KANSAS BAR ASSOCIATION

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

FROM: **William Matthews, Clay Barker, Michael Doering, William Quick, Amy Westbrook, and William Wood, II**
On Behalf of the Kansas Bar Association

RE: **House Bill No. 2455** – Updating the Kansas General Corporation Code, the Business Entity Transactions Act, the Business Entity Standard Treatment Act, and others

DATE: **March 14, 2023**

Chairman Patton and Members of the House Judiciary Committee:

We appreciate the opportunity to appear today to brief the Committee and answer questions related to HB 2455, 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 the general counsel of the Secretary of State's Office. Over the past year, we have worked to draft amendments to the Kansas General Corporation Code (KGCC) and related business entity statutes, including the Business Entity Transactions Act (BETA) and the Business Entity Standard Treatment (BEST) Act. Our bill seeks to accomplish three general purposes. Principally, we have worked to bring the KGCC, and corresponding applicable provisions of BETA and the BEST Act, up to date with appropriate innovations adopted by Delaware since 2016, the last comprehensive update of the KGCC. Secondly, we have proposed certain changes to the KGCC, the BEST Act, and other business entity laws requested by the Secretary of State's Office.

Our testimony today has three goals. First, we wish to provide a brief background on the relationship between Kansas's and Delaware's corporation laws and the benefits Kansas has derived from that relationship. Second, we have briefly highlighted those provisions of the proposed bill that we feel are most significant or innovative. Lastly, we note several changes in Delaware's law that are not appropriate for Kansas to adopt.

Relationship Between Kansas's and Delaware's Corporation Laws

Formally as a matter of policy since the adoption of the KGCC in 1972 and informally long before then, Kansas has patterned its corporation laws on the Delaware General Corporation Law (DGCL). The reasons for this policy are numerous. The DGCL is broadly acknowledged as the preeminent body of corporation law in the world, as evidenced by the number and size of corporations formed in Delaware. Approximately half of all publicly traded companies in the United States, including more than 67% of the Fortune 500, are incorporated in Delaware. Delaware has created a specialized court, the Court of Chancery, that only hears corporate and business law cases. Its judges are selected for their knowledge of business law matters, and through their work they are considered experts in interpreting business law statues and issues not controlled by statute. The Court of Chancery produces a high volume of excellent quality decisions each year,

resulting in a deep and comprehensive body of case law precedent. The Delaware legislature continually evaluates case law, reviews new business developments, monitors changes in federal law (including federal securities and tax laws), and acts on suggestions from the business community. Nearly every session the Delaware legislature modifies the DGCL and its other business entity statutes to keep them on the cutting edge of learning in these areas.

By patterning the KGCC on the DGCL, Kansas and its businesses and legal community have benefited greatly. By following the DGCL, the KGCC keeps pace with the gold standard and latest legal innovations. Kanas courts have recognized Delaware corporate decisions as persuasive and are able to benefit from its vast body of precedent. Kansas businesses and their legal counsel also have access to this case law, which provide a commodity most sought by business—greater legal clarity so they can plan their affairs. In HB 2455, our committee has sought to continue the policy that has been the foundation of Kansas corporate law for more than five decades.

Significant Provisions in HB 2455

New Section 1 and various sections throughout. Based on DGCL updates over several years, we have proposed several amendments designed to facilitate various corporate transactions and communications through electronic means and to comprehensively address the manner and form of electronic signatures and delivery by electronic means. The core of these changes is new section 1. First, it provides that any act or transaction may be provided for in a "document," and an electronic transmission constitutes a written document. Second, whenever a signature is required or permitted, that signature may be made by manual, facsimile, conformed, or "electronic signature." Third, it defines when an electronic transmission is deemed delivered to a person. Fourth, it states that persons may conduct a transaction in accordance with the Uniform Electronic Transactions Act as long the requirements of the new section are satisfied. Fifth, it specifies that certain transactions are excluded from application of the new section. Finally, the new section deals with the interaction between these amendments and the federal Electronic Signatures in Global and National Commerce Act (E-Sign Act).

Conforming changes are made throughout the KGCC, including adjusting the return mail exception for stockholder notices, *see* Section 27 (K.S.A. 17-6520); whether electronic transmissions may be used for stockholder demands for appraisals, *see* Section 36 (K.S.A. 17-6712); revising how stockholder consents would be received, *see* Section 26 (K.S.A. 17-6518); and substituting references to "writing" and "mailed" throughout the KGCC for "document" and "given."

Section 6 (K.S.A. 17-6002). We have proposed that any amendment, repeal, or elimination of an exculpatory provision in the articles of incorporation will not revoke or eliminate a limitation or elimination of liability for an act or omission while the provision was in effect, unless the provision already permitted retroactive application.

Section 9 (K.S.A. 17-6010). We have proposed to adopt changes made to the DGCL in response to the global pandemic in 2020. These changes expand the type of catastrophes that would trigger a corporation's emergency powers to include "an epidemic or pandemic, and a declaration of a national emergency by the United States government," permit the adoption of emergency bylaws by a majority of director's present if a quorum cannot be readily convened, permit postponing meetings of stockholders, and permit changing the record date and payment date of dividends that had been declared but for which the record date had not yet occurred.

Section 12 (K.S.A. 17-6301). We have proposed that the minimum number of directors required to take action by a committee of the board of directors or a subcommittee of any such committee is a majority, unless a different number is set by the articles of incorporation, bylaws, or board resolution, but the quorum may not be less than one-third. Unless the articles of incorporation, bylaws, or resolution of the board

requires a different amount, a vote of a majority of directors present at a committee or subcommittee meeting where a quorum is present is required to take an action.

Section 13 (K.S.A. 17-6305). As passed in Delaware, we have proposed to define which officers are entitled to mandatory indemnification under K.S.A. 17-6305 only to the corporation's president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer, or chief accounting officer and any individual identified in public filings as one of the most highly compensated officers of the corporation. This change appears to be prompted by a Delaware case that supported a claim for indemnification by a "vice-president" who had no management or policy-making authority. A corporation may permissibly grant indemnification to others that do not qualify as an "officer" under this amendment.

Section 19 (K.S.A. 17-6427). We have proposed changes that clarify when an amendment to the articles of incorporation or bylaws are effective to opt-out of the restrictions on transactions with interested stockholders under K.S.A. 17-6427. In general, any such amendment is effective 12 months after adoption unless the corporation has never been an SEC reporting company and has never chosen to be governed by K.S.A. 17-6427 in its articles of incorporation.

Sections 11 and 20 (K.S.A. 17-6014, 17-6428). We have proposed several changes to the provision governing ratification and validation of defective corporate acts. First, we propose to amend K.S.A. 17-6014 to make K.S.A. 17-6428 applicable to nonstock corporations. When originally passed, it was believed that most defective acts subject to K.S.A. 17-6428 would involve defects in capital stock. But since its passage, the provision has found application to various other issues.

Second, the changes confirm the availability of K.S.A. 17-6428 where there is no valid outstanding stock (for example, if no shares have been issued or only punitive shares have been issued), even if ratification of the apparently defective corporate act would otherwise require shareholder approval. Third, the changes specify that the date for determining shareholders to vote to ratify a defective corporate act that involved a vote of the shareholders is the record date of such vote, not the date of the apparent defective corporate act. Often corporations will have accurate records of who are the stockholders as of a record date, but not who are stockholders at the time of a defective corporate act (for example, the recording of an amendment to the articles of incorporation). Fourth, the changes confirm that any act that is within a corporation's powers under the KGCC may be ratified or validated, even if approval had not been obtained as required by the corporation's articles of incorporation or bylaws. This change was to overturn a Delaware decision that held otherwise. Finally, the changes clarify that a misstatement in a proxy statement is subject to ratification and validation under K.S.A. 17-6428.

Section 22 (K.S.A. 17-6503). In line with other updates related to electronic transmissions, we have proposed amendments that outline three non-exclusive, default methods for providing notices to stockholders—U.S. mail, courier, and electronic mail. The amendment reverses the current requirement that a stockholder must opt-in to notice by email and protects the ability of the corporation to use email to provide stockholder notices, subject to certain conditions.

Sections 23 and 25 (K.S.A. 17-6509, 17-65-14) and Various Sections Throughout. We have proposed changes throughout the KGCC to provide express statutory authority to use networks of electronic databases, including blockchain and distributed ledgers, for certain electronic transmissions and records, including allowing the "stock ledger" to utilize such technology.

Section 26 (K.S.A. 17-6518). We have proposed amendments to remove the requirement that written consents of stockholders must include a date of signature. This change is designed to overrule a Delaware case that found stockholder consents invalid because they included pre-printed signature dates. Conforming

changes are made to the effectiveness of such consents, which were otherwise calculated from the date of signature.

Sections 29-31 (K.S.A. 17-6701 through -6703). We have proposed various amendments to the merger provisions of the KGCC. One involves eliminating the need to have a separate vote to approve a merger following an initial tender or exchange offer, subject to certain conditions, and how shares are counted for this exception. Another eliminates the requirement that the organizational documents of the surviving entity in a so-called "holding company reorganization merger" must be the same as the articles of incorporation of the original corporation. This change recognizes that a holding company's articles will be much different than the articles of a public operating company, and it allows greater flexibility for a holding company that is a limited liability company. The amendment retains various protections for shareholders.

Section 36 (K.S.A. 17-6712). We have proposed three sets of amendments related to appraisal rights. In general, stockholders who did not vote to approve certain transactions are entitled to be paid the fair value of their shares upon consummation of the transaction as determined by the courts. The first amendments set a de minimis threshold for maintaining a claim for appraisal rights in a non-short-form merger of greater than 1% of the outstanding number of shares or the value of the consideration exceeds $1 million. These changes seek to limit perceived abuse by a small number of shareholders who use the appraisal procedure to gain leverage in negotiations with the corporation. The second amendments would allow corporations to tender payment of appraisal amounts at the beginning of litigation to avoid accrual of statutory interest. Currently, statutory interest is calculated after the court determines the fair value of the shares in an appraisal proceeding, even if the court determines that the value to be paid is the same or less than what the corporation agreed to pay. The third amendment would deny appraisal rights to persons who held shares in an SEC reporting company pursuant to a so-called "intermediate merger" under K.S.A. 17-6701(h). This is an extension of the "market-out" exception to appraisal rights currently available to holders of shares in a SEC reporting company under a long-form merger.

Sections 40 and 41 (K.S.A. 17-7001, 17-7002). We have proposed amendments that clarify the procedure to "restore" the articles of incorporation of a corporation that expired because of a time limitation in its existence and the procedure to "revive" the articles of incorporation of a corporation whose existence became forfeited or void (other than because of a forfeiture proceeding in court). Conforming changes are proposed to language in various sections of the KGCC.

Sections 43-45 (K.S.A. 17-72a04, 17-72a05, 17-72a07). We have proposed amendments to eliminate the super-majority stockholder voting requirements associated with article amendments to add or remove public benefit corporation provisions or to merge or consolidate with another entity such that the resulting entity would include or omit public benefit corporation provisions. The amendments would eliminate the special appraisal rights of stockholders of a corporation that converts to or from a public benefit corporation. Finally, these amendments would make the exculpatory provisions for directors of public benefit corporations the default. These amendments recognize the growing popularity and acceptability of public benefit corporations among investors.

Sections 54-56 (K.S.A. 17-78-202, 17-78-203, 17-78-205). We have adopted changes to BETA to permit so-called "short-form mergers" between domestic corporations and both domestic and foreign business entities other than corporations. Long permitted for mergers and consolidations between corporations, a short-form merger is a merger or combination between a corporation that owns 90% or more of the stock of another corporation that can be effected without the vote of the stockholders.

Various Sections Throughout. We have proposed changes requested by the Secretary of State's office to various business entity laws, generally to clarify or simplify transactions with the Secretary of State's office. These changes include specifying the attributes of addresses of individuals and entities in periodic reports, simplifying the fees charged for copies of certified and uncertified documents, broadening the ability of the

Secretary of State to accept filings by various electronic means (including electronic uploads), providing that certain filings may or must be on forms prescribed by the Secretary of State, broadening the terms of incorporation permitted for religious intuitions, and repealing provisions that would permit the Secretary of State to obtain income tax filings and extensions.

DGCL Amendments Not Included

We have not proposed a change made to the DGCL's provision that said that no corporate name could conflict with the name of any registered series of a limited liability (or any name reserved for that purpose). We had already made that change when the protected series concept was adopted in Kansas in 2019 (and effective in 2020).

Delaware made technical and minor changes to various provisions of the DGCL dealing with mergers or combinations of domestic corporations and both domestic and foreign business entities other than corporations, including to bring consistency between the various provisions. In general, we have not recommended these changes because cross-entity mergers and combinations of Kansas corporations is governed by the Business Entity Transactions Act (BETA), which sets uniform rules for all types of cross-entity transactions and uses uniform definitions.

We are not proposing to adopt changes from Delaware dealing with annual reports required to be filed by foreign corporations who are qualified to do business. Kansas has different interests associated with periodic report filings. But, as noted above, we have proposed changes to the information required to be included in periodic reports, as requested by the Secretary of State's Office.

Except for certain fee changes proposed by the Secretary of State's office, we have not proposed fee changes similar to those adopted in Delaware.

As Kansas has long ago repealed franchise taxes for corporations and other business entities, we have not proposed amendments adopted in Delaware related to franchise taxes.

Conclusions

We believe that HB 2455 advances Kansas's reputation as being business friendly and at the forefront of innovations in corporate law. Adopting this legislation continues Kansas's policy of leveraging cutting-edge developments and the body of case law advanced by Delaware to the benefit of Kansas and its business community.

We thank you for the opportunity to appear today and your patience. We would be happy to attempt to answer your questions.

Respectfully Submitted,

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