

SESSION OF 2023

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2455

As Recommended by House Committee on
Judiciary

Brief*

HB 2455 would create a new section of law and substantially update various articles of the Kansas General Corporation Code (Code).

The bill would also amend various provisions concerning Secretary of State (SOS) business filings, reports, and fees in the Code and the Kansas Revised Limited Liability Company Act (RLLCA); Business Entity Transactions Act (BETA); the Business Entity Standard Treatment Act (BEST Act); Kansas Revised Uniform Limited Partnership Act (RULPA); and the Kansas Uniform Partnership Act (KUPA).

The bill would repeal several statutes as follows:

- On and after January 1, 2024, KSA 17-72a03, concerning public benefit corporation amendments and mergers;
- KSA 17-7511, concerning the inspection of a corporation's income tax return to verify a business entity information report to the SOS;
- KSA 17-7514, KSA 56-1a610, and KSA 56a-1204, concerning applications for extension of time for filing income tax returns submitted to the SOS; and
- KSA 56-1a608 and KSA 56a-1203 concerning annual reports and related fees. [*Note*: Continuing

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

law requires such reports and fees be collected biennially.]

[*Note:* The bill would also repeal the version of KSA 17-6712 as amended by Section 36, concerning appraisal rights in mergers and consolidations, on and after January 1, 2024. The new section would retain most of the bill’s amendments, as further explained below.]

The bill would also amend two sections of law concerning taxation to remove cross-references to a statute that would be repealed by the bill. .

***Electronic Signatures and Electronic Transmissions
(New Section 1)***

The bill would add a section to law governing the formation of corporations in the Code. This new section would provide that any act or transaction governed by the Code, articles of incorporation, or bylaws could be provided for in a “document,” which would be defined by the bill and would be deemed the equivalent of an electronic transmission.

The bill would also specify that whenever a signature is required or permitted under the Code, it could be a manual, facsimile, conformed, or “electronic signature,” which would be defined by the bill. The bill also would outline when an electronic transmission is deemed delivered to a person. In addition, the bill would allow persons to conduct transactions in accordance with the Uniform Electronic Transactions Act as long as the requirements of this section are satisfied.

The bill would specify the various types of transactions to which the section would not apply, and other related limitations of the section’s provisions.

The bill would state that the provisions of the Code would control to the fullest extent permitted under the federal Electronic Signatures in Global and National Commerce Act

in the event such Code provisions are deemed to modify, limit, or supersede that Act.

Other Code Amendments (Sections 2-50)

Throughout the Code, the bill would amend law to authorize certain actions of corporations in accordance with the new section concerning electronic signatures and electronic transmissions discussed above, unless otherwise restricted. Additionally, the bill would provide express authority for corporations to use networks of electronic databases, including blockchain and distributed ledgers, for certain electronic transmissions and records.

The bill would make additional substantive changes to law governing various aspects of corporations, as follows.

Formation of Corporations (Sections 6-11)

The bill would amend law governing the formation of corporations in the Code to:

- Specify an amendment, repeal, or elimination of a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders would not affect an act or omission by a director occurring before such amendment, repeal, or elimination unless the provision allows retroactive application;
- Specify any person, whether or not an incorporator or director, could provide an instruction that consent to action would be effective at a future time, including a time determined upon a happening of an event not later than 60 days after the instruction is given, and would be revocable prior to the time the consent becomes effective;

- Expand the types of catastrophes that would trigger a corporation's emergency powers to include an epidemic, a pandemic, or a declaration of a national emergency by the U.S. government. In addition, the bill would make a corporation's emergency bylaws adoptable by a majority of directors present if a quorum cannot be readily convened, and would add language concerning actions that could be taken to address the emergency condition, including postponing stockholder meetings and changing record and payment dates of dividends declared;
- Clarify a court's jurisdiction to interpret, apply, or enforce, or determine the validity of, any instrument, document, or agreement when a corporation and one or more stockholders sells or offers to sell stock or when a corporation agrees to sell, lease, or exchange any of its property or assets upon consent of the stockholders; and
- Allow nonstock corporations to ratify defective corporate acts and stock.

Directors and Officers (Sections 12 and 13)

The bill would amend law governing directors and officers to:

- Clarify that bylaws could set a board of directors' quorum at a number below or above a majority of directors, but the quorum could not be less than one-third of the total number of directors;
- Specify which officers would be entitled to mandatory indemnification for any act or omission occurring after June 30, 2023, including the corporation's most highly compensated executive officers as identified in public filings with the U.S. Securities and Exchange Commission (SEC); and

- Authorize a corporation to permissively grant indemnification for other persons who are not officers for acts or omissions occurring after June 30, 2023.

Stocks and Dividends (Sections 14-20)

The bill would amend law governing stocks and dividends to:

- Permit stock certificates to be signed by any two authorized officers of the corporation rather than by certain specified officers;
- Provide that shares of a corporation's capital stock would not be entitled to vote nor counted for quorum purposes if such shares belong to any entity that is controlled directly or indirectly by the corporation;
- Clarify the effective dates of amendments to a corporation's articles of incorporation electing not to be governed by statutory provisions limiting business combinations with interested stockholders;
- Permit the ratification of defective corporate acts or stocks when there is no valid outstanding stock for ratifications occurring on or after July 1, 2023;
- Specify the date for determining shareholders to vote to ratify a defective corporate act that involved a vote of the shareholders would be the record date of the such vote, not the date of the apparent defective corporate act;
- Clarify that any act that is within a corporation's powers under the Code could be ratified or validated, even if approval had not been obtained

as required by the corporation's articles of incorporation or bylaws; and

- Clarify the definition of "failure of authorization" would include the failure to authorize or effect an act or transaction in compliance with the disclosure set forth in any proxy or consent solicitation statement to the extent such failure would render the act or transaction void or voidable.

Meetings, Elections, Voting, and Notices (Sections 21-28)

The bill would amend law governing meetings, elections, voting, and notices to:

- Allow certain stockholder notices, including consents, to be provided by U.S. mail, courier, or email (the bill would not require an opt-in for email service);
- Allow the use of electronic databases, including blockchain, distributed ledgers, and stock ledgers, for certain electronic transmissions and recordkeeping;
- Allow certain stockholder records to be maintained on behalf of a corporation, and would specify that printed electronic records are valid and admissible evidence in court proceedings; and
- Remove language concerning dated signatures on written consents to no longer require such signatures be dated.

Merger or Consolidation (Sections 29-37)

The bill would amend law governing merger or consolidation to:

- Replace references to “Kansas corporations” with “domestic corporations” and replace references to corporations organized in other states with “foreign corporations”;
- Modify provisions regarding voting rights of stockholders and proxies in conformance with New Section 1 of the bill;
- Specify the information to be included in a merger or consolidation agreement, and remove a requirement that in a merger involving a holding company, the resulting company’s organizational documents be the same as the articles of incorporation of the original corporation;
- Specify that for mergers or consolidations between two domestic corporations consummated prior to July 1, 2023, the surviving entity would be required to amend its organizational documents to include certain identical information to that of the constituent corporation if it did not already contain the required information;
- For mergers or consolidations between two domestic corporations consummated pursuant to an agreement or board of directors resolution adopted on or after July 1, 2023, no vote by stockholders would be required to approve such merger or consolidation unless expressly required by the corporation’s articles of incorporation;
- Allow certain surviving entities to amend their organizational documents to reduce the number of classes and shares of stock or other units and remove certain language authorized by the Act;
- Revise provisions concerning required stockholder votes to approve a merger to not require such vote when the offer is conditioned on a tender of a

certain amount of shares of stock of the constituent corporation;

- Allow for certain stock to become excluded or be deemed rollover stock per a written agreement for the purposes of the merger. Such provisions would be effective only with respect to merger agreements entered into on or after July 1, 2023;
- Require a merger agreement concerning a surviving domestic corporation contain a statement concerning whether amendments or changes in the articles of incorporation are desired. For consolidation involving domestic corporations, the bill would require the articles of incorporation to be attached to the agreement;
- Require merger or consolidation agreements involving a surviving or resulting foreign corporation to include information required by the laws under which the corporation is organized;
- Require that for nonstock corporation mergers or consolidations involving converted memberships, the cash, property, rights, or securities provided in exchange for such conversion be specified in the agreement;
- Raise the fee for service of process by the SOS to \$50 from \$40. Continuing law and provisions under the bill would require an out-of-state nonstock corporation to designate the SOS as its agent for service of process by in-state corporations;
- Amend provisions related to the merger or consolidation of a nonstock corporation with a stock corporation by specifying what information related to the articles of incorporation must be in such agreement;

- If the SOS is required to be appointed to receive service of process for the surviving or resulting corporation, and if a certificate of merger or consolidation is required to be filed, the bill would require such designation to be included in the filed certificate;
- Under an agreement consummated before July 1, 2023, if a corporation's articles of incorporation are amended, appraisal rights would be available, pursuant to continuing law [*Note: A new statutory section that would become effective on January 1, 2024, would not contain this specific appraisal provision*];
- Under an agreement consummated on or after July 1, 2023, the bill would:
 - Set a threshold for maintaining a claim of appraisal rights in certain mergers to be greater than 1 percent of the outstanding shares, or the value of the consideration exceeds \$1 million; and
 - Allow corporations to tender payment of appraisal amounts when litigation begins to avoid accrual of interest; and
- Deny appraisal rights to persons who hold shares in an SEC reporting company pursuant to an intermediate merger under the bill.

Dissolution and Disposition of Corporate Assets (Sections 38 and 39)

The bill would amend law governing dissolution and disposition of corporate assets to:

- Clarify the district court would have jurisdiction to revoke or forfeit a corporation's articles of

incorporation upon motion by the Attorney General;
and

- Allow the district court to appoint trustees for winding up the affairs of those corporations whose articles of incorporation have been revoked or forfeited, and limit the court's powers to revoke or forfeit to this section.

*Extension, Renewal, or Reinstatement of Corporate Status
(Sections 40-42)*

The bill would amend law governing extension, renewal, or reinstatement of corporate status to:

- Modify the process by which a corporation could revoke a voluntary dissolution or restore certain articles of incorporation that expired because of an existing time limitation;
- Amend provisions relating to corporate revival for nonrevoked corporations to:
 - Replace references to "renewal," "extension," and "reinstatement" with the term "revival";
 - Set requirements for certificates of revival;
 - Clarify rights and duties of a corporation upon revival; and
 - Add language defining "board of directors" and "bylaws" for purposes of reviving a corporation and establishing the requirements for authorization by the board of directors.

Public Benefit Corporations (Sections 43-45)

The bill would amend law governing public benefit corporations to:

- Amend provisions regarding the management of public benefit corporations by balancing pecuniary interests of stockholders, best interests of those materially affected by the corporation's conduct, and specific public benefit (balancing requirement) to:
 - Add language concerning conflicts of interest for directors of public benefit corporations and make the exculpatory provisions for directors of public benefit corporations the default;
 - Add language regarding enforcement provisions of the balancing requirement 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; and
 - Remove the special appraisal rights of stockholders of a corporation that converts to or from a public benefit corporation.

Amendments to BETA (Sections 53-58)

The bill would amend provisions in BETA governing mergers of business entities to permit certain mergers or combinations with a corporation that can be effected without the vote of the stockholders when the merging entity owns 90 percent or more of the stock of the corporation. The bill would allow such mergers to occur between domestic corporations and both domestic and foreign non-corporation business entities.

The bill would also state that the provisions of BETA would control to the fullest extent permitted under the federal Electronic Signatures in Global and National Commerce Act

in the event such provisions modify, limit, or supersede that Act.

Amendments to Code, BETA, BEST Act, RULPA and KUPA Concerning SOS Filings, Reports, and Fees (Sections 51-52, 59-72; Other Various Sections Throughout)

The bill would amend law concerning business entity information filings, reports, and fees submitted to the SOS in the Code, BETA, the BEST Act, RULPA, and KUPA to:

- Clarify business filing entity reports must contain the location of the principal office, including a full postal address, and would clarify other references to addresses in these acts to mean postal addresses;
- Standardize the attributes of addresses of individuals and entities in periodic reports;
- Replace a per-page fee with a per-document fee for requested copies of certified and uncertified documents from the SOS;
- Expand the ability of the SOS to accept filings by various electronic means, including electronic uploads;
- Specify when filings must be made on forms prescribed by the SOS;
- Remove language requiring the number of shares of capital stock issued for domestic for-profit corporations be included on business entity filing reports;
- Remove language requiring number of memberships or number of shares of capital stock

issued for non-profit corporations be included on business entity filing reports;

- Add certificates of revocations of dissolution and certificates of merger or consolidation to the SOS fee schedule for corporate filings;
- Remove language requiring the SOS to maintain copies of applications for extension tax returns of limited liability companies; and
- Clarify provisions regarding resignation of resident service agents and filing related certificates of resignation.

Background

The bill was introduced by the House Committee on Federal and State Affairs at the request of a representative of the Kansas Bar Association (KBA). The bill was referred to the House Committee on Judiciary on March 9, 2023.

House Committee on Judiciary

In the House Committee hearing on March 14, 2023, two representatives of the KBA and a representative of the SOS testified as **proponents** of the bill. Proponents generally stated the purpose of the updates contained in the bill is to bring Kansas statutes up to date with provisions contained in the Delaware General Corporation Law (DGCL). [*Note:* Kansas has patterned its Code on the DGCL since the Code's adoption in 1972.] Proponents also stated the bill would standardize and improve requirements related to business filings with the SOS.

No other testimony was provided.

Fiscal Information

According to the fiscal note prepared by the Division of the Budget on the bill, the SOS and the Department of Revenue indicate enactment of the bill would not have a fiscal effect.

Corporations; business entities; filings; Secretary of State; Kansas General Corporation Code; Kansas Revised Limited Liability Company Act; Business Entity Transactions Act; Kansas Revised Uniform Limited Partnership Act; Kansas Uniform Partnership Act