

17-12,100. Business combinations with interested shareholders; definitions. As used in this act:

(a) "Affiliate" means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, another person.

(b) "Associate," when used to indicate a relationship with any person, means:

(1) Any corporation or organization of which such person is a director, officer or partner or is, directly or indirectly, the owner of 20% or more of any class of voting stock;

(2) any trust or other estate in which such person has at least a 20% beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity; and

(3) any relative or spouse of such person, or any relative of such spouse, who has the same residence as such person.

(c) "Business combination," when used in reference to any corporation and any interested stockholder of such corporation, means:

(1) Any merger or consolidation of the corporation or of any direct or indirect majority-owned subsidiary of the corporation with the interested stockholder or with any other corporation if the merger or consolidation is caused by the interested stockholder and as a result of such merger or consolidation, K.S.A. 17-12,101 and amendments thereto is not applicable to the surviving corporation;

(2) any sale, lease, exchange, mortgage, pledge, transfer or other disposition, in one transaction or a series of transactions, except proportionately as a stockholder of such corporation, to or with the interested stockholder, whether as part of a dissolution or otherwise, of assets of the corporation or of any direct or indirect majority-owned subsidiary of the corporation, which assets have an aggregate market value equal to 10% or more of either the aggregate market value of all the assets of the corporation determined on a consolidated basis or the aggregate market value of all the outstanding stock of the corporation;

(3) any transaction which results in the issuance or transfer by the corporation or by any direct or indirect majority-owned subsidiary of the corporation of any stock of the corporation or of such subsidiary to the interested stockholder, except:

(A) Pursuant to the exercise, exchange or conversion of securities exercisable for, exchangeable for or convertible into stock of such corporation or any such subsidiary, which securities were outstanding prior to the time that the interested stockholder became such;

(B) pursuant to a dividend or distribution paid or made, or the exercise, exchange or conversion of securities exercisable for, exchangeable for or convertible into stock of such corporation or any such subsidiary, which security is distributed, pro rata to all holders of a class or series of stock of such corporation subsequent to the time the interested stockholder became such;

(C) pursuant to an exchange offer by the corporation to purchase stock made on the same terms to all holders of such stock; or

(D) any issuance or transfer of stock by the corporation, except that in no case under subsections (c)(3)(B) through (c)(3)(D) of this subsection shall there be an increase in the interested stockholder's proportionate share of the stock of any class or series of the corporation or of the voting stock of the corporation;

(4) any transaction involving the corporation or any direct or indirect majority-owned subsidiary of the corporation which has the effect, directly or indirectly, of increasing the proportionate share of the stock of any class or series, or securities convertible into the stock of any class or series, of the corporation or of any such subsidiary which is owned by the interested stockholder, except as a result of immaterial changes due to fractional share adjustments or as a result of any purchase or redemption of any shares of stock not caused, directly or indirectly, by the interested stockholder; or

(5) any receipt by the interested stockholder of the benefit, directly or indirectly, except proportionately as a stockholder of such corporation, of any loans, advances, guarantees, pledges, or other financial benefits, other than those expressly permitted in subsections (c)(1) through (c)(4) of this subsection provided by or through the corporation or any direct or indirect majority-owned subsidiary.

(d) "Control," "controlling," "controlled by" and "under common control with" mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract or otherwise. A person who is the owner of 20% or more of a corporation's outstanding voting stock shall be presumed to have control of such corporation, in the absence of proof by a preponderance of the evidence to the contrary. Notwithstanding the foregoing, a presumption of control shall not apply where such person holds voting stock, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee, custodian or trustee for one or more owners who do not individually or as a group have control of such corporation.

(e) (1) "Interested stockholder" means any person, other than the corporation and any direct or indirect majority-owned subsidiary of the corporation, that is:

(A) The owner of 15% or more of the outstanding voting stock of the corporation; or

(B) an affiliate or associate of the corporation and was the owner of 15% or more of the outstanding voting stock of the corporation at any time within the three-year period immediately prior to the date on which it is sought to be determined whether such person is an interested stockholder and the affiliates and associates of such person;

(2) the term interested stockholder shall not include:

(A) Any person who:

(i) Owned shares in excess of the 15% limitation as provided in this subsection as of, or acquired such shares pursuant to a tender offer commenced prior to, the effective date of this act or pursuant to an exchange offer announced prior to the effective date of this act and commenced within 90 days thereafter and continued to own shares in excess of such 15% limitation or would have but for action by the corporation; or

(ii) acquired such shares from a person described in subsection (e)(2)(i) by gift, inheritance or in a transaction in which no consideration was exchanged; or

(B) any person whose ownership of shares in excess of the 15% limitation as provided in this subsection (e) is the result of action taken solely by the corporation. Such person shall be an interested stockholder if thereafter such person acquires additional shares of voting stock of the corporation, except as a result of further corporate action not caused, directly or indirectly, by such person;

(3) for the purpose of determining whether a person is an interested stockholder, the voting stock of the

corporation deemed to be outstanding shall include stock deemed to be owned by the person as provided in subsection (h), but shall not include any other unissued stock of such corporation which may be issuable pursuant to any agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options, or otherwise.

(f) "Person" means any individual, corporation, partnership, unincorporated association or other entity.

(g) "Voting stock" means stock of any class or series entitled to vote generally in the election of director.

(h) "Owner," "own" and "owned" when used with respect to any stock, mean a person that individually or with or through any of its affiliates or associates:

(1) Beneficially owns such stock, directly or indirectly;

(2) (A) has the right to acquire such stock, whether such right is exercisable immediately or only after the passage of time, pursuant to any agreement, arrangement or understanding, or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise. A person shall not be deemed the owner of stock tendered pursuant to a tender or exchange offer made by such person or any of such person's affiliates or associates until such tendered stock is accepted for purchase or exchange; or

(B) the right to vote such stock pursuant to any agreement, arrangement or understanding. A person shall not be deemed the owner of any stock because of such person's right to vote such stock if the agreement, arrangement or understanding to vote such stock arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made to 10 or more persons; or

(3) has any agreement, arrangement or understanding for the purpose of acquiring, holding, voting, except voting pursuant to a revocable proxy or consent as provided in subsection (h)(2)(B) of this subsection, or disposing of such stock with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, such stock.

History: L. 1989, ch. 75, § 1; July 1.