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To: House Judiciary Committee

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Subject: **HB 2256** – Extending the Deadline to File a Notice of Lien on Leased Commercial Real Property from 90 to 180 Days and Making Technical Corrections to the Kansas Commercial Real Estate Broker Lien Act

Chairman Barker and members of the House Judiciary Committee, thank you for the opportunity to provide testimony today on behalf of the Kansas Association of REALTORS® in support of **HB 2256**, which would extend the deadline for filing a notice of lien on leased commercial real property under the Kansas Commercial Real Estate Broker Lien Act (K.S.A. 58-30a01 *et seq.*) from the current 90 to 180 days after the tenant takes possession of the property. In addition, **HB 2256** would make a small technical correction to one section of the act.

KAR is the state's largest professional trade association, representing nearly 8,000 members involved in both residential and commercial real estate and advocating on behalf of the state's 700,000 property owners for over 95 years. REALTORS® serve an important role in the state's economy and are dedicated to working with our elected officials to create better communities by supporting economic development, a high quality of life and providing affordable housing opportunities while protecting the rights of private property owners.

Summary of Kansas Commercial Real Estate Broker Lien Act

During the 2005 Legislative Session, the Kansas Legislature passed **SB 215**, which established the Commercial Real Estate Broker Lien Act (K.S.A. 58-30a01 *et seq.*) Under K.S.A. 58-30a03(a), a commercial real estate broker "shall have a lien on commercial real estate in the amount of the compensation as agreed upon by the broker and the owner or the owner's agent" when certain conditions specified in the statute are satisfied.

Under K.S.A. 58-30a02, "commercial real estate" means any real estate except real estate that: (1) contains one to four residential units; (2) contains single-family residential units such as condominiums or townhomes that are part of a larger building but are conveyed on a unit by unit basis; (3) has no buildings or structures and sits on land zoned for single-family residential use; and (4) is used for agricultural purposes.

Under K.S.A. 58-30a05, the commercial real estate broker's lien attaches to commercial real estate when the broker procures a ready, willing and able buyer or tenant of the property upon the terms set forth in the written agreement between the broker and the owner and the broker records a notice of the lien with the register of deeds of the county in which the property is located. For purchase transactions, the statute requires the notice of lien to be filed prior to the actual conveyance or transfer of the property subject to the lien. *Id.*

Under K.S.A. 58-30a09, the notice of the lien must be recorded with the register of deeds of the county in which the property is located within 90 days after the tenant takes possession of the property in lease transactions. If written notice of the intention to sign the lease is personally served on the broker entitled to claim a lien at least 10 days before the date of the intended signing of the lease, the notice of the lien must be recorded before the date indicated for the signing of the lease. *Id.*

Under K.S.A. 58-30a13(a), the commercial real estate broker is required to mail a copy of the notice of the lien to the owner of the commercial real estate within ten days after recording the lien. If the notice of the lien is recorded within the ten days prior to the closing of the transaction, the broker is not required to mail a copy of the notice of the lien to the owner of the commercial real estate. *Id.*

If the broker fails to comply with the requirements regarding the mailing or serving of a copy of the notice of the lien on the owner of the commercial real estate or fails to record the notice of the lien with the register of deeds of the county in which the property subject to the lien is located, then the lien is void and unenforceable. K.S.A. 58-30a13(b).

Under K.S.A. 58-30a14(a), the broker may only enforce the lien attaching against commercial real estate by filing a petition to foreclose the lien in the district court of the county in which the property is located. A failure to file such petition within two years of the recording of the notice of the lien shall extinguish the lien and the lien may not be reasserted in subsequent legal proceedings. *Id.*

How Would **HB 2256** Modify the Kansas Commercial Real Estate Broker Lien Act (K.S.A. 58-30a01 *et seq.*)?

Under Section 1 of **HB 2256**, the proposed new language would correct a technical ambiguity in K.S.A. 58-30a03(b). This language currently states that “a broker shall have a lien on such commercial real estate if the broker has a written agreement with a person to represent such person in the purchase, lease or other conveyance to the buyer of such real estate when the broker becomes entitled to compensation pursuant to the written agreement.”

However, in a real estate lease transaction pursuant to the written agreement between the real estate licensee and the owner of the property, there will be no “buyer” of such real estate and instead there will be a “lessee” or “tenant.” Similarly, if there is some other conveyance of the property other than a buyer or lessee, then there will be a “grantee” of the property.

Unfortunately, a literal interpretation of the current language found in K.S.A. 58-30a03(b) seems to prohibit a real estate licensee from exercising his or her lien rights on the property unless there is a “buyer” of such real estate, which would not allow the real estate licensee to exercise his or her lien rights if the property is leased to a lessee or otherwise conveyed to a grantee pursuant to the written agreement. In order to resolve this ambiguity, the new language in Section 1(b) would simply add the words “lessee or grantee” to this subsection.

Furthermore, under Section 2 of **HB 2256**, the proposed new language is intended to address situations where a commercial real estate broker intends to file a notice of lien on leased commercial real estate. Under the current language found in K.S.A. 58-30a07, the real estate licensee is required to file the notice of lien within the first 90 days of the tenant’s possession of the property. Under Section 2 of **HB 2256**, the deadline to file the notice of lien on the leased property would simply be extended from the current 90 to 180 days.

Similarly, the new language in Section 3 of **HB 2256** would extend the deadline to file the notice of lien on leased property that includes provisions for the sublease or assignment of the lease from the current 90 to 180 days after the tenant takes possession of the property. In both K.S.A. 58-30a07 and 58-30a09, the real estate licensee must file the notice of lien prior to the execution of the lease agreement if a written notice of intention to sign the lease agreement is served on the real estate licensee at least 10 days before the date of the intended execution of the lease agreement.

Why Do Real Estate Licensees Want an Additional 90 Days to File a Notice of Lien on Leased Property?

In many commercial real estate lease transactions, the real estate licensee agrees to accept the payment of any real estate commissions due under the listing agreement with the owner of the property and the lease agreement between the owner and the tenant in installments at specified times during the duration of the lease agreement. In doing so, the real estate licensee subjects himself or herself to substantial risk of non-payment or default on the obligation to pay real estate commissions that are due under the written agreements.

Under the current language found in K.S.A. 58-30a07, the notice of lien must be filed by the real estate licensee within 90 days after the tenant takes possession of the property. If the real estate licensee fails to file the notice of lien within this time period, they will lose the right to enforce his or her lien rights on the property if the tenant or owner later fails to pay the promised compensation to the real estate licensee under the written agreements.

Not surprisingly, real estate licensees are extremely reluctant to file a notice of lien on leased commercial real estate when the owner and tenants are fulfilling their obligations to provide compensation to the real estate licensee for services provided under the written agreements between the parties. In most cases, the act of filing a notice of lien against the property causes substantial friction and sours the working relationship between the parties to the lease agreement and the real estate licensee.

However, the manner in which the statute is structured basically requires the real estate licensee to preemptively file the notice of lien against the property before either one of the parties has an opportunity to default on their respective obligation to pay compensation to the real estate licensee under the written agreements. Again, for obvious reasons, it generally is not a good business practice for the real estate licensee to file the notice of lien against the property when the parties are currently not in default on their obligations.

Having said that, our members have encountered numerous situations in which the parties to the lease agreement default on their obligation to provide compensation to the real estate licensee after the first 90 days of the tenant's possession of the property and the expiration of the real estate licensee's ability to file a notice of lien against the property to preserve his or her lien rights. In these situations, the real estate licensee completely loses his or her ability to compel the payment of the compensation through the execution of his or her lien rights.

Based on my practical experience in the time that has elapsed since the act was enacted in 2005, it is exceedingly rare for a real estate licensee to actually file a notice of lien on leased commercial real estate. Instead, the lien rights created under the act are typically used as leverage to convince a party that has defaulted on their obligations to resume compliance with the written agreement before a notice of lien is filed against the property.

If the real estate licensee will lose the ability to file a notice of lien on the leased property after the first 90 days of the tenant's possession of the property, then the real estate licensee will lose this leverage if the owner or tenant later defaults on their obligations under the lease agreement. As a result, my commercial real estate members have requested an additional 90 days to determine whether the parties to the lease agreement will honor their obligations under the written listing and lease agreements.

Extending the Deadline to File Notices of Lien Rights on Leased Property Could Reduce the Number of Filings

If the Kansas Legislature agrees, this would give real estate licensees more time to evaluate the parties' intent to honor their obligations. In addition, this would also limit the number of notices of lien rights that are preemptively filed against leased properties where the parties are not in default and the real estate licensee is simply seeking to defensively preserve his or her lien rights to enforce the written agreements.

Although it may be counterintuitive, we believe that extending the deadline by an additional 90 days may actually reduce the number of notices of lien rights that are filed against leased properties. In our opinion, once a real estate licensee has verified that the parties have honored their obligations under the written agreements for at least 180 days, he or she is much more likely to waive their lien rights by failing to exercise them than he or she would have been after just 90 days.

Banking, Legal and Title Insurance Industry Representatives Were Consulted and Do Not Object to the Changes

Prior to the introduction of **HB 2256**, the Kansas Association of REALTORS® made a good faith effort to reach out to representatives of the Kansas Bankers Association, Kansas Bar Association and Kansas Land Title Association to ensure that our real estate industry partners had no objections to the proposed changes. Representatives of each association have confirmed that they do not believe the proposed changes in **HB 2256** will be harmful to their respective interests in real property and real estate transactions.

Conclusion

In closing, we would respectfully request that the members of the House Judiciary Committee support **HB 2256** and approve of these minimal changes. Thank you for the opportunity to provide comments on this issue.

Kansas Commercial Real Estate Broker Lien Act

K.S.A. 58-30a01 through 58-30a18

58-30a01. Citation. K.S.A. 58-30a01 to 58-30a18, inclusive, and amendments thereto, shall be known and may be cited as the commercial real estate broker lien act.

58-30a02. Definitions. As used in the commercial real estate broker lien act:

- (a) "Commercial real estate" means any real estate and any interest therein, except:
 - (1) Real estate containing one to four residential units;
 - (2) real estate containing single-family residential units such as condominiums, townhouses or homes in a subdivision when sold, leased or otherwise conveyed on a unit by unit basis, even though these units may be a part of a larger building or parcel of real estate containing more than four residential units;
 - (3) real estate on which no buildings or structures are located and which is zoned for single-family residential use; or
 - (4) real estate used for agricultural purposes.
- (b) "Compensation" means all amounts to be paid to a broker for services provided under a written agreement including, but not limited to, the broker's commission and any brokerage, management, consulting or other fees.
- (c) "Services" means any act or service for which compensation is paid and the performance of which requires a license under the real estate brokers' and salespersons' license act.
- (d) Words and phrases used in this act, unless provided otherwise have the meanings ascribed thereto in K.S.A. 58-3035, and amendments thereto.

58-30a03. Amount of lien; conditions. (a) Any broker shall have a lien on commercial real estate in the amount of the compensation as agreed upon by the broker and the owner or the owner's agent, if:

- (1) Such real estate is listed with the broker under terms of a written agreement signed by the owner or the owner's agent; and
 - (2) the broker or salespersons retained by the broker have provided services that resulted in the procuring of a person or entity ready, willing and able to purchase, lease or otherwise accept a conveyance of the commercial real estate as provided by such agreement which were otherwise acceptable to the owner or owner's agent as evidenced by a written agreement signed by the owner or the owner's agent.
- (b) A broker also shall have a lien on such commercial real estate if the broker has a written agreement with a person to represent such person in the purchase, lease or other conveyance to the buyer of such real estate when the broker becomes entitled to compensation pursuant to the written agreement.

58-30a04. Notice of lien. The notice of any lien filed pursuant to this act shall state the name of the broker claiming the lien, the name of the owner of the real estate, a description of the real estate upon which the lien is being claimed, the amount for which the lien is claimed and the real estate license number of the broker. The notice of lien shall be signed by the broker and the broker shall attest that the information contained in the notice is true and accurate as to the broker's knowledge and belief.

58-30a05. When lien attaches. A broker's lien attaches to the commercial real estate when:

- (a) The broker procures a person or entity ready, willing and able to purchase, lease or otherwise accept a conveyance of such real estate upon the terms set forth in the written agreement with the owner or terms otherwise acceptable to the owner or owner's agent, or the broker is entitled to a fee or commission pursuant to a written agreement signed by the owner or the owner's agent; and
- (b) the broker records a notice of the lien in the office of the register of deeds of the county in which the commercial real estate is located so long as such lien is filed prior to the actual conveyance or transfer of the commercial real estate subject to such broker's lien.

58-30a06. Compensation paid in installments; when lien is effective and attaches. If compensation to a broker is due in installments and a portion of the compensation is due after the conveyance or transfer of the commercial real estate, any claim for a lien for installment payments due after the transfer or conveyance of such real estate may be recorded any time after the transfer or conveyance of the commercial real estate on behalf of a broker who represented the current owner of the real estate but must be recorded before the date on which the payment is due. Such lien shall be effective as a lien against the commercial real estate only to the extent moneys are still owed to the broker. A single claim for a lien recorded before the transfer or conveyance of the commercial real estate, claiming all moneys due under an installment payment agreement is not valid or enforceable to the extent of the payments due after the transfer or conveyance. The lien attaches for purposes of this paragraph when the claim for lien is recorded.

58-30a07. Leases. In the case of a lease, the lien must be recorded within 90 days after the lessee takes possession of the property. If written notice of the intention to sign the lease is personally served on the broker entitled to claim a lien at least 10 days before the date of the intended signing of the lease, the claim for lien must be recorded before the date indicated for the signing of the lease. The lien attaches for purposes of this paragraph when the claim for lien is recorded.

58-30a08. When lien attaches. If the broker has a written agreement with a prospective buyer as provided in subsection (b) of K.S.A. 58-30a03, and amendments thereto, the lien attaches when the broker records a notice of the lien within 90 days after the purchase, conveyance or transfer in the office of the register of deeds in the county in which the commercial real estate is located.

58-30a09. Leases; sublease or assignment of lease; notice; attachment. If a lease also includes provisions for a sublease or assignment of lease, the notice of lien must be recorded not later than 90 days after the lessee takes possession of the leased premises. If the transferor personally serves written notice of the intended execution of the lease on the broker entitled to claim a lien at least 10 days prior to the date of the intended execution of the lease, the notice of lien must be recorded before the date indicated in such notice for the execution of the lease. The lien shall attach as of the recording of the notice of lien and shall not relate back to the date of the written instrument.

58-30a10. When additional compensation is owed. If additional compensation is owed to a broker as a result of the exercise of an option to expand the leased premises, the renewal or extension of a lease, the purchase of the property or other transaction pursuant to a written agreement signed by the current owner or tenant, the broker may record its notice of lien at any time after execution of the lease or other written agreement containing such option but not later than 90 days after the occurrence of the transaction for which the additional commission is claimed.

58-30a11. Additional compensation due; action to foreclose lien, time, when. Any action to foreclose a lien to collect additional compensation must be commenced within two years of the date of the transaction on which the additional compensation is claimed. If the property is sold or otherwise conveyed prior to the date on which additional compensation is due, and if the broker has filed a valid notice of lien prior to the sale or other conveyance of the property, the purchaser or transferee shall be deemed to have notice of and shall take title to the property subject to the notice of lien. If a broker claiming additional compensation fails to record its notice of lien for additional compensation prior to the recording of a deed conveying legal title to the property to the purchaser or transferee, such broker may not claim a lien on the property. The provisions of this subsection shall not limit or otherwise affect claims or defenses a broker, owner or other party may have on any other basis, in law or in equity.

58-30a12. Broker precluded from receiving compensation; release or satisfaction of lien. If a claim for a lien has been filed with the register of deeds and a condition occurs that would preclude the broker from receiving compensation under the terms of the broker's written agreement, the broker shall record and provide the owner of record a written release or satisfaction of the lien.

58-30a13. Notice of lien for owner; failure to provide.

- (a) Within 10 days of recording the notice of lien, the broker shall mail a copy of the notice of the lien to the owner of record of the commercial real estate or the agent thereof at the address of the owner stated in the written agreement on which the claim for lien is based. If no address is given, such notice shall be mailed to the address of the real estate on which the claim of lien is based. If the notice of lien is recorded within 10 days prior to closing, the broker is not required to mail or personally serve a copy of the notice of lien. Mailing a copy of the notice of lien is effective when deposited in the United States mail, with postage prepaid.

- (b) The broker's lien shall be unenforceable if mailing or service of a copy of notice of lien does not occur at the time and in the manner required by this section. The broker's lien is void if the broker does not record the lien as provided in this act.

58-30a14. Enforcement of lien; foreclosure petition; priority of liens.

- (a) A broker may enforce a lien attaching against commercial real estate by filing a petition to foreclose such lien in the district court of the county in which such real estate is located. Failure to file such petition within two years of recording a lien shall extinguish such lien. A claim for a lien extinguished pursuant to this section may not be asserted in subsequent proceedings.
- (b) A foreclosure petition shall contain the name of the broker and the broker's license number, the name of the owner or owners of the real estate, a statement of the terms of the contract or agreement on which the lien is based, the date when the contract or agreement was made, a description of the services performed, the amount due and unpaid, a description of the real estate that is subject to the lien and any other facts necessary for a full understanding of the rights of the parties. The plaintiff shall file the action against all known parties who have an interest in such real estate. A foreclosure action for a lien claimed pursuant to this act shall be brought in the manner provided by article 24 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto.
- (c) Any valid prior recorded liens or mortgages shall have priority over a real estate broker's lien.

58-30a15. Failure to file suit to foreclose lien. If a broker claiming a lien pursuant to this act fails to file suit to enforce the lien within 30 days after a properly served written demand of the owner, the lien shall be extinguished. Service of such demand shall be by restricted mail as defined by K.S.A. 60-103 and amendments thereto or by personal service.

58-30a16. Recording of satisfaction or release of lien, when required. If a lien filed pursuant to this act has been paid in full or otherwise discharged, or if the broker fails to institute a suit to enforce the lien within the time provided by K.S.A. 58-30a11 and 58-30a14, and amendments thereto, the broker shall record the satisfaction or release of such lien in writing upon written demand within 20 days after such demand in the office of the register of deeds of the county in which the commercial real estate is located.

58-30a17. Who may demand the entering of satisfaction or release of lien.

- (a) The following persons may make demand upon a broker for the entering of satisfaction or release of the lien, as provided for in K.S.A. 58-30a12 and 58-30a16, and amendments thereto:
 - (1) An owner or the owner's heirs or assigns or anyone acting for such owner, heirs or assigns;
 - (2) an owner of real estate upon which a lien has been recorded by someone having no legitimate claim in the real estate; or
 - (3) a lender or designated closing agent acting as a closing agent in the sale, financing or refinancing of the real estate subject to such lien.
- (b) Any broker or assignee of a broker who refuses or neglects to enter satisfaction or release of such lien within 20 days after demand has been made as provided in subsection (a) shall be liable to the person for whom the demand was made in the sum of \$500 as a civil penalty, together with a reasonable attorney's fee for preparing and prosecuting the action. The plaintiff in such action may recover any additional damages that the evidence in the case warrants. Civil actions may be brought under this section before any court of competent jurisdiction, and attachments may be had as in other cases.

58-30a18. Costs. The costs of any proceeding arising out of a lien filed pursuant to this act, including reasonable attorney's fees, shall be awarded to the prevailing party or parties.