

PUBLIC BENEFIT AND PRIVATE PROFIT

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I. INTRODUCTION

It requires an abiding faith in the human character to convincingly extoll the efficacy of benefit corporations (BC).¹ Can instinctive physical selfishness really be tempered by conscientious intellectual selflessness? Self-interest is hard wired because survival is the first human instinct.² Except in the family or in rare war circumstances, selfishness prevails over any selfless notion to sacrifice one's own survival, even knowing that another's survival is dependent on the sacrifice. The self takes precedence over the other.³ It seems only an extension of the first instinct, that given a choice between altruism and profit-seeking, people will pursue the latter. Especially when the pursuit of profit does not obviously or immediately portend dire consequences for someone else. In economic transactions, selfishness manifests itself in profit-seeking behavior. The ethos of business is that every actor seeks profit, even at the expense of another person or everybody else's loss.⁴ It is a competition constrained only by wide legal

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1. I will use "benefit corporation" or "BC" to refer to entities organized under the Model Benefit Corporations Act or Delaware's Public Benefit Corporations. I use the phrase in reference to business entities that have "a legal duty to consider the interests of other groups, such as employees, customers, communities, and perhaps even the environment, when making business decisions." MICHAEL B. DORFF, BECOMING A PUBLIC BENEFIT CORPORATION: EXPRESS YOUR VALUES, ENERGIZE STAKEHOLDERS, MAKE THE WORLD A BETTER PLACE 4 (Eric Nee & Johanna Mair eds., 2024).

2. The assertion is, of course, greatly simplified and I do not intend a dissertation on human behavior or the invariability of human behavior. I am instead requesting a stipulation that humans are first and foremost self-serving. *But see, e.g.*, Emma Seppälä, *Compassion: Our First Instinct*, PSYCH. TODAY (June 3, 2013), <https://www.psychologytoday.com/intl/blog/feeling-it/201306/compassion-our-first-instinct#sthash.gwfGEZkd.dpuf>. (I acknowledge, however, a great body of scientific knowledge asserting that compassion is the first human instinct).

3. *See* Scott Barry Kaufman & Emanuel Jauk, *Healthy Selfishness and Pathological Altruism: Measuring Two Paradoxical Forms of Selfishness*, FRONTIERS PSYCH. 1, 3 (May 21, 2020), <https://www.frontiersin.org/journals/psychology/articles/10.3389/fpsyg.2020.01006/full>. Two researchers use the phrase "pathological altruism" to refer to selfless behavior that is damaging to the self. *Id.*

4. *See* DORFF, *supra* note 1, at 10; "From this perspective, shareholders are the entire reason corporations exist. All of the other groups who contribute to the enterprise's success must look out

boundaries. In civil society, selflessness manifests itself in sharing behavior. Here, it is a collaboration to ensure there are no losers, or at least to moderate the plight of losers. But that effort is constrained by selfish instincts prevailing in the larger market. The trick is to combine the good things derived from business and civil society together without either of them constraining the other.

Public Benefit Corporation (PBC) advocates reject the notion that selfishness will inevitably prevail over selflessness. They insist, at least implicitly, that when circumstances are not so dire as to permit only one person's economic survival, people can and will sacrifice marginal utility to facilitate someone else's subsistence or the common welfare. The further an investor is from mere subsistence, the more likely the investor will reject a "get rich or die trying" ethos in favor of public benefit instead. The PBC is the business associational expression of that faith in human character. PBC investors keep that faith, agreeing amongst themselves that so long as there is no threat to survival, they will sacrifice an indefinite measure of profit for public benefit, broadly defined.

Wishful thinking? Can socially minded investors ever really be counted on to temper selfishness with selflessness? Certainly not in dire situations where profit-taking is, at least in the short term, diametrically opposed to the public good. Can they be counted on in less than dire situations to do so? We should question whether it is pollyannish to think that charitably minded fiduciaries, especially those operating in an environment awash in profit potential, will fulfill a sharing obligation voluntarily undertaken by acceptance of tax exemption or PBC status.

The question is probably too complicated to answer, except by case studies or with the collaboration of many different disciplines. I do not propose to write a dissertation incorporating sociology, psychology, economics, and statistics. This essay merely presents the especially sensational story of OpenAI (c)(3),⁵ the famous charity that developed ChatGPT,⁶ and which is currently struggling with an honest desire to temper profit-taking with altruism.⁷ It is an early retrospective. I don't expect

for themselves. The corporation's job is to extract as much value from these other groups as possible while paying them as little as possible, maximizing shareholders' wealth." *Id.*

5. See generally *Introducing OpenAI*, OPENAI (Dec. 11, 2015), <https://openai.com/index/introducing-openai/>.

6. See generally *Introducing ChatGPT*, OPENAI (Nov. 30, 2022), <https://openai.com/index/chatgpt/>.

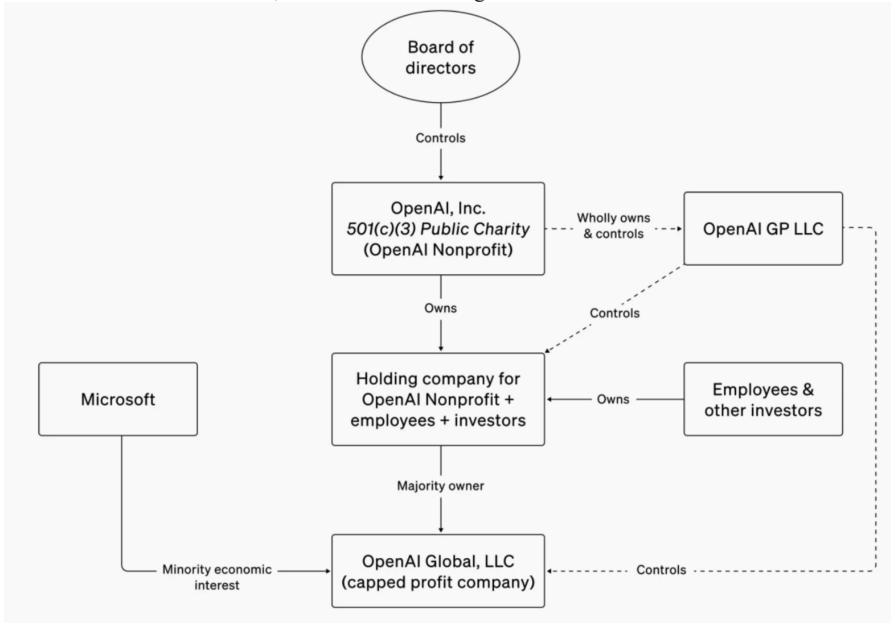
7. See generally Krystal Hu & Kenrick Cai, *OpenAI to Remove Non-Profit Control and Give Sam Altman Equity*, REUTERS (Sept. 26, 2024, 4:10 AM), <https://www.reuters.com/technology/artificial-intelligence/openai-remove-non-profit-control-give-sam-altman-equity-sources-say-2024-09-25/>; Krystal Hu & Kenrick Cai, *OpenAI's Huge Valuation Hinges on Upending Corporate*

OpenAI (c)(3)’s experience will answer all the questions or tell us everything we need to know. It can only help us know what we don’t know.

The climax is that OpenAI (c)(3)⁸ has found it impossible, as a tax-exempt charity, to combine profit-seeking and charity in pursuit of the public good. OpenAI (c)(3) asserts that charity – the public good – is not achievable without more private profit than tax exemption tolerates.⁹ And that tax law’s insistence that OpenAI (c)(3) comply with even a watered-down version of the “nondistribution constraint”¹⁰ nevertheless renders its pursuit of the public good futile. We will see that as a practical matter, there really is no

Structure, REUTERS (Sept. 14, 2024, 6:20 AM), <https://www.reuters.com/technology/artificial-intelligence/openais-stunning-150-billion-valuation-hinges-upending-corporate-structure-2024-09-14/>. Throughout this essay I avoid judging intentions and take OpenAI fiduciaries at their word.

8. The complicated structure by which the OpenAI organization, writ large, conducts business and charity includes several layers of entities with similar names. *See generally Our Structure*, OPENAI, <https://openai.com/our-structure/> (last visited Oct. 28, 2024). I will use generic names – OpenAI (c)(3), OpenAI LP, and OpenAI BC to refer to the tax-exempt charity, the joint venture in which the charity and Microsoft are members, and the benefit corporation OpenAI states it will convert to. Meanwhile, here is the official organization chart:



9. *See Hu & Cai, OpenAI to Remove Non-Profit Control and Give Sam Altman Equity, supra note 7.*

10. The famous phrase, coined by Henry Hansmann, refers to state corporate and federal tax provisions prohibiting a nonprofit and tax-exempt charity, respectively, from distributing profits. *See* FLA. STAT. ANN. § 617.0505 (West 2024) (effective Oct. 1, 2009); I.R.C. § 501 (West); Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 56 (1981) (describing the “non distribution constraint”).

limit on the amount of profit OpenAI (c)(3) might have distributed to profit seekers, whose association with OpenAI (c)(3) is necessary for public benefit.

Tax law requires OpenAI (c)(3) to pursue public benefit¹¹ but since 1998 the law also allows profit distribution in that effort.¹² Profit, if it occurs as an incidence of the pursuit of public benefit, may be distributed to private investors but only through a delicately structured partnership designed to ensure OpenAI (c)(3) operates for public benefit.¹³ Thus, Microsoft contributed capital as a limited partner in a joint venture with OpenAI(c)(3) and agreed that the latter could exclusively pursue public benefit.¹⁴ Microsoft agreed that OpenAI (c)(3) would be bound by none of the duties partners or corporate fiduciaries have to enrich their principals. Tax law insists on that stipulation if OpenAI (c)(3) is to associate with profit seekers, however indispensable they may be to achieving public benefit. We will see that Microsoft's efforts to increase the likelihood of that coincidence may have undermined OpenAI (c)(3)'s pursuit of the public good.

Implicit in tax law's approval is the recognition that OpenAI (c)(3)'s conceived public good is worthy and cannot be achieved without selfish profit-taking.¹⁵ My point here is that at some point, profit takers will inevitably express an instinct that is contrary to the public good. The lion may lie down with the lamb for a while, but if food becomes scarce, the lion will eat the lamb. That point has come for OpenAI (c)(3).¹⁶ Food – investor capital -- has become scarce, and to save itself, OpenAI (c)(3) decided to shed its charitable tax-exempt status. OpenAI (c)(3) is attempting to salvage a semblance of itself by reorganizing as a public benefit corporation. Whether OpenAI PBC can succeed where OpenAI (c)(3) failed cannot be known *ex ante*. The conversion has not yet occurred, though as of the date of this publication, it is a *fait accompli*.¹⁷ It seems instructive to recap

11. See generally Treas. Reg. § 1.501(c)(3)-1 (2017) (“An organization is not organized or operated exclusively for one or more of the purposes specified in subdivision (i) of this subparagraph unless it serves a public rather than a private interest.”).

12. Rev. Rul. 98-15, 1998-1 C.B. 718.

13. *Id.*

14. See *OpenAI LP*, OPENAI (Mar. 11, 2019), <https://openai.com/index/openai-lp/>; see also *Our Structure*, OPENAI, *supra* note 8.

15. Revenue Ruling 98-15 does not require OpenAI to prove that distributing profit to a private investor is indispensable to achieving the public benefit, only that doing so would “better serve” the public benefit. 1998-1 C.B. 718.

16. See Hu & Cai, *OpenAI to Remove Non-Profit Control and Give Sam Altman Equity*, *supra* note 7.

17. See *OpenAI Looks to Convert from Nonprofit Roots and Become For-Profit Company*, PBS NEWS (Sept. 26, 2024, 2:52 PM), <https://www.pbs.org/newshour/nation/openai-looks-to-convert-from-nonprofit-roots-and-become-for-profit-company>.

OpenAI (c)(3)'s efforts and, from that, make a few observations on whether the effort to temper selfishness with selflessness is even worth the trouble.

II. SELFISHNESS AND SELFLESSNESS IN THE PURSUIT OF PUBLIC BENEFIT

Elon Musk has described OpenAI (c)(3)'s joint venture with Microsoft as something akin to an organization founded to save the Amazon rainforest.¹⁸ When the organization suddenly beholds the vast private profit potential, it operates instead like a lumber company determined to chop down the forest and sell all the wood. If the description is apt, it would mean that OpenAI (c)(3) is operating selfishly, in violation of the premise underlying tax exemption or a public benefit charter. We might excuse Musk's apocalyptic rhetoric. His primary evidence appears to be that OpenAI (c)(3) is generating way too much profit. Maybe his envy makes it difficult to think of any business reaping billions, all in less than ten years since its founding, as a charity or as operating for the public benefit. But tax-exempt organizations are not prohibited from generating profit, not even massive amounts. The law does not object in either case if profit is a consequence or incidence of good works.¹⁹ If the presence of even astronomical profit were problematic, Harvard University would be neither tax exempt nor operating for public benefit.²⁰

Thus, the first lesson from our retrospective is that profit, even extraordinary profit, is not invariably inconsistent with public benefit. Charities and public benefit corporations exist in thoroughly capitalist markets and profit is the currency of exchange. Charities and public benefit corporations, like traditional profit-makers, must play by prevailing rules. Except for too few benefactors and uncertain government grants, nobody donates their necessary inputs. Thus, charities and public benefit corporations necessarily participate in market rate transactions to acquire

18. Mark Harris, *Elon Musk Used to Say He Put \$100M in OpenAI, but Now It's \$50M: Here are the Receipts*, TECHCRUNCH (May 17, 2023, 4:37 PM), <https://techcrunch.com/2023/05/17/elon-musk-used-to-say-he-put-100m-in-openai-but-now-its-50m-here-are-the-receipts/>, (quoting Elon Musk) ("This would be like, let's say you funded an organization to save the Amazon rainforest, and instead they became a lumber company, and chopped down the forest and sold it for money.").

19. See Treas. Reg. § 1.501(c)(3)-1 ("An organization may meet the requirements of section 501(c)(3) although it operates a trade or business as a substantial part of its activities, if the operation of such trade or business is in furtherance of the organization's exempt purpose or purposes and if the organization is not organized or operated for the primary purpose of carrying on an unrelated trade or business, as defined in section 513.").

20. See Laura M. Binger, John F. Bowman & Benjamin J. Oldfield, *Harvard's Role As a Nonprofit*, THE HARV. CRIMSON (May 21, 2009), <https://www.thecrimson.com/article/2009/5/21/harvards-role-as-a-nonprofit-harvard/>.

inputs without which the public benefit cannot be generated.²¹ We should hope that in the course of doing so, they accumulate reserves too, assuring that their existence and good works are more than fleeting or tenuous. Profit, or the amount remaining after immediate operating needs, is rather a necessity, not a reason for suspicion.

OpenAI (c)(3) began in December 2015 when it set forth as a Delaware nonprofit corporation.²² In 2016, the IRS determined that it qualified as a tax-exempt charity²³ on the strength of its stated purpose, sufficient for both tax exemption and public benefit status:

OpenAI is a non-profit artificial intelligence research company. Our goal is to advance digital intelligence in the way that is most likely to benefit humanity as a whole, unconstrained by the need to generate financial return. Since our research is free from financial obligations, we can better focus on positive human impact. We believe AI should be an extension of individual human wills and, in the spirit of liberty, as broadly and evenly distributed as possible. The outcome of this venture is uncertain and the work is difficult, but we believe the goal and the structure are right. We hope this is what matters most to the best in the field.²⁴

The founders, themselves, were responsible for initial operating capital and together they pledged \$1 billion towards the effort.²⁵ OpenAI (c)(3) quickly developed information technology using large language models (LLM) described in the industry as generative pre-trained transformers, or GPT.

The word “Open” in the organization’s title hints at only half the public benefit goal. Theoretically, OpenAI (c)(3) generates public domain

21. See *How Much Profit Can a Nonprofit Make? (Or When Tax-Exempt Really Isn't)*, CRSCPA (Mar. 22, 2023), <https://crscpa.com/blog/how-much-profit-can-a-nonprofit-make-or-when-tax-exempt-really-isnt/>.

22. See *Department of State: Division of Corporations*, DELAWARE, <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx> (type “OpenAI” in “Entity Name” box and click “search”; then follow “OPENAI, INC.” hyperlink).

23. See generally *GuideStar Openai Inc.*, CANDID, <https://www.guidestar.org/profile/81-0861541>.

24. See generally *Introducing OpenAI*, OPENAI, *supra* note at 5; OpenAI (c)(3)’s mission statement hardly conveys the theoretical danger to the public. Although stated in theoretical terms, the dangers center around the concern that robots will take over the world enslaving or even doing away with human beings. The concerns are so real that the United States and the European Union have adopted legally binding guidelines to constrain the uninhibited development and deployment of artificial intelligence. Commission Regulation 2024/1689, 2024 O.J. (L 144) 1, 21; *The Artificial Intelligence Act - Regulation (EU) 2024/1689*, <https://www.artificial-intelligence-act.com/> (last visited Oct. 28, 2024); see also Exec. Order No. 14,110, 3 C.F.R. 349 (Oct. 30, 2023).

25. See Harris, *supra* note 18.

technology in an effort to avoid monopolization and economic exploitation.²⁶ To achieve that goal, OpenAI (c)(3) must be both smart and fast. Fast enough to generate intellectual property before other researchers who might sooner assert intellectual property rights to exploit the IP solely for profit. It is as though OpenAI (c)(3) seeks a cure for a fatal disease and wants to ensure the cure's availability to the entire population even though market distribution would bring untold riches. The other half of OpenAI (c)(3)'s public benefit mission is safety.²⁷ Here, it is as though OpenAI (c)(3) seeks a cure for a fatal disease but delays release until it is sure it does not release a fatal virus instead. It delays deployment, even if sooner deployment might bring untold riches. Freely available technology, released only after it has been proven safe, is obviously conducive to the public good, but it implies financial sacrifice.

Things progressed smoothly and as planned until OpenAI (c)(3) began experiencing successive breakthroughs with its GPT technology.²⁸ Those breakthroughs demonstrated the tremendous profit potential embodied in artificial intelligence. Profit-seekers recognized the potential and began organizing themselves in commercial ventures that would not necessarily be concerned with public benefit. In a sense, OpenAI (c)(3) had become a victim of its own success. Donations declined because people who might have otherwise donated to OpenAI (c)(3) invested instead in its for-profit competitors. The cost of new breakthroughs, already high, increased to even higher levels with each successive scientific breakthrough.²⁹ It was at this point that OpenAI felt the real need to attract capital-rich profit-seekers in

26. See generally David Gray Widder, Meredith Whittaker & Sarah Myers West, *Open (for Business): Big Tech, Concentrated Power, and the Political Economy of Open AI*, SSRN (Aug. 18, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4543807. (“What openness looks like in practice varies considerably, and can include anything from making the training and evaluation datasets used to shape an AI model publicly accessible, to releasing the code defining a model’s architecture or its hyperparameter settings under one or another open source license, to making a model’s learned parameters (model weights) publicly available, to providing documentation like model cards or data sheets. But some systems described as ‘open’ provide little more than an API and a license authorizing reuse, including commercialization of the technology.”).

27. *OpenAI Safety Update*, OPENAI (May 21, 2024), <https://openai.com/index/openai-safety-update/>.

28. See *Models*, OPENAI, <https://platform.openai.com/docs/models> (last visited Oct. 22, 2024) (For a list of OpenAI’s “models”).

29. See Mike Isaac & Erin Griffith, *OpenAI Is Growing Fast and Burning Through Piles of Money*, N.Y. TIMES, (Sept. 27, 2024), <https://www.nytimes.com/2024/09/27/technology/openai-chatgpt-investors-funding.html>. The trend continues even now. (OpenAI “expects to lose roughly \$5 billion this year after paying for costs related to running its services and other expenses like employee salaries and office rent, according to an analysis by a financial professional who has also reviewed the documents. Those numbers do not include paying out equity-based compensation to employees, among several large expenses not fully explained in the documents”).

hopes that those profit-seekers would mediate their selfishness for public benefit. As capital increasingly flowed towards profit potential undiminished by the pursuit of public benefit, OpenAI (c)(3) would become increasingly unable to pursue its charitable goal.

OpenAI (c)(3) needs profit-seekers to achieve public benefit. It is an implicit and accepted capitalist principle that public good is unachievable without private profit.³⁰ Tax law, like corporate law, historically disdained mixed motives.³¹ At first, tax lawmakers prohibited mixing altruism with profit-seeking³² as much as corporate lawmakers disapproved of mixing profit-seeking with altruism. Tax law's disdain was much more absolute. Both tax and corporate codes eventually relented, but tax law prohibited private investment in charitable purposes until long after courts interpreted the Business Judgement Rule to allow for charitable impulses by profit corporations.³³

Tax lawmakers did not relent until 1998.³⁴ The occasion arose after a period of sustained pressure by nonprofit hospitals in need of capital increasingly available only from private investors.³⁵ It is not that tax law explicitly acknowledged that public benefit – in that case, healthcare – is unachievable without private profit. Revenue Ruling 98-15 provides a framework for mixed motives but it acknowledges only that private profit is not necessarily inconsistent with public benefit.³⁶ Still, the acknowledgment

30. See Milton Friedman on the Centrality of Profit for Capitalism: 50 Years In Retrospect, CAUX ROUND TABLE FOR MORAL CAPITALISM, (Sept. 16, 2020), <https://www.cauxroundtable.org/2020/09/16/milton-friedman-on-the-centrality-of-profit-for-capitalism-50-years-in-retrospect/>.

31. See Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L. J. 1106, 1136 (2018).

32. See *Plumstead Theatre Society, Inc. v. Comm'r of Internal Revenue*, 74 T.C. 1324, 1333 (1980) (the Commissioner of Internal Revenue argued that a limited partnership between a charitable organization in need of capital and private investors seeking profit from a nonprofit theatre production was inherently inconsistent with tax exemption and thus precluded the organization's qualification under IRC 501(c)(3)). The Tax Court disagreed, holding that a joint venture involving the charitable organization and limited partners providing capital necessary to the charitable goal did not disqualify the organization. See *id.* The Ninth Circuit affirmed. See *Plumstead Theatre Society Inc. v. Comm'r of Internal Revenue*, 675 F.2d 244, 245 (9th Cir. 1982) (per curiam).

33. See I.R.C. § 4944 (West 2006); see also Patrick M. Birney, *Financially Distressed Businesses: Revisiting the Business Judgment Rule and the Entire Fairness Doctrine*, 14 THE NAT'L L. REV. (May 20, 2020), <https://natlawreview.com/article/financially-distressed-businesses-revisiting-business-judgment-rule-and-entire>; see also I.R.C. § 170 (West 2022); Exempt Purposes – Internal Revenue Code Section 501(c)(3), IRS (Aug. 20, 2024), <https://www.irs.gov/charities-non-profits/charitable-organizations/exempt-purposes-internal-revenue-code-section-501c3#:~:text=The>.

34. See Rev. Rul. 98-15, 1998-1 C.B. 718.

35. See *id.*

36. See *id.*

was enough to allow OpenAI (c)(3) to construct what is essentially an extreme public benefit corporation in which fiduciaries actually, not just theoretically on an ad hoc basis, disdain profit-seeking in favor of public benefit.

So it was that in 2019, OpenAI (c)(3) entered into a partnership with Microsoft, resulting in an entity I will refer to as “OpenAI JV.”³⁷ OpenAI (c)(3) invested its entire tax-exempt self.³⁸ Microsoft invested \$13 billion, which entitled it to exclusive licensing of OpenAI (c)(3)’s scientific output and distributions of OpenAI (c)(3)’s incidental profit in an amount up to 100 times its investment.³⁹ Profits in excess of that amount would be reinvested into the pursuit of the public benefit.⁴⁰ To ensure that Microsoft’s profit incentive does not take operational precedence over OpenAI (c)(3)’s charitable purpose, and as a condition of maintaining tax exemption, the operating agreement requires that OpenAI (c)(3) have majority control over OpenAI JV.⁴¹ OpenAI’s (c)(3)’s control ensures, at least in theory, that OpenAI JV will operate for public benefit even as Microsoft legitimately expects profit distributions up to \$1.3 trillion. OpenAI (c)(3) thereby gained access to capital without which it could not pursue public benefit; Microsoft invested in that effort without necessarily sacrificing private profit.

On November 30, 2022, OpenAI JV experienced its greatest scientific breakthrough yet when it released ChatGPT, an artificial intelligence algorithm that can respond to human queries, commands, or prompts as would a human with instantaneous access to and recall of infinite knowledge.⁴² Since that time, OpenAI JV’s market value has increased to \$160 billion as OpenAI JV continually improves.⁴³ The events in the interim are especially instructive. As OpenAI JV’s market capitalization increased, it began offering stock options to its scientific researchers who would have otherwise been employed by OpenAI (c)(3).⁴⁴ The indispensable researchers

37. See *OpenAI LP*, OPENAI, *supra* note 14.

38. See *id.*

39. See *id.*

40. See *id.*

41. See *id.*; see also Rev. Rul. 98-15, 1998-1 C.B. 718.

42. *Introducing ChatGPT*, OPENAI, *supra* note 6.

43. Rocio Fabbro, *OpenAI Thinks It’s Worth More Than \$100 Billion*, QUARTZ (Aug. 29, 2024), <https://qz.com/openai-valuation-funding-round-chatgpt-microsoft-1851635153#:~:text=In%20This%20Story&text=OpenAI%20is%20looking%20to%20put,the%20matter%20and%20company%20documents>. As a result of its most recent public offering, OpenAI JV now has an estimated value of \$300 billion. Cade Metz, *OpenAI Completes Deal That Values Company at \$300 Billion*, NY TIMES (Mar. 31, 2025).

44. Jack Raines, *OpenAI Isn’t Selling Equity — It’s Selling Shares of Profits That May Never Come. Investors Can’t Get Enough*, SHERWOOD (Sept. 10, 2024 3:19 PM), <https://sherwood.news/business/openai-isnt-selling-equity-its-selling-shares-of-profits-that-may-never-come/>. (OpenAI

would not have been permitted to acquire such equity in OpenAI (c)(3). They nevertheless acquired equity indirectly through their employment by OpenAI JV. The joint venture complied with the requirement that OpenAI (c)(3) retain governing control, but when OpenAI (c)(3) trustees fired co-founder and CEO Sam Altman, Microsoft engineered his return, proving that though OpenAI (c)(3) retained legal control Microsoft had more potent economic control.⁴⁵

The OpenAI (c)(3) trustees fired Sam Altman, believing that he had sacrificed the charitable mission for the sake of investors' faster profits.⁴⁶ Upon learning of Altman's firing, researchers critical to the pursuit of public benefit and armed with stock options and offers of employment from Microsoft threatened to resign unless the Board reinstated Altman.⁴⁷ Without those researchers, neither OpenAI (c)(3) nor OpenAI JV could operate. The OpenAI (c)(3) trustees had no choice. To prevent OpenAI (c)(3) and JV's demise, the OpenAI (c)(3) trustees reappointed Altman and then promptly resigned. Meanwhile, OpenAI JV continued its intellectual output while research costs continued to increase. To meet those increasing costs, OpenAI JV began exploring methods to attract even more indispensable capital. Eventually, it would seek new equity investments totaling \$7 billion from investors ranging from Apple, Inc. and the United Arab Emirates.⁴⁸ There was no shortage of potential investors, but those investors insisted that OpenAI JV shed the charitable governance mandated by tax law and the 10,000% limitation on profit distribution.⁴⁹ OpenAI (c)(3) maintains a desire to pursue the public good but has reportedly decided that it cannot do so as a

employees are offered "profit participation units," or PPU's, instead of traditional restricted stock units (RSUs) and stock options. These PPU's are functionally similar to "profit interest units," or PIU's, a form of equity-like compensation sometimes offered by private companies.")

45. See Michael W. Peregrine, Robert C. Louthian III & Charles M. Elson, *Corporate Governance Lessons from the OpenAI Controversy*, THE CLS BLUE SKY BLOG: COLUM. L. SCH.'S BLOG ON CORPS. AND THE CAP. MKT. (Jan. 26, 2024), <https://clsbluesky.law.columbia.edu/2024/01/26/corporate-governance-lessons-from-the-openai-controversy/>; *Our Structure*, OPENAI, *supra* note 8; Tom Dotan & Deepa Seetharaman, *The Awkward Partnership Leading the AI Boom*, WALL ST. J., (Jun. 13, 2023), [https://www.wsj.com/tech/ai/openai-board-brings-sam-altman-back-adds-three-new-members-bbdb4807](https://www.wsj.com/articles/microsoft-and-openai-forge-awkward-partnership-as-techs-new-power-couple-3092de51?adobe_mc=MC MID%3D59096471620769787; Deepa Seetharaman & Tom Dotan, Sam Altman Rejoins OpenAI Along with Three New Directors, WALL ST. J., (Mar. 8, 2024), <a href=).

46. See Seetharaman & Dotan, *Sam Altman Rejoins OpenAI Along with Three New Directors*, *supra* note 45; Keach Hagey, *The Secrets and Misdirection Behind Sam Altman's Firing From OpenAI*, WALL ST. J., (Mar. 28, 2025), <https://www.wsj.com/tech/ai/the-real-story-behind-sam-altman-firing-from-openai-efd51a5d>.

47. *Id.*

48. See Isaac & Griffith, *supra* note 29.

49. Hu & Cai, *OpenAI to Remove Non-Profit Control and Give Sam Altman Equity*, *supra* note 7.

tax-exempt organization subject to tax law requirements. If it should continue with a stated commitment to public benefit, it can only do so as a public benefit corporation.

III. MIXED MOTIVE BUSINESS AND THE INTENTIONAL PURSUIT OF PUBLIC BENEFIT

Any determination of success regarding OpenAI (c)(3)'s effort to enlist profit-seekers in the pursuit of public benefit must rest on assessable standards. In tax exemption law, success is measured by reference to the non-distribution constraint as expressed in IRC 501(c)(3) and IRC 4958.⁵⁰ A charity that does not violate the constraint is presumed successful because none of its profits are diverted from the public benefit to private enrichment. And even in situations involving explicit profit sharing with private investors, charities are nevertheless considered successful if charitable fiduciaries maintain control over the business entity from which incidental profits are distributed to private investors. In that instance, charitable fiduciaries' compliance with the constraint and their maintenance of operational control results in a presumption of success.

What lesson can be learned from OpenAI (c)(3)'s efforts via tax exemption, and how might those lessons inform our understanding of public benefit corporations? We might think comparisons of tax exemption and public benefit status are inapposite. In the former, pursuit of public benefit over private profit is mandatory.⁵¹ Nobody has a right to the unlimited upside potential in the manner hoped for by private investors. This is not the case in public benefit corporations, where investors must only consider the public good in their primary pursuit of profit and are otherwise unconstrained in their profit-taking. Nevertheless, OpenAI (c)(3)'s experience is sufficiently analogous to provide at least one obvious insight. Even charitably minded investors will inevitably act selfishly. What is perhaps remarkable is that they will act selfishly at an unknown time well before the matter devolves into a situation in which profit is diametrically opposed to public benefit. And that point may come so early in the endeavor as to render their public benefit intentions mere lip service.

Two things about OpenAI (c)(3)'s experience support the insight. First, there are circumstances in which public benefit and private profit are coterminous. OpenAI (c)(3)'s desired public benefit – wide and safe

50. 26 U.S.C.A §4958 (West 2018); *see* Exempt Purposes – Internal Revenue Code Section 501(c)(3), *supra* note 33.

51. An excise tax is imposed on unreasonable compensation for goods and services. *See* 26 U.S.C. § 4958.

distribution – seems exactly that which any pure profit-making entity might have pursued, whether those benefits were good for business or simply mandated by legal boundaries imposed on profit corporations.⁵² In this instance, OpenAI (c)(3)'s mandated fidelity to public benefit hardly differed from obligations that would be undertaken by a public benefit or traditional profit-seeking corporation. Second, the joint venture mechanism by which OpenAI (c)(3) harnessed necessary capital is almost indistinguishable, as a practical matter, from the mechanism a public benefit or traditional profit-seeker would employ. OpenAI(c)(3) offered investors access to its unlimited upside potential unless one thinks a 10,000 percent cap is commonplace and easily reached. OpenAI (c)(3)'s limitation on profits to investors was theoretical, at best. Despite its tax-exempt status and the restrictions that status entails, OpenAI appeared more like a private benefit corporation and Microsoft a venture fund with preferred equity. The case can be made that the private investors in OpenAI JV sacrificed no more profit than they might have with a taxable start-up. And yet, the effort failed.

IV. CONCLUSION

The single explanation for OpenAI's (c)(3) inability to elevate public benefit over private profit as a tax-exempt organization is an age-old one. It is explained, perhaps, by our first selfish instinct to provide for self rather than for others. Maybe it's a cynical reading, but OpenAI (c)(3)'s experience suggests that investors will not accept even theoretical limitations in their pursuit of profit. Theoretical limitations might never be reached and yet investors reject them just as though those limitations were real and currently imposed. Selfish instincts are hard to overcome, apparently.

Does admitting that much prove that profit-taking can never be mediated by concerns for public benefit and that public benefit status is no more than a marketing ploy we should not indulge? I don't advocate doing away with public benefit corporations, but governments can already ensure that investors at least do not harm the public benefit through laws applicable to all market participants. Governments can enact civil and criminal laws to protect the public benefit. But those laws establish only a minimum floor

52. The recent concerns regarding the harmful effects of social media are an example of the public and the sellers of information technology slowly coming to a realization that information technology offered by profit seekers should be constructive and allocated in a manner to reduce or avoid public harm. See Richard Wike et al., *Social Media Seen as Mostly Good for Democracy Across Many Nations, But U.S. is a Major Outlier*, PEW RSCH. CTR., (Dec. 6, 2022), at https://www.pewresearch.org/wp-content/uploads/sites/20/2022/12/PG_2022.12.06_Online-Civic-Engagement_REPORT.pdf.

and many social ills proliferate nevertheless.⁵³ Public benefit corporation advocates implore us to seek more than the minimum. For that reason alone, the effort to encourage investors to mediate profit-seeking with public benefit still seems worthwhile even if the effort is ultimately based on nothing more than faith. It remains to be seen whether OpenAI can operate as a public benefit corporation to achieve meaningful public benefit beyond the minimal level required by civil and criminal codes.

53. Purdue Pharma violated no criminal laws and yet its development and marketing of pain reducing opioids is blamed for untold suffering worldwide. The only constraints ever imposed on its profit-making to date are civil penalties apparently insufficient to seriously reduce the billions investors reaped from their legal business activity. See Barry Meier, *Origins of an Epidemic: Purdue Pharma Knew Its Opioids Were Widely Abused* N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycotin.html>. (asserting that Purdue Pharma “knew about significant abuse of OxyContin in the first years after the drug’s introduction in 1996 and concealed that information” to keep making astronomical profits).