



**KANSAS BAR  
ASSOCIATION**

**TO:**           **The Honorable Fred Patton**  
                  And Members of the House Judiciary Committee

**FROM:**       **William Quick and William Matthews,**  
                  On Behalf of the Kansas Bar Association

**RE:**           **House Bill No. 2401** – Providing an exception to the quorum requirements for shareholder meetings for certain corporations.

**DATE:**       **March 4, 2020**

Chairman Patton and Members of the House Judiciary Committee:

We appreciate the opportunity to provide perspective to the Committee related to HB 2401 and other legislation seeing to amend provisions of the Kansas General Corporation Code (KGCC).

We are members of the Section on Corporation, Banking & Business Law of the Kansas Bar Association (KBA). Our members represent a wide variety of interests, including corporate management and shareholders (both controlling and non-controlling) and plaintiffs and defendants in corporate litigation. Members of our Section and its predecessors were the drafters of the KGCC, which became effective in 1972, and since then members of our Section have drafted all of the major substantive amendments to the KGCC, primarily for the purpose of updating the KGCC to changes in the Delaware General Corporation Law upon which the KGCC is modeled. Therefore, our Section has an interest in maintaining the integrity of the KGCC. Our purpose is to educate the Committee on certain principles that have guided the adoption of and amendments to the KGCC for nearly 50 years that are relevant to HB 2401.

### **Changes Should Be Generally Applicable**

As its name states, the Kansas General Corporation Code was drafted for general applicability to all private corporations formed in Kansas. For that reason, our Section has resisted adopting changes applicable to one or even a few businesses. When changes are made, it is under the expectation that the changes should apply to all corporations at least as a default rule, subject to differences as may be adopted in a corporation's articles of incorporation or bylaws. For this reason the interests of all stakeholders—both management and shareholders—are considered. We cannot know the particulars of every corporation. A change made for one corporation may inadvertently apply to several others.

Developed and refined over nearly half a century, the provisions of the KGCC are detailed, highly interconnected, and are the culmination of tested public policy and experience through litigated cases. As specific, endemic issues have arisen that merit deviation from the general rules established in the KGCC, those exceptions have been memorialized in specific provisions that clearly delineate in a systematic way how the changes related to the broader whole of the KGCC. Examples of such exceptions include the long-standing provisions applicable to statutory close corporations (adopted at the same time as the KGCC), *see* K.S.A. 17-7201 to -7216; specialized provisions applicable to nonstock, nonprofit, and charitable

corporations, *see, e.g.*, K.S.A. 17-6014; and the recently adopted provisions for public benefit corporations (adopted in 2017), *see* K.S.A. 17-72a01 to -72a09. Adopting changes to the general provisions of the KGCC to solve issues already addressed in the specialized provisions of the KGCC carry a high likelihood of upsetting the carefully balanced framework of the KGCC.

Furthermore, by its express terms, *see* K.S.A. 17-6001(c), the KGCC provides the default rules governing all types of specialized entities created under other Kansas laws, and many specific acts elsewhere in the Kansas Statutes incorporate the KGCC to supplement their specific requirements. These include Kansas banks, *see* K.S.A. 9-801(c)(5), -1114(e), (f), -1905(b); cooperative societies, *see* K.S.A. 17-1520; cooperative marketing associations, *see* K.S.A. 17-1628; corporations created for religious or charitable purposes, *see* K.S.A. 17-1726; Kansas credit unions, *see* K.S.A. 17-2201(c); professional corporations, *see* K.S.A. 17-2708; rural electric cooperatives, *see* K.S.A. 17-4635; renewable energy cooperatives, *see* K.S.A. 17-4635; non-profit medical and hospital service corporations, *see* K.S.A. 40-19c09(a); and captive insurance companies, *see* K.S.A. 40-4306(i). These other laws typically provide that the KGCC is the default and its provisions are superseded by the specific provisions of these other acts. Changing the general provisions of the KGCC without review of these other acts could inadvertently upset their statutory schemes.

The Section's policy is not to pick sides in specific corporate disputes. Without a detailed investigation, it is impossible to know whether a request for a change for a specific corporation is an attempt by one side of a dispute to gain an advantage or even a "win." Adherence to the principles outlined here safeguard against changes motivated by factional concerns.

### **Fundamental Changes Should Be Prospective in Effect**

The Section's general policy is to make substantive changes to the KGCC (rather than clarifications as to original intent or changes to procedure) prospective in nature and not retroactive. There are several reasons for this. First, substantive changes may implicate established, substantive property rights. When shareholders pay consideration and subscribe to their shares, they become subject to the obligations and have those rights and remedies as specified by the KGCC and the articles of incorporation and bylaws of the corporation. Often shareholders subscribe in reliance on the current state of those laws and documents, including the democratic, statutory scheme outlined in the KGCC that guarantees notice, quorum, and minimum voting rights to effect changes to those obligations, rights, and remedies. Because our Section does not intend to upset preexisting expectations and reliance, we generally make substantive changes to the KGCC applicable only to corporations formed after the effective date of the change.

Second, parties may specifically negotiate for substantive rights, remedies, or obligations. The KGCC allows corporations to vary from some of its default provisions. Which defaults may be modified and the procedures for their modification are carefully specified to balance the interests of the applicable stakeholders. It is often the case that prospective shareholders will negotiate for certain rights or procedural safeguard as a condition to subscribing to shares. For example, a minority shareholder may assure itself participation on a board of directors by negotiating for cumulative voting for directorships, or a shareholder may seek to prevent dilution of its ownership interest by requiring a supermajority shareholder vote to authorize the sale of additional shares. For this reason, the Section makes most substantive changes subject to the terms of a corporation's articles of incorporation or bylaws.

### **Changes Should be Narrowly Tailored to Address the Issue**

For all of the reasons outlined above, when we make a substantive change to the KGCC we try to tailor the change to address only the issue at hand, and care is taken to make sure that the change does not inadvertently impact other issues. For example, a change to the media through which a board of directors

approves an action, such as electronic approval, should not dispense with requirements for advanced notice of meetings or the number of directors required to approve an action without a meeting.

For similar reasons, if the KGCC already provides an acceptable method to address common issues that a business could reasonably anticipate, the Section believes that the business should use those preexisting mechanisms to solve its issues, even if those mechanisms may be more time consuming or expensive. An example is the long-standing requirement that directors may not approve an action in writing and without a meeting unless all of the directors consent. *See* K.S.A. 17-6301(f). Many corporations complain that it is difficult to get all directors to timely respond, and they do not want to go to the trouble or endure the delay of noticing a formal meeting, especially in cases where a clear majority of the board will approve. As described above, the KGCC carefully balances the interests of the various stakeholders, including through procedural safeguards. The Section believes it is not the Legislature's job to solve the problems of corporations where the KGCC provides a solution, where the problem is the fault of the corporation, or where the existing solution is more expensive because of the corporation's lack of foresight or planning.

### **Conclusions**

We hope that the Committee values maintaining the integrity of the KGCC and will consider these principles when evaluating HB 2401 and other changes to the KGCC.

Respectfully Submitted,

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