Approved ______________________
Date

MINUTES OF THE HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT.

The meeting was called to order by Elizabeth Baker, Chairperson, at

3:40 ~~a.m.~~/p.m. on Thursday, March 23, 1989 in room 423-S of the Capitol.

All members were present except: Representatives Goossen, Heinemann, Helgerson, Foster and Dean. Excused.

Committee staff present:
Jim Wilson, Revisor
Lynne Holt, Research
Elaine Johnson, Secretary

Conferees appearing before the committee:
Terry Hurley, Senior Attorney, United Telephone Communications
Dan McGee, Director of Government Relations in Kansas for Centel Corporation
Dick Dilsaver, The Coleman Company, Inc.
Danton Rice, for The Kansas Bar Association

Chairman Baker called the meeting to order at 3:40 p.m.

The hearing on S.B. 116 was opened and Chairman Baker recognized Terry Hurley, Senior Attorney with United Telecommunications, Inc.

Mr. Hurley went over a summary of S.B. 116 for the committee. (Attachment l). Mr. Hurley testified in support of S.B. 116 on behalf of United Telecommunications, Inc. He stated that the bill is virtually identical to Section 203 of the Delaware General Corporation Code, which was enacted and signed into law early last year. The Delaware law represents the cumulation of one of the most extensive legislative efforts concerning a corporation statute ever undertaken. Mr. Hurley said that clearly, the bill before this committee today is a well researched, carefully crafted piece of legislation. This bill is not an "antitakeover bill". The proposed law does not in any way restrict the public's ability to acquire the stock of Kansas corporations on the open market. It also does not restrict or impair the voting rights of shareholders. The bill will not impair shareholders' ability to conduct a proxy fight or otherwise influence Kansas corporations through the exercise of voting power. Nothing in this bill will prevent fully-funded tender offers that are extended to shareholders in fair and equitable fashion. (Attachment 2). Mr. Hurley also distributed to the committee and referred to a letter addressed to The Honorable Wint Winter, Jr. which answers the questions raised by the Senate committee. (Attachment 3).

Mr. Hurley responded to questions from the committee.

Mr. Dan McGee, Director of Government Relations in Kansas for Centel Corporation was the next conferee to testify in support of S.B. 116. Mr. McGee testified that with the increased volume of takeovers a concensus has developed to prevent the abuses that frequently accompany takeovers. This bill is designed, not to prohibit takeovers, but to establish ground rules that serve the interests of all who have a genuine stake in the interests of the enterprise. The provisions indicate that the bill is restrained, moderate and in no way stops takeovers. Nothing in the bill will prevent an acquiror from making a full and fair offer for all of the company's shares. The bill does provide for an orderly process by which shareholders can decide whether they favor a change of control in the company and does so in a manner that affords minority shareholders substantial protection against abusive takeover tactics. (Attachment 4).

Mr. McGee responded to questions from the committee.

Dick Dilsaver of The Coleman Company, Inc. briefly addressed the committee regarding the letter from John M. Reiff, Senior Vice President of The Coleman Company, Inc. (Attachment 5).

Doug Mays, Securities Commissioner told the committee that he has no objection to the bill in its present form. This bill helps to prevent abusive takeovers.

Mr. Mays responded to questions from the committee.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT,

room 423-S, Statehouse, at 3:40 ~~a.m.~~/p.m. on Thursday, March 23, 1989

(Attachment 6) is testimony from Ralph Whitworth, director of the United Shareholders Association in opposition to S.B. 116. Mr. Whitworth was not able to attend the committee meeting.

This closed the hearing on S.B. 116.

Chairman Baker then opened the hearing on S.B. 242 and recognized Danton Rice.

Mr. Rice testified on behalf of the Kansas Bar Association and gave their endorsement to S.B. 116.

Mr. Rice testified in support of S.B. 242 that makes several changes to the professional corporation law of the State of Kansas, K.S.A. 17-2706 et seq. The changes proposed in this bill would modernize the professional corporation law and are based upon similar changes to the Missouri Code. Mr. Rice then explained each proposed change to the committee. (Attachment 7).

Mr. Rice responded to questions from the committee.

This closed the hearing on S.B. 242.

The meeting adjourned at 4:30 p.m.

Elizabeth Baker

Date: 3/23/89

GUEST REGISTER

HOUSE

Committee on Economic Development

NAME	ORGANIZATION	ADDRESS
Jamie Schwartz	United Telecom	Topeka
Terry Hurley	" "	KC
Dan McGee	Centel Corp	Great Bend
Dan Rice	KBA	~~Topeka~~ Lawrence
Brent Anderson	Sec. of States Office	Wichita
[illegible]	The Coleman Co.	Wichita
Marla Smith	Hein & Ebert, Chtd.	Wichita
Ann Patterson	KDOC	Topeka
Doug Mays	Securities Commissioner	Topeka

SUMMARY OF SENATE BILL NO. 116

Operative Provision

Senate Bill 116 prohibits Kansas corporations from engaging in any business combination with any interested stockholder for a period of 3 years following the date the interested stockholder becomes an interested stockholder (the "acquisition date").

Exceptions

The prohibition does not apply, if (i) prior to the acquisition date the target's board approves the transaction, or (ii) the transaction results in the interested stockholder's ownership of at least 85% of the target's outstanding voting stock (excluding certain insider-held shares), or (iii) subsequent to the acquisition date, the business combination is approved by the target's board and two-thirds of the target's outstanding voting stock not held by the interested stockholder.

Exclusions

White Knight - If the target is subjected to a competing takeover approved by its board, the restrictions on business combinations do not apply.

Opt-out - The target may opt out of the statute by board or shareholder action.

Definitions

Interested Stockholder - Any person (subject to certain exceptions) who has acquired or owned 15% or more of the target's outstanding voting stock during the previous 3-year period.

Business Combination - Includes mergers, asset dispositions, stock issuances, disproportionate recapitalizations, reorganizations and similar transactions.

House Eco Devo Committee
Attachment 1 3/23/89

STATEMENT OF TERRY L. HURLEY

ON BEHALF

OF

UNITED TELECOMMUNICATIONS, INC.

BEFORE THE

HOUSE ECONOMIC DEVELOPMENT COMMITTEE

TOPEKA, KANSAS

MARCH 23, 1989

House Eco Devo Committee
Attachment 2 3/23/89

Madam Chairman and Members of the Committee, I appreciate the opportunity to be here today. My name is Terry Hurley, and I am Senior Attorney with United Telecommunications, Inc. of Westwood, Kansas. I am appearing on behalf of United to express our support for Senate Bill No. 116.

United, incorporated in 1938 under the laws of Kansas, is a holding company with subsidiaries in a number of telecommunications markets. Currently, United owns 16 telephone operating companies doing business in 19 states, including the State of Kansas. United also is majority owner of US Sprint Communications Company, the nation's third largest long-distance telephone company, which is headquartered in the greater Kansas City metropolitan area.

Senate Bill No. 116 is virtually identical to Section 203 of the Delaware General Corporation Code, which was enacted and signed into law early last year. The Delaware law represents the cumulation of one of the most extensive legislative efforts concerning a corporation statute ever undertaken. Clearly, the bill before this Committee today is a well researched, carefully crafted piece of legislation.

It is important to point out what this bill does not do. This is not an "antitakeover bill". The proposed law does not in any way restrict the public's ability to acquire the stock of

Kansas corporations on the open market. The bill also does not restrict or impair the voting rights of shareholders. Thus, this bill would not impair shareholders' ability to conduct a proxy fight or otherwise to influence Kansas corporations through the exercise of their voting power. Finally, nothing in this bill will prevent fully-funded tender offers that are extended to shareholders in a fair and equitable fashion.

The proposed legislation is aimed at curbing the use of abusive "two-tier" takeovers which have been employed repeatedly by takeover specialists in recent years. A two-tier takeover involves the acquisition of control of a target company (e.g., 50% plus 1 share) followed by a transaction, usually a merger or liquidation, in which the remaining target company shareholders are involuntarily squeezed out. These remaining shareholders often do not receive the same consideration for their shares as is paid initially by the takeover specialist in gaining control of the target company. This legislation would discourage these two-tier transactions by imposing a three-year moratorium on such transactions.

The proposed legislation is very narrowly drawn. The bill contains the following self-limiting provisions:

(a) The board of directors may opt out under the law within one year of its effectiveness.

(b) The shareholders may opt out under the law at any time, subject to a twelve month waiting period.

(c) The bill does not preclude a less than 15% stockholder from proposing to the target's shareholders that they vote for a takeover of the company.

(d) If the shareholder acquires 15% or more of the target's shares, he faces the three-year moratorium period with respect to transactions involving himself, but there is no prohibition against his operating the business if he can get control.

(e) The three-year moratorium will not apply if the target's board agrees to the shareholders acquisition of 15% or more of the target's shares.

(f) If the takeover specialist obtains 85% of the target's shares in a transaction which takes him above the 15% level, he does not need the consent of the target's board or disinterested shareholders. (Shares held by any director-officers and by certain employee stock ownership plans are excluded.)

(g) If a 15% shareholder secures the board's approval to a combination and the approval of two-thirds of the disinterested shares, the three-year moratorium period will not apply.

(h) In the event the target's board voluntarily entertains competing offers, the moratorium would not apply.

We believe the proposed legislation strikes a fair balance between two guiding public policy principals: holding management accountable for their actions; and encouraging long-term stability in our business institutions. Irresponsible management

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will not be insulated from accountability by this bill. Managers still will be susceptible to proxy contests, derivative shareholder lawsuits, liability for breaches of fiduciary duty, and legitimate tender offers. On the other hand, the bill will discourage the kind of highly leveraged, speculative takeovers which have resulted in the dismemberment of very profitable, highly successful companies. Those transactions generally result in the erosion of our competitive base, adversely affecting long-term investors, employees, and the communities which are served by targeted companies.

Finally, some of the concerns which may be raised about this bill should be addressed. First, the proposed legislation will not cause share prices to go down over the long-term. Studies have been conducted on the share prices of companies organized under the laws of other states in which similar legislation has been adopted. Those studies have indicated no perceptible long-term decrease in share prices. Second, this bill does not significantly impair shareholders' basic property rights in their stock. The bill affects only business combination transactions involving the target, not the right to buy or sell shares.

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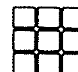
Third, there is no indication that this legislation is unconstitutional. The Delaware law, after which this bill is patterned, has withstood several constitutional challenges since its adoption. Finally, the proposed legislation is not duplicative of the control share acquisition statute adopted last year in Kansas. This bill focuses on business combination transactions, not on shareholder voting rights. While the control share acquisition statute would apply only to those Kansas corporations having a substantial presence in Kansas, the proposed bill would apply to all major, publicly-held corporations organized and existing under Kansas law.



UNITED TELECOMMUNICATIONS, INC.
BOX 11315/KANSAS CITY, MISSOURI 64112/(913) 676-3096

TERRY L. HURLEY
SENIOR ATTORNEY

February 22, 1989

HAND DELIVERED

The Honorable Wint Winter, Jr.
Chairman - Senate Judiciary Committee
State Capitol Building
Room 120 - S
Topeka, KS 66612

Re: Senate Bill No. 116

Dear Senator Winter:

Please allow me to again express my appreciation for permitting me to speak last week on behalf of United Telecom in support of the above-referenced legislation.

Several questions were raised by you and other members of the Committee concerning the proposed legislation. I will attempt to provide answers to those questions which were not fully answered at the hearing. The answers are set forth below in a question and answer format for your convenience.

1. **Question**: Which states have adopted both an Indiana-type control share acquisition statute and a Delaware-type business combination moratorium statute?

   Answer: Our research indicates that the states having both types of laws on their books are as follows:

Arizona	Nebraska
Idaho	South Carolina
Indiana	Tennessee
Maine	Wisconsin
Missouri	

House Eco Devo Committee
Attachment 3 3/23/89

2. <u>Question</u>: Please identify the judicial decisions which have dealt with the constitutionality of the Delaware business combination moratorium law (Section 203 of the Delaware General Corporation Code).

   Answer: The decisions are as follows:

   (a) <u>BNS Inc. v. Koppers Company</u>, 683 F.Supp. 458 (D. Del. 1988).

   (b) <u>RP Acquisition Corp. v. Staley Continental</u>, 686 F.Supp. 476 (D. Del. 1988).

   (c) <u>City Capital Associates v. Interco, Inc.</u>, 696 F.Supp. 1551 (D. Del. 1988).

   Each of the above decisions was rendered in response to requests for preliminary relief. The decisions upheld, on a preliminary basis, the constitutionality of the Delaware law.

3. <u>Question</u>: Are nexus requirements in addition to incorporation within the state necessary to ensure the constitutionality of the proposed legislation?

   Answer: We think it is unlikely that the legislation would be struck down for failing to include additional nexus requirements, such as the presence of assets or shareholders within the state. As indicated above, the Delaware law already has been judicially tested on several occasions and preliminarily has been held constitutional. Additionally, New York's business combination moratorium statute has been upheld in a most recent decision captioned <u>Vernitron Corp. v. Kollmorgen Corp.</u>, 89 Civ. 0241 (S.D.N.Y. Feb. 9, 1989). In <u>Vernitron</u>, the court ruled that the New York law does not place an impermissible burden on interstate commerce, citing <u>CTS Corp. v. Dynamics Corp. of America</u>, 107 S.Ct. 1637 (1987) (Upholding Indiana's control share acquisition law.).

   In our view, the proposed legislation does not offend the Commerce Clause of the United States Constitution because (i) the statute does not discriminate between tender offers for foreign corporations and tender offers for domestic corporations, (ii) the proposed law would not subject corporations to inconsistent state regulation, since

it is applicable only to domestic corporations, and (iii) the burden imposed by the law on interstate commerce is not excessive, in view of the Supreme Court's recent decision in CTS.

4. **Question:** Why does Senate Bill No. 116 provide for a three-year "cooling-off" period during which business combinations are restricted?

Answer: The proposed law provides for the same cooling-off period as the Delaware law. A review of the transcript of hearings before the Joint House-Senate Judiciary Committee of the Delaware Legislature does not reveal a specific rationale for the three-year period. The three-year period appears to be a compromise between the need to protect shareholders for a period of time sufficient to discourage abusive two-tier takeovers and the need to allow targeted corporations to get on with their business as expeditiously as possible.

To place this in perspective, we have compiled the following list of states which have adopted a Delaware-type law, indicating the length of the cooling-off period for each state:

Arizona (3 yrs.)
Connecticut (5 yrs.)
Delaware (3 yrs.)
Georgia (5 yrs.)
Idaho (5 yrs.)
Indiana (3 yrs.)
Kentucky (5 yrs.)
Minnesota (5 yrs.)
Missouri (5 yrs.)
Nebraska (5 yrs.)
New Jersey (5 yrs.)
New York (5 yrs.)
South Carolina (2 yrs.)
Tennessee (5 yrs.)
Washington (5 yrs.)
Wisconsin (3 yrs.)

We believe the three-year cooling-off period contained in the Delaware law represents a fair compromise between competing policy considerations.

5. **Question:** Why is the legislation drafted with an opt-out rather than an opt-in provision?

Answer: The proposed law provides for an opt-out which can be accomplished by a corporation's board of directors during the first 90 days after the law goes into effect. The legislation also provides for a shareholder opt-out at any time, subject to the 12-month delay discussed below.

In our view, the statute adopts the opt-out approach for two basic reasons. First, the vast majority of corporation statutes are mandatorily applicable to, or provide for an opt-out by, subject corporations. This approach encourages uniform application of corporation laws to the broadest possible spectrum of corporations. Secondly, since this statute is aimed at protecting the interests of minority and long-term shareholders, there is some doubt that takeover specialists, arbitrageurs and institutional investors, whose interests often are short-term, would vote in favor of opting in under the proposed law.

This was a predominant issue during the hearings before the Delaware Legislature. After extensive testimony from both proponents and opponents of the opt-out approach, the legislature adopted the opt-out provision.

6. **Question**: Why does the proposed law provide for a 12-month delay in the effectiveness of a shareholder opt-out?

   Answer: The 12-month delay is identical to the delay imposed by the Delaware law. The waiting period is necessary to prevent a controlling shareholder from circumventing the law by forcing an amendment to the target corporation's articles of incorporation upon minority shareholders. Presumably, the amendment would be accomplished through a proxy fight conducted by the controlling shareholder. Normally, such an amendment would require only the approval of a simple majority of those outstanding shares entitled to vote on the matter. If the effectiveness of such an amendment were immediate, the controlling shareholder could negate the application of the law with a simple majority of the target's stock, thereby avoiding the requirement under the proposed law that restricted business combinations must be approved by two-thirds of the target corporation's disinterested shares.

7. **Question**: Is Senate Bill No. 116 identical to the Delaware business combination moratorium law?

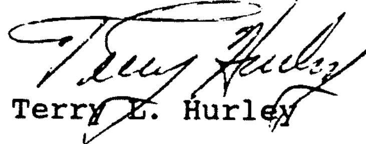
   Answer: A comparison of the legislation currently under consideration in Kansas and Section 203 of the Delaware General Corporation Code indicates no substantive differences between the laws. It is our

understanding that the bill was intentionally drafted to be virtually identical to the Delaware law.

I hope that the answers provided above adequately address the questions raised by the Committee. In the event you would desire further clarification of these issues or if the Committee wishes to raise additional questions, I would be more than happy to provide my assistance.

Once again, the opportunity to present United Telecom's views to the Committee is appreciated.

Very truly yours,



Terry L. Hurley

TLH:lw

cc: J. F. Dodd, Esq.
D. A. Jensen, Esq.
Mr. J. M. Russell
Mr. C. J. Schwartz

G-3-5
3/23/89

Testimony Presented to the
House Economic Development Committee
Senate Bill No. 116
March 23, 1989

Thank you Madam Chairman, and members of the committee, for the opportunity to comment on SB 116, an act relating to business combinations. My name is Dan McGee. I am Director of Government Relations in Kansas for Centel Corporation.

As you may know, Centel Corporation is incorporated in Kansas. Centel supports SB 116 and appreciates the opportunity to inform you of our reasons for believing that the bill would serve the best interests of Kansas corporations and their shareholders, as well as the communities, employees and other businesses having relationships with Kansas corporations.

In recent years, there has been a tremendous number of corporate takeovers, both friendly and hostile. There is a good deal of debate whether these transactions are good or bad. On the one hand, some of these takeovers have led to the dismemberment of going businesses to pay off acquisition indebtedness, causing the loss of jobs and disruption of communities. On the other hand, there is also a recognition that in some instances, managements have done a poor job in their role as managers. The adoption of the bill does not require a resolution of this debate. With the increased volume of takeovers a concensus has developed to prevent the abuses that frequently accompany takeovers.

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Accordingly, many states in recent years have begun to address this issue with a view to setting up some ground rules, particularly for hostile takeovers. At this point, 33 states have adopted legislation. The bill is substantially identical to legislation adopted in February 1988 by Delaware, home to more than 50 percent of the Fortune 500 companies and more than 45 percent of all companies listed on the New York Stock Exchange. The Delaware legislation was adopted after the receipt of input from many different sources, including over 150 comment letters received from corporations, lawyers, Commissioners of the Securities and Exchange Commission and the Federal Trade Commission, executives, institutional investors, academics and others. Like the Delaware legislation, the bill is designed, not to prohibit takeovers, but to establish ground rules that serve the interests of all who have a genuine stake in the interests of the enterprise.

The bill contains the following features:

--The board or the shareholders can decide that they prefer not to be subject to the proposed statute.

--The bill does not preclude any shareholder from conducting a proxy fight to take over the management of the company.

--The bill does not preclude a less than 15% shareholder from proposing to the shareholders that they vote for a takeover of the company.

--If the shareholder acquires 15% or more of the shares, he faces a three-year cooling off period with respect to mergers with a

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corporation he owns or other transactions with himself, but there is no prohibition against his operating the business if he can get control.

--The three-year cooling off period will not apply if the board agrees to the shareholder's acquisition of 15% or more of the shares.

--If the acquiror obtains 85% of the shares in a transaction that takes him above the 15% level, he does not need the consent of the board (shares held by director-officers and by certain employee stock ownership plans are excluded in determining whether the 85% level has been crossed).

--If a 15% or higher shareholder secures the approval of the board and the holders of 2/3 of the disinterested shares, the three-year cooling off period will not apply.

These provisions indicate that the bill is restrained, moderate and in no way stops takeovers. Nothing in the bill will prevent an acquiror from making a full and fair offer for all of the company's shares. By the same token, the bill provides for an orderly process by which shareholders can decide whether they favor a change of control in the company and does so in a manner that affords minority shareholders substantial protection against abusive takeover tactics.

Although it has adopted a control share acquisition statute, Kansas should nevertheless adopt the bill. Like Centel, many Kansas corporations may not be covered by the Kansas control share acquisition statute because they have an insufficient number of Kansas shareholders. When the Delaware statute was under consideration, there was some concern that the statute would not withstand a constitutional challenge because of its applicability to corporations that, apart from being

incorporated in Delaware, did not have significant contacts there. The Delaware statute has been challenged several times since its adoption, and no court has yet held the statute to be unconstitutional, thus upholding the ability of the states to make legislative determinations on these matters of corporate governance.

Centel provides a good example of the public need for protection against abusive takeover tactics. Centel provides telephone and electric utility services, including electric utility service to customers in Kansas. Many takeovers have been accomplished by acquirors who incur large amounts of indebtedness. The indebtedness in turn creates pressure on the company to reduce costs or sell assets. In the case of a company providing utility services, these measures may result in diminished quality of services to the customers. The bill would assist boards of directors in negotiating with an acquiror, thereby enabling them to address the broad range of interests affected by their companies.

The failure by the Kansas legislature to pass the bill may result in the reincorporation of Kansas companies under the laws of other states. The harm to Kansas from the resulting reduction in franchise taxes seems unnecessary, especially in light of the growing acceptance of takeover statutes. We believe that the takeover legislation passed by many states signals a recognition that corporations are long-term business institutions that require a framework of

stability and long-term thinking. To pursue these long-term goals, it is important that corporations not be distracted by the goals of corporate raiders who desire to make short-term profits. We believe that the bill is an appropriate method of preventing these abuses while not foreclosing takeovers in general.

a-4-5
3/23/89

The COLEMAN COMPANY, INC.

General Offices

JOHN M. REIFF, Senior Vice President - Law & Personnel, 261-3230
LARRY E. SANFORD, Director - Legal Department, 261-3526
HAROLD J. PFOUNTZ, Corporate Attorney & Assistant Secretary, 261-3197
KENNETH R. BELL, Corporate Attorney, 261-3522

March 22, 1989

Representative Elizabeth Baker, Chairperson
Economic Development Committee
House of Representatives
State Capital Building
Topeka, KS

Re: SB 116 Business combinations with interested shareholders

Dear Rep. Baker:

As you are aware, Coleman led in the drafting and introduction of the above legislation. Since we introduced the issue to the legislature a number of well-publicized events relating to Coleman have occurred.

The day of the first Senate committee hearing on the bill, a company organized by the Coleman family and joined by members of management, including me, made a leveraged buy-out proposal for the Company. The Coleman Board of Directors appointed a special committee of non-management/non-family directors to study the proposal. The committee determined to auction Coleman, and this past Sunday MacAndrews & Forbes was declared the high bidder with an all cash offer sub- stantially in excess of the Coleman family's bid.

The Board unanimously approved the MacAndrews offer once it was determined to be the clear winner. It is expected that the MacAndrews tender offer to the stockholders will commence this Friday and it is also expected, although technically uncertain, that it will be successful. One or two months from now, Coleman will no longer be a public company.

This puts Coleman, and me personally, in an unusual position since the legislation we originally proposed is no longer relevant to us. While we still believe in and support the concept of the legislation, it does not apply to the MacAndrews offer because of the board's approval. In short, although the Coleman family and management are disappointed to have lost the auction, the MacAndrews acquisition of Coleman is a friendly one and would be unaffected by SB 116.

I did not want your Committee to be under the impression that SB 116 has anything to do with the MacAndrews offer.

John

John M. Reiff

House Eco Devo Committee
Attachment 5 3/23/89

P.O. BOX 1762 250 N. ST. FRANCIS WICHITA, KANSAS 67201 (316) 261-3211

Statement of the
United Shareholders Association
Before the Kansas House Economic Development Committee
March 23, 1989

Madam chairman and members of the committee, my name is Ralph Whitworth. I am director of the United Shareholders Association, a grassroots membership organization founded in 1986 to serve as an advocate for shareholder rights. USA's membership now numbers more than 58,000 individual shareholders. We have testified on shareholder rights issues before Congress and the Securities and Exchange Commission on numerous occasions, and we have been active in several states that have considered corporate tender offer legislation similar to the bill under discussion today. We appreciate the opportunity to appear today to present our views on Senate Bill 116.

We characterize this type of legislation as anti-shareholder because it undermines the right of shareholders to decide who will run public corporations and vests that power in the hands of corporate managers. This is harmful to shareholders and detrimental to our economic competitiveness.

A total of 36 states have adopted some form of management protectionist legislation, most of them within the last two years. In public companies, managers are employed to serve the interests of shareholders, the owners of the corporation. Essentially, shareholders of publicly owned corporations are employers, managers are employees. But the state tender offer statutes create a blatant conflict of interest, protecting corporate managers from the shareholders whom they were hired to serve. In so doing, the legislation significantly reduces the accountability of managers to shareholders, removing an important incentive for improved corporate performance.

The costs associated with eliminating these incentives are enormous. The kind of legislation under discussion today, commonly known as a business combination freeze-out, gives incumbent managers enormous power to veto unwanted bids for control, even in cases where a majority of shareholders approve a transaction. A 1987 Federal Trade Commission study of a similar bill found that eventually became law in New York cost shareholders in 94 firms more than $1.2 billion, equal to nearly one percent of the value of the affected firms.

The FTC study said that anti-takeover laws such as New York's "may promote the inefficient management of society's assets by lessening the ability of capital markets to efficiently reallocate assets." The FTC asserts that as a result, increases in the "real cost of goods and services produced by the firms

House Eco Devo Committee
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affected by these regulations" is "injuring consumers as well as shareholders."

Freeze-out provisions actually encourage the least beneficial type of acquisition -- the conglomerate merger. It permits large corporations to buy smaller corporations, because the large acquiror can sustain the burden of not being able to integrate operations or realize gains from asset sales for five years. In this way, the freeze-out encourages ill-advised diversifications that reshuffle assets to satisfy managers' desires to expand the size of their firms through strategies that benefit neither shareholders nor the economy.

Nor will the legislation protect jobs, except for those of top managers. While potential job loss is an understandable concern of the legislators, there is no evidence that hostile takeovers lead to aggregate employment declines. None of the empirical studies performed to date on this question finds a link between takeovers and employment. While it is true that takeovers sometimes result in layoffs, they also produce productivity gains that position companies for healthier long-term growth, and higher potential employment levels.

Attempts to restrain restructuring and takeover activity would put at serious risk the economic benefits that have resulted from an active market for corporate control over the past several years. A September 1987 study by SEC Commissioner Joseph Grundfest found that takeovers increased shareholder returns by as much as $210 billion between 1981 and 1986. This money is recirculated through the economy, providing capital for new investments and creating jobs.

The President's Council of Economic Advisers, in opposing the freeze-out legislation in Delaware that was enacted last year said that these gains are "evidence that a competitive market for corporate control serves to move the country's corporate assets into the hands of those managers who can utilize them most productively."

Takeovers are an important element of a broad restructuring of American industry that is making our firms more productive, competitive and efficient. Indeed, productivity gains have been particularly strong in industrial sectors that have experienced a high level of takeover and other restructuring activity. McKinsey & Co., the management consulting firm, found that the value created by restructuring is due to better management of corporate assets. "Contrary to popular belief ... our analyses show that more than 80 percent of the benefits of restructuring is generally attributable to improved performance," said Ennius Bergsma, the head of McKinsey's corporate finance practice.

a-6-2
3/23/89

By insulating firms from this dynamic environment, an anti-shareholder law will make Kansas firms slower to adapt to change in national and world markets. In the short-term, this may protect organized vested interests -- both incumbent managers and current workers -- but will result in long-term harm to consumers, the labor force and the economy as a whole.

The Kansas legislature has the opportunity to chart a different course. While strongly urging you to resist the protectionist approach, this is not to say that there should be no new legislation. USA supports legislation aimed at promoting shareholder rights. A true shareholder rights law would include:

-- a ban on discriminatory greenmail payments by managers;
-- requiring a shareholder referendum on the adoption of poison pills, which have been adopted by some 800 corporations without shareholder approval;
-- requiring shareholder approval for lucrative golden parachute management severance contracts;
-- a confidential vote in corporate elections;
-- greater shareholder access to the proxy process; and
-- a one share/one vote guarantee;

With such legislation, the owners of Kansas' corporations would be guaranteed management that is accountable and responsive to the interests of shareholders. The result would be corporations that are better prepared to meet the competitive challenges that lie ahead.

a-6-3
3/23/89

TESTIMONY BEFORE THE HOUSE ECONOMIC DEVELOPMENT COMMITTEE
IN SUPPORT OF SB 242

March 23, 1989

By: Danton B. Rice, on behalf of the Kansas Bar Association

Senate Bill 242 makes several changes to the professional corporation law of the State of Kansas, K.S.A. 17-2706 et seq. The changes proposed in Senate Bill 242 would modernize our professional corporation law and are based upon similar changes to the Missouri Code.

The proposed amendment to K.S.A. 17-2708 will allow professionals to incorporate under the General Corporation Code, within the limits of their ethical guidelines. Increasingly, professionals are doing business in states other than their state of incorporation. However, some states have restrictions on the authority of a professional corporation to do business in the state, while no restrictions are placed upon general corporations. In addition, the recent case of Central State Bank v. Albright, 12 Kan. App.2d 175 (1987), held that a bank could not use shares of a professional corporation as collateral because it is not a "qualified shareholder." This amendment makes it clear that professionals may form general corporations if they so desire.

The proposed amendment to K.S.A. 17-2712 would allow a partnership where all the partners are authorized to render a professional service, or a professional corporation where at least one person is licensed to provide the professional service in Kansas, to incorporate in Kansas. This change would recognize the increasing interstate nature of professional corporations and would be of particular interest to Kansas City area professionals.

The proposed amendment to K.S.A. 17-2714 addresses the situation where the sole shareholder of a professional corporation dies. Currently, the professional corporation law in Kansas allows only a qualified shareholder to operate a professional corporation. This proposed change would allow the successors in interest of a deceased shareholder to collect accounts receivable and wind down the business of the corporation, or convert it to a general corporation for some other purpose.

The proposed amendment to K.S.A. 17-2715 makes it clear that a professional is liable for his or her own malpractice, as well as for negligently appointing, supervising, or participating in an activity with another professional. It would also make it

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clear that a professional would have no liability for the malpractice of another if that professional was not involved as indicated. Although this is merely a restatement of what has been thought to be the current law in Kansas, it is a necessary clarification due to recent adverse judicial decisions in other jurisdictions. As an example, the Georgia Supreme Court in First Bank & Trust Co. v. Zagoria, 302 SE 2d 674 (Ga. 1983), cited language similar to our existing statute when it found a non-negligent shareholder of a professional corporation personally liable for the misdeeds of a co-shareholder, even though the non-negligent shareholder had not participated in the negligent act giving rise to the suit.

These proposed changes will significantly benefit the professional corporations of the State and will modernize our professional corporation law. Therefore, on behalf of the Kansas Bar Association, I urge you to support SB 242.

DR:pjr