¹⁰⁴ See *supra* text accompanying note 71.

¹⁰⁵ See *supra* text accompanying note 84 (showing the recommended board size comprise a total of only fifteen directors).

¹⁰⁶ Scott Goss, *Delaware Prosperity Partnership Hires Interim CEO Behind Closed Doors*, THE NEWS J. (Sep. 22, 2017), <https://www.delawareonline.com/story/news/politics/2017/09/22/delaware-prosperity-partnership-hires-interim-ceo-behind-closed-doors/691422001/>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

available, if any, for legal recourse. State statute also allows the nonprofit corporations to include a safe harbor exception in its certificate of incorporation that eliminates any monetary liability for a director's breach of the duty of care.¹⁰⁹ Therefore, adopting a policy and regulatory framework that ensures DPP's transparency and accountability to the public is paramount.

As an example, Indiana's economic development P3 uses a transparency portal webpage that provides comprehensive data on economic development projects that the IEDC undertakes and provides links to board and committee meeting minutes, financial and legislative reports, as well as other information, including links to professional services and performance-based tax credit, grant, and loan contracts.¹¹⁰ Pursuant to state statute, Indiana's Secretary of Commerce prepares and submits annual economic incentive and compliance reports to both the governor and the state legislative council with updates on grants, loans, tax credit programs, and active projects dating back to the inception of the IEDC; and these reports are publicly available on the transparency portal.¹¹¹ The IEDC is not a nonprofit, but it has a nonprofit subsidiary, the Indiana Economic Development Foundation, Inc. ("IEDF"), and both are subject to the state's Open Door Law permitting Indiana citizens access to meetings held by public agencies.¹¹²

By contrast, Delaware's new partnership's board of directors is not required to hold public meetings, post agendas or publish minutes of its discussions, which has already caused public concern of being excluded from commenting on how the P3 spends millions in taxpayer dollars.¹¹³

¹⁰⁹ DEL. CODE ANN. tit. 8 § 102(b)(7) (effective as of Jan. 28, 2019) (this safe harbor provision does not apply to actions not done in good faith).

¹¹⁰ IEDC TRANSPARENCY PORTAL, <https://secure.in.gov/apps/iedc/transparencyportal/home> [hereinafter *IEDC Portal*] (last visited November 18, 2017).

¹¹¹ *IEDC Portal* (follow "Additional Public Information" hyperlink).

¹¹² See Handbook on Indiana's Public Access Laws, <http://www.hammond.lib.in.us/PDF/PublicAccess/Indianas%20Public%20Access%20Laws.pdf> (last updated December 2003); see also IEDC & IEDF Electronic Meeting Policy (July 1, 2017), *IEDC Portal* (follow "Additional Public Information" hyperlink; then follow "IEDC Board Meeting Minutes & Presentations" hyperlink; then follow "IEDC.IEDF Electronic Meetings Policy 2017.pdf" hyperlink).

¹¹³ Scott Goss, *Carney's Economic Strategy Raises Transparency Questions*, THE NEWS J. (Aug. 18, 2017), <http://www.delawareonline.com/story/news/politics/2017/08/18/transparency-questions-surround-carneys-business-plan/574745001/> ("Emails and other communication involving the

Additionally, financial disclosure forms that reveal potential conflicts of interests and are required of business leaders who serve on the P3's board have also been withheld from public scrutiny and some say that this lack of transparency could attract abusive practices by business leaders on the board who could use their positions to reward companies aligned with their own private interests or thwart competitors.¹¹⁴ Although not required by statute, to strengthen support, Delaware's economic development P3 should adopt similar efforts employed by the IEDC to ensure that the public can hold the P3 accountable, and that transparency and timely access of information are publicly available, especially in the beginning stages of implementation.

Since the DPP's early days when "[o]pen government advocates . . . voiced concerns that deals [were] being made without any public input and were upset in September 2017 when John Riley was named interim CEO during a closed-door meeting," the new CEO, Foreman has reported "that communication between the components of the public-private alliance is strong."¹¹⁵ And according to Foreman, "keep[ing] the public apprised of every negotiation and prospective deal. . . . could jeopardize the Partnership's work by scaring off some prospective companies who aren't interested in airing their business publicly."¹¹⁶ Furthermore, Foreman [has stated] that the DPP "never do[es] anything" alone, but "is always working with multiple partners."¹¹⁷ This reflects the DPP's discretion as a private nonprofit in how transparent it chooses to be.

CONCLUSION

Public-private partnerships can be effective tools to connect public and private sector entities in collaborative project opportunities that solve critical needs of public interest while minimizing financial risks to the government and offering the private company a host of benefits including access to political capital and promotion of its goodwill. When the partnership is organized as a nonprofit corporation, it can take advantage

nonprofit also could be off limits since four of its board members will be state legislators, who enjoy a blanket exemption from Delaware's open records law.").

¹¹⁴ *Id.*

¹¹⁵ Alex Vuocolo, *How Delaware Prosperity Partnership is Moving Forward*, DEL. BUS. TIMES (Dec. 27, 2018), <https://www.delawarebusinesstimes.com/delaware-prosperity-partnership-moves-forward>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

of federal tax exemptions—if willing to narrow its organizational purposes. However, the nonprofit's board will also be subject to the fiduciary duties associated with exercising reasonable and informed decision-making.

Many states follow a robust regulatory regime for nonprofits, but in Delaware, nonprofits fall under general corporation laws which are very flexible, and generally do not require much regulatory oversight of nonprofits. Because the Delaware Prosperity Partnership was created as a non-profit P3, and includes the state governor as one of the two co-chairs, whom also selected some of the board members, questions abound concerning potential conflicts of interest, and if a policy is in place for the nonprofit board, the corresponding businesses they represent, and other entities involved in the partnership. Also, key are regulatory provisions to ensure fair competition during the selection process of projects and project partners and compliance with procedures for awarding P3 contracts. Most importantly, a pressing concern is how can the state effectively regulate the nonprofit with the governor and other legislators on the board? Examples from other states exist and clearly demonstrate that transparency, meeting access, and open records laws are the key in meeting the tri-party goals of the partnership to the public's benefit.

Such measures must be implemented to ensure effective monitoring of the partnership for public accountability and evaluation of clearly delineated metrics to determine if the outcomes of the state's economic development goals are achieved. For its part, since its initial inception and formation, the DPP has held public meetings, adopted transparency guidelines and a conflict of interest policy,¹¹⁸ and developed an Internet website providing news and updates along with meeting minutes,¹¹⁹ all essential steps toward achieving public transparency.

However, because the DPP's board of directors is not required to hold public meetings, post agendas, or publish minutes of its discussions, and four of the board members are legislators who enjoy blanket exemption from Delaware's open records law, and because there are limited accountability mechanisms in place for the range of constituents involved, the board should be held to an ordinary negligence standard of

¹¹⁸ *Delaware Prosperity Partnership Transparency Guidelines*, <https://choosedelaware.com/about-us/transparency-guidelines> (last visited Mar. 22, 2019).

¹¹⁹ *Delaware Prosperity Partnership Board of Directors*, <https://choosedelaware.com/about-us/board-of-directors> (last visited Mar. 22, 2019).

care instead of the gross negligence standard under the business judgment rule standard of review. Thus, applying an ordinary negligence, based on a reasonable person standard, is one viable way to strengthen the enforcement mechanism of a director's fiduciary duties to the nonprofit, thereby safeguarding the public trust. Alternatively, Delaware could strengthen its regulatory regime for nonprofits. Either option would provide more assurance of public accountability for private nonprofits engaged in public partnerships with the state.
