



**KANSAS BAR
ASSOCIATION**

TO: The Honorable Richard Wilborn
And Members of the Senate Judiciary Committee

**FROM: William Matthews, Robert Alderson, Edwin Hecker, Virginia Harper Ho,
Garrett Roe, William Quick, and William Wood**
On Behalf of the Kansas Bar Association

RE: House Bill No. 2125 – Amending the Kansas General Corporation Code

DATE: March 20, 2017

Chairman Wilborn and Members of the Senate Judiciary Committee:

We appreciate the opportunity to appear today to brief the Committee and answer questions relating to H B 2125, a bill requested by the Kansas Bar Association (KBA).

We are members of a special committee created by the KBA's Section on Corporation, Banking & Business Law, composed of Kansas practitioners, academics, and a staff attorney from the Secretary of State's Office. In the 2016 Session, our committee proposed and the Legislature approved legislation, 2016 Sen. Sub. for H B 2112, 2016 Kan. Sess. Laws ch. 110, to update the Kansas General Corporation Code (KGCC) and related business entity statutes, including the Business Entity Standard Treatment (BEST) Act, K.S.A. 17-7901 et seq., including updates adopted by Delaware since the last comprehensive update of the KGCC.

The original draft of the 2016 bill proposed to add a new article to the KGCC that corresponds to Chapter XV of the Delaware General Corporation Law (DGCL), which was adopted in 2013. Those provisions would have adopted a new corporation type, called a public benefit corporation. Although a variation of the public benefit corporation has been adopted by over 30 other states and is currently being considered in several others, several legislators were concerned that these new provisions were more significant and warranted more consideration than was available in the 2016 session. Therefore, we removed those provisions from the bill as finally introduced. We now propose their separate adoption in this bill.

Our purpose today is, first, to explain how the public benefit corporation complements existing business forms available in Delaware and in Kansas, and second, to highlight for the Committee the primary features of the public benefit corporation form, with reference to the Delaware statute and, where applicable, to the common standards that have emerged in benefit corporation legislation in other states, which also informed the provisions proposed in this bill.

Expanding Entrepreneurial Choice Through Benefit Corporation Legislation

The primary objective of H B 2125 is to increase flexibility for businesses in Kansas by expanding the choice of business forms, facilitating their access to new sources of private finance that are directed at benefit corporations, giving Kansas entrepreneurs the freedom to conduct business using a corporate form that is free from certain restrictions that apply to nonprofit corporations, and keeping Kansas competitive as a forum for new entity formation.

Public benefit corporations, known in many states simply as “benefit corporations,” are a hybrid between traditional for-profit corporations (in which directors may have a duty to maximize profits) and non-profit corporations. While public benefit corporations are for-profit (and are taxed as such), the proposed statute requires a public benefit corporation to achieve other public benefit goals in addition to generating shareholder profit. As is the case for all corporations, these fiduciary duties are enforceable only by the shareholders. A central and related feature of the public benefit corporation in every adopting state, including Delaware, is the requirement that the corporation prepare a “benefit report” regarding its promotion of its stated public benefit(s).

As noted, more than 30 states have adopted (31 states, including Delaware, Nebraska, and Colorado) or are considering (7 states, including Oklahoma and Iowa) some variation of public benefit corporation legislation. Failing to pass public benefit corporation legislation does not prevent the operation of this corporation type in Kansas. It does assure, however, that other states are the home for their incorporation and that other states’ public policy, through their laws and courts, will guide the internal affairs of these businesses.

By modeling its corporation statutes on those in effect in Delaware, Kansas and its business and legal communities have been able to benefit from new innovations in business entity law. In H B 2125, our committee seeks to ensure that Kansas corporate law keeps pace with important changes in Delaware and other states and to provide added flexibility for business in Kansas, continuing a trend that has been an integral part of Kansas law for over four decades.

HB 2125: Adapting Delaware Precedent to Kansas

New Section 1. Public benefit corporations remain subject to the KGCC, except where the new article on public benefit corporation imposes different requirements. In this respect, public benefit corporations resemble statutory close corporations, which are governed by Article 72 of the KGCC (K.S.A. 17-7201-K.S.A. 7216). This section conforms to DGCL Section 361.

New Section 2. Formation of a public benefit corporation occurs upon the filing with the secretary of state of articles of incorporation. The articles of incorporation must identify one or more specific public benefit(s) that the corporation will promote. The provision broadly defines what constitutes a “public benefit.” Generally, any positive effect or reduction of a negative effect on any one or more categories or persons, entities, communities, or interests, other than the stockholders as stockholders, qualifies as a public benefit. The provision lists several nonexclusive examples of types of public benefits, including charitable, economic, religious, medical, scientific, or technological effects. Public benefit corporations are for-profit corporations. This section conforms to DGCL Section 362.

New Section 3. Paramount in the bill’s formulation is the protection of preexisting expectations and interests of shareholders. A 2/3 shareholder vote is required to elect or terminate public benefit corporation status. Those shareholders who do not consent to election or termination of public benefit corporation status are entitled to appraisal rights if they are overruled by a supermajority of other shareholders, as described below. Although the parallel provisions of the DGCL only provide for appraisal rights on a vote to elect public benefit corporation status, this new section provides for appraisal rights for dissenting shareholders in both cases. This section otherwise conforms to DGCL Section 363.

New Section 5. Public benefit corporations are subject to statutory fiduciary duties that require the corporation’s directors to balance the specific public benefit(s) identified by the corporation, its shareholders’ economic interests, and the best interests of those materially affected by the corporation’s conduct. This section conforms to DGCL Section 365.

New Section 6. The corporation must report annually to its shareholders regarding its promotion of its stated public benefit(s). This reporting requirement is a central requirement in every adopting state and is

intended to encourage transparency and accountability of the corporation and its directors regarding the corporation's public benefit objectives. This section conforms generally to DGCL Section 366, with the following distinctions: (1) consistent with other required corporate reports in Kansas, this section requires reporting annually, rather than biennially, as required in Delaware; (2) in order to ensure the reliability of benefit reports, this section follows the standards established in all but two adopting states by requiring benefit reports to be prepared on the basis of an independent third-party standard selected by the corporation and by requiring that the benefit report be posted on the corporation's website or otherwise made publicly available after redaction of any proprietary information. There is no requirement that the report be filed with the Secretary of State.

Section 10 (K.S.A. 2016 Supp. 17-6014). As public benefit corporations may only be operated for profit, this provision amends K.S.A. 2016 Supp. 17-6014 to make the new public benefit corporation article inapplicable to nonprofit corporations. This section conforms to DGCL Section 114.

Section 11 (K.S.A. 2016 Supp. 17-6712). Those shareholders who invest in a corporation with an expectation that it be operated as a traditional corporation prioritizes profit maximization or, alternatively, as a public benefit corporation with modified public benefit duties are protected if the corporation's existing status is changed without their consent. Procedures for appraisal rights under K.S.A. 17-6712 also apply when a corporation elects or terminates public benefit corporation status. This section conforms to DGCL Section 262.

Section 12 (K.S.A. 2016 Supp. 17-7903 of the BEST Act). This section adds public benefit corporation articles of incorporation to the list of corporate documents required to be filed with the secretary of state.

Section 13 (K.S.A. 2016 Supp. 17-7919 of the BEST Act). The name of a public benefit corporation may include words or designations to that effect or may include traditional corporation name designations (such as Inc., Corp., etc.), or may contain both public benefit corporation name designations and traditional corporation name designations. Most states (including Delaware) who have adopted public benefit corporation legislation either do not require or make permissive the use of a public benefit corporation name designation.

Conclusion

We believe HB 2125 will further solidify the state's reputation as being business friendly and in the forefront of 21st century business law innovation. By enacting this legislation, Kansas will maintain continuity with our other business statutes which also follow Delaware and give Kansas businesses the same flexibility and choice of entity form that is now available in Delaware and 30 other states.

Thank you for the opportunity to appear today and for your patience. We would be happy to try to answer any questions you may have.

Respectfully Submitted,

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