

MINUTES OF THE HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT

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

3:40 ~~xxx~~ p.m. on Monday, March 26, 1990 in room 423-S of the Capitol.

All members were present except: Representatives Barkis, Heinemann and Mead. Excused.

Committee staff present:

Jim Wilson, Revisor
Lynne Holt, Research
Elaine Johnson, Secretary

Conferees appearing before the committee:

Speaker Jim Braden
Harland Priddle, Secretary of Department of Commerce
Charles Warren, President, Kansas Inc.
Ed Bruske, President, Kansas Chamber of Commerce and Industry
Mr. Stan Andeel, Attorney, Wichita
Mr. Al Martin, Attorney, Overland Park
John Wine, Assistant Secretary of State

The meeting was called to order at 3:40 p.m. by Chairperson Baker.

Representative Baker opened the hearing on SB 652 and recognized Speaker Jim Braden.

Speaker Braden testified in support of SB 652. He stated that Kansas Inc., through its 15 member Board of Directors, provides an institutional forum where the executive branch, the Legislature, the university system, labor, and the private sector can provide policy direction and oversight on issues affecting the State's economy. SB 652 is an attempt to refine the basic statute that created Kansas Inc. The bill clarifies the role of Kansas Inc. as the strategic planner for economic development and the Department of Commerce as the lead agency in implementing the Kansas economic development strategy and coordinating state programs. These changes simply ratify existing practice. This bill does not change the public/private partnership of Kansas Inc. It does reinforce the commitment of state government to its support as set in the annual appropriations process. It dedicates private funding to the research and educational activities. This greatly assists the annual fund raising efforts and provides a much more appropriate use of private dollars. Attachment 1.

Harland Priddle, Secretary of the Department of Commerce was the next conferee to testify in support of SB 652. Mr. Priddle informed the committee that briefly stated, SB 652 corrects and properly aligns functions and responsibilities for strategic planning and economic development implementation. They believe these are the proper alignments of responsibilities and duties and also these will allow for proper timing of submission to the Governor and legislature for consideration in the next session of the Legislature. Attachment 2.

Mr. Priddle responded to questions from the committee.

The next conferee was Charles Warren, President, Kansas Inc. Mr. Warren testified in support of SB 652. He addressed the provisions which modify Kansas Inc. funding arrangements. Mr. Warren urged favorable consideration of this bill as it will provide significant assistance to their fund raising efforts and help ensure that they continue as a viable public/private partnership. Attachment 3.

Mr. Warren responded to questions from the committee.

Ed Bruske, President of the Kansas Chamber of Commerce and Industry was the final conferee to appear in support of SB 652. Mr. Bruske stated that it is their contention that Kansas Inc. should be financed by state government as it relates to its basic needs. State funds should be utilized to support the facilities and staff and any special research projects designated by the Legislature or the executive branch. This bill addresses many of those concerns. Attachment 4.

Mr. Bruske responded to questions from the committee.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT,
room 423-S, Statehouse, at 3:40 ~~xxx~~/p.m. on Monday, March 26, 1990

Attachment 5 is Mr. Gregg Svoboda's testimony in support of SB 652. Mr. Svoboda was unable to attend today's meeting and requested that it be distributed to the committee and become a part of the permanent record.

Representative Baker closed the hearing on SB 652 and called for discussion of the bill.

Representative Chronister made a motion to pass SB 652 favorably. Mr. Weimer seconded the motion. Motion carried.

Representative Ronald Reinert requested that his vote on SB 652 be recorded as a "No" vote.

Representative Baker opened the hearing on HB 3064 and recognized Mr. Stan Andeel.

Mr. Andeel, an attorney from Wichita, testified in support of HB 3064. He stated that the principal reasons for the need to pass limited liability company legislation in Kansas are as follows. Generally, when businessmen organize an entity for a business or investment purpose, their choices of entity are limited to either a corporation or a partnership. Corporations provide protection from personal liability to shareholder-investors but they are taxed as separate entities. Partnerships, on the other hand, are taxed on a "pass through" basis directly to the partner-owners, but generally provide no personal liability protection to the partners from partnership debts. Some refinements of both of these concepts are provided to a corporation by an "S" election (corporation electing pass-through treatment for taxation purposes) or by the formation of a limited partnership (limited liability to all limited partners but full liability to the general partner). Attachment 6.

Mr. Andeel responded to questions from the committee.

The next conferee was Mr. Al Martin, Attorney from Overland Park. Mr. Martin supports HB 3064. Mr. Martin believes that the limited liability company statute fits an important need for those persons who wish to be taxed as a partnership for federal and Kansas tax purposes but who otherwise want to be treated like a corporation in many respects. Frequently businesses cannot now do that and must make a choice of whether they want some undesirable aspects of federal tax law or some undesirable aspects of state law. This simply will modernize the statutes to give a third choice of a hybrid which could be a partnership for federal and state purposes and yet an entity much like a corporation for Kansas state law purposes. Since creditors of these entities would know in advance what type of entity they are dealing with, there is no public policy reason which should prevent the implementation of this concept. Mr. Martin went over his proposed amendments to the bill for the committee. Attachment 7.

Mr. Martin responded to questions from the committee.

John Wine, Assistant Secretary of State was the final conferee to testify in support of HB 3064. Mr. Wine stated that HB 3064 would authorize limited liability companies in Kansas. Since the IRS has recently ruled that this form of business entity would be treated as a partnership for income tax purposes, limited liability companies offer an attractive, alternative form of organization for certain businesses. He strongly encourages the committee to make this option available to Kansas investors. In addition, it is suggested that the committee adopt the conformity amendments contained in the lengthy attachment to his testimony. The changes do not affect the rights of the parties but only conform the act to existing corporate and limited partnership laws in Kansas. Attachment 8.

Mr. Wine responded to questions from the committee.

Representative Baker closed the hearing on HB 3064.

Representative Baker called for discussion on HB 2783.

Representative Brady made a motion to pass HB 2783, as amended, favorably. Representative Reinhardt seconded the motion. Motion carried.

Representative Baker called for discussion of HB 3089.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT,
room 423-S, Statehouse, at 3:40 ~~xxx~~/p.m. on Monday, March 26, 1990.

Representative Gjerstad made a motion to amend HB 3089 to say any project begun on or after January 1, 1900. Representative Dean seconded the motion. Representative Reinert made a sub-motion that HB 3089 be reported adversely. Representative Gregory seconded the motion. Motion failed. Representative Gjerstad's motion to amend carried. Representative Dean made a motion to limit this bill to road projects. Representative Gregory seconded the motion. Motion failed. Representative Gjerstad made a sub-motion to pass HB 3089 favorably, as amended. Representative Foster seconded. Motion carried.

Representative Baker called for discussion on SB 438.

Representative Chronister made a motion to pass SB 438 favorably. Representative Aylward seconded the motion. Motion carried.

The meeting adjourned at 5:04 p.m.

E Elizabeth Baker

Date: 3/26/90

GUEST REGISTER

HOUSE

Committee on Economic Development

<u>NAME</u>	<u>ORGANIZATION</u>	<u>ADDRESS</u>
Sara Sanders	KTCA	Topeka
MARVIN Stottheim	KDHE	TOPEKA
Chuck Horn	KBA	"
Kathy Taylor	"	"
Scott Small	Kansas Inc.	Topeka
Ann Patterson	KDOC	Topeka
Alan Steppat	McGill Assoc.	Topeka
Charles Wain	Kansas Inc	Topeka
Al Ashke	KOOI	Topeka
RMS Shields	Harris	"
Spie Cooper	KU	Lawrence
Jim Brack	LIEB	
Cathy Holdeman	City of Wichita	Wichita
Whitney Zanner	Wichita Inland Park	Topeka
John Neip	Sec. of St.	Topeka
Alson R Martin	Sheek, Hardy, & Bacon	Overland Park
Stanley B. Andeck	Foulston + Siefken	Wichita
Herland Piddell	KDOC	Topeka

Testimony on Senate Bill 652

by

James R. Braden, Speaker of the House
House Committee on Economic Development
March 26, 1990

Mr. Chairman, members of the Committee, I appreciate this opportunity to appear before you in support of Senate Bill 652. I am testifying in my capacity as a member of the Board of Directors of Kansas Inc. since its creation in 1986. I am also speaking as one of the founders of Kansas Inc. In 1985, I served as Chairman of the Legislative Task Force on Economic Development which proposed a number of new initiatives for the State of Kansas to rebuild our economy. Among those initiatives was the recommendation that we establish a public/private partnership that would serve as a central guidance mechanism and oversight body in economic development.

As you know, Kansas Inc., through its 15 member Board of Directors, provides an institutional forum where the executive branch, the Legislature, the university system, labor, and the private sector can provide policy direction and oversight on issues affecting the State's economy.

I believe that we were wise in our design of Kansas Inc. During the past four years, it has served this State well in its role as an independent and objective source of policy advice and direction. The Board has reviewed the organization, structure and mission of Kansas Inc. at its regular meetings and a special retreat held last Summer. We concluded that there is little need for significant change in its representation or method of operation.

Senate Bill 652 is an attempt to refine the basic statute that created Kansas Inc. The Bill clarifies the role of Kansas Inc. as the strategic planner for economic development and the Department of Commerce as the lead agency in implementing the Kansas economic development strategy and coordinating state programs. These changes simply ratify existing practice.

The funding arrangements for Kansas Inc. do need to be modified. When we established Kansas Inc. we believed that it was critical to require private sector support of its activities. The requirement that one-third of its funding be derived from the private sector was designed to give the business community a sense of ownership and involvement, as well as to provide a

House Eco. Devo. Committee
Attachment 1 *3/26/9*

measure of independence from political control. That reasoning was sound and I believe it remains important to retain the public/private character of Kansas Inc.

While we must maintain the public/private concept, Kansas Inc. does require greater flexibility and latitude in its annual funding and its ability to raise the private dollars for its support. Recent changes in the appropriations process have required Kansas Inc. to raise private dollars for salaries and other operating expenses. This has made it even more difficult to raise money and plan for normal expenses.

Senate Bill 652 does not change the public/private partnership of Kansas Inc. It does reinforce the commitment of state government to its support as set in the annual appropriations process. It dedicates private funding to the research and educational activities. This greatly assists the annual fund raising efforts and provides a much more appropriate use of private dollars.

We at Kansas Inc. have successfully matched state funds with private dollars. The private match was met the last two years and will be met again this year. The private sector has demonstrated its support through the contributions of over 80 Kansas companies. Charles Warren will provide you the details of those efforts.

It is extremely difficult to raise private money. There is a great deal of competition for corporate giving for both charitable and political causes. The current statute makes it even more difficult.

I urge your favorable support of S.B. 652. These amendments will help to ensure that Kansas Inc. continues to play an important role in economic development for both the State of Kansas and the private sector.

I would be pleased to answer any questions. Thank you.

TESTIMONY

ON

SENATE BILL 652

TO

HOUSE ECONOMIC DEVELOPMENT COMMITTEE

BY

HARLAND E. PRIDDLE
SECRETARY OF COMMERCE

March 22, 1990

*House Eco. Dev. Committee
Attachment 2 3/26/90*

Madam Chair and Members of the Committee:

Kansas should be proud of its system of organization for developing policies and strategies and implementing economic development programs. We have moved forward in many areas since the initial program initiatives in 1986 and have completed most of the necessary fine tuning and technical changes we believe are necessary.

Briefly stated, Senate Bill 652 corrects and properly aligns functions and responsibilities for strategic planning and economic development implementation. The original responsibilities outlined in the enabling legislation for the Kansas Department of Commerce placed the responsibility for a strategy plan with our agency. We believe this was not the intent and should have been properly aligned to Kansas Inc. In their assigned responsibilities, Kansas Inc. is the agency designated for policy and strategic planning for the future.

Simply stated, Senate Bill 652 allows for the following:

1. Kansas Inc. will be responsible for strategic and policy planning and the development of supporting plans related to strategic planning.
2. The Kansas Department of Commerce will develop an annual Economic Development Implementation Plan which, in effect, will direct the efforts of the economic development agencies along the intended strategy and policy lines.
3. The timing of documentation and planning has been arranged with the basic concept of providing documentation to the Governor and the legislature in time

for their use during the upcoming session. For example, Senate Bill 652 provides for the submission of an annual Economic Development Implementation Plan to Kansas Inc. from the Kansas Department of Commerce by July 15. Kansas Inc. will review this plan and provide comments to the Governor and legislature by September 1. Kansas Inc. will also review and evaluate the annual reports of Kansas Technology Enterprise Corporation, Kansas Department of Commerce, and other appropriate agencies. In turn, Kansas Inc. will provide the Governor and the legislature an evaluation as it relates to fulfilling the strategies as previously outlined in Kansas Inc.'s plan. These comments will also go to the Governor and legislature by September 1.

We believe these are the proper alignments of responsibilities and duties and also these allow for proper timing of submission to the Governor and legislature for consideration in the next session of the legislature.

In order to implement and develop the necessary coordinating programs, a Cabinet Council for Economic Development will be established and chaired by the Secretary of Commerce. This Council will involve all agencies, including cabinet agencies, and others in a coordination effort designed to retain the proper direction of economic development programs.

I stand for questions Mr. Chairman and members of the committee.

STRATEGIC PLANNING PROCESS

Kansas Inc. assigns responsibility for Strategic and Policy planning.

Department of Commerce will develop an annual implementation plan.

Arranges timing of documentation to allow Governor and Legislature to consider plans as part of their process of policy development.

July 15 Annual Economic
Implementation Plan to Kansas Inc.

September 1 Plan reviewed and comments
forwarded to Governor and
Legislature.

September 1 Annual Reports reviewed and
comments forwarded to Governor and
Legislature.

Legislative Testimony



S.B. 652

KANSAS INC. STATUTE

by

Charles R. Warren
President

House Committee on Economic Development
March 26, 1990

400 S.W. 8th Street, Suite 113
Topeka, Kansas 66603

(913) 296-1460

*House Eco. Dev. Committee
Attachment 3 3/26/90*

Madame Chairperson, members of the Committee, I appreciate your consideration of Senate Bill 652 and the opportunity to explain the objectives of these amendments to our existing statute.

Secretary Harland Priddle has addressed the recommendations relating to the strategic planning functions of Kansas Inc. and how the Department of Commerce and our agency envision our respective roles with regard to this function. I have attached for your information a further explanation of those amendments. I would like to emphasize that this would clarify existing practice among the Department of Commerce and Kansas Inc. As you know, Harland and I do work closely together and believe that this provides a better definition of our respective roles. Strategic planning is a significant responsibility and one which I hope to place more emphasis on in the near future. I believe that we can contribute best by focusing on the long term needs of the state and providing direction to our economic development policies. Planning for the future and evaluation of our current programs should be the most important roles for Kansas Inc.

I would like to concentrate my remarks on the provisions which modify Kansas Inc. funding arrangements.

The current statute requires a two-thirds/one-thirds match of state funds with private dollars. This provision was modified in 1988 by Senate Bill 739 which authorized us to count in-kind contributions as part (up to 20%) of the one-third private match. That was extremely helpful to our fundraising. We have received major in-kind donations each of the last two years.

The current matching requirement was intended to ensure that we operated as a public/private partnership. That concept remains sound and must be preserved. However, in practice it has become far more burdensome and more inflexible than I am sure was intended by the Legislature. Kansas Inc. was modeled after the Indiana Economic Development Council. Prior to coming here, I evaluated the Indiana agency and wrote a chapter in a book about its operation. The Indiana statute also calls for one-third private funding, but it does not demand a mandatory match. In Indiana, salaries and operating expenses are paid by the State. Private funds are used for research.

Technically, we cannot spend money from the state general fund unless and until we are able to match each dollar with 50 cents from the private sector. We are granted the entire year to raise the private match. This year the problem has been compounded by the appropriations statute which authorized only two-thirds of the annual salary amount to be spent from the SGF. This means that we must use private dollars to pay salary expenses for the months of March, April, May and June. Salary for those four months totals \$63,000. We currently have \$25,591 in our private checking

account and \$35,423 in the state matching fund. We have more than \$18,000 in pledges of cash donations that will be received over the next several weeks. Those sources total \$79,764. We will meet our payroll.

The major problems we face are: 1) the difficulty in raising private money for salaries (most consider us to be state employees); and 2) the inability to plan expenditures until the end of the fiscal year.

We are not asking for relief from the obligation to raise private dollars in support of Kansas Inc. We are asking for more flexibility and to make a very difficult job somewhat easier.

I want to report to you on our fund raising success. 1988 was the first year I was President and the first year Kansas Inc. was required to match state dollars. In FY1988, we met the match by raising \$80,658 for the portion of the year required. In FY1989, we raised private dollars in an amount that exceed the matching requirement. Our required match was \$145,885, we actually expended \$153,237 from private sources. This fiscal year (1990) we are required to raise \$148,970.

FY90 Fundraising:

The following details our fund raising efforts this fiscal year.

Cash donations/confirmed pledges:	\$70,150
In-Kind contributions to date:	1,700
Cash anticipated in support of Planning data base project:	13,200
Cash anticipated from FY89 donors:	26,850
In-Kind from Ernst & Young:	15,000
	<hr/>
Total Raised to 2/28/90:	\$126,900

For Fiscal Year 1990, we still need to secure \$22,070 which will need to come primarily from new contributors. I have every confidence that we will meet that goal.

We have also been very successful in broadening our base of contributors. We now have approximately 80 companies which we consider the private investors of Kansas Inc. Attached is a list of those companies arranged in order of size of donation. As you can see, the business community in Kansas appreciates the work of Kansas Inc. and has been generous in its support. I am proud of the support shown by these businesses.

Accountability of Private Funds

I would like explain the other provisions of New Section 3. Section 3 (b) makes explicit the authorization of Kansas Inc. to receive private funds and grants from private foundations and other governmental entities. Section 3(c) places in statute the existing system that we have established with the Division of Accounts and Reports in providing a monthly status of private receipts and expenditures. It also establishes an annual financial report which would detail the share of our budget funded by the state and the private sector. We have established a system to provide a full disclosure and accounting of all private funds received. These amendments would update our statute.

I urge your favorable consideration of this bill. It will provide significant assistance to our fund raising efforts and help ensure that we continue as a viable public/private partnership.

I would be pleased to answer any questions, or provide any additional information desired by the committee. Thank you.



Board of Directors

James Braden
Speaker of the House
Clay Center

Paul "Bud" Burke
President of the Senate
Leawood

Tom Clevenger
President
Fourth Financial Corporation

Governor Mike Hayden
Co-Chairman
Topeka

Henry Helgerson
State Representative
Wichita

Frances Degan Horowitz
Vice-Chancellor for Research
University of Kansas

Eric Jager, Co-Chairman
President
Windcrest Investment Management

Michael Johnston
Senate Minority Leader
Parsons

Don Landoll
President
Landoll Corporation

Bill Moore
Business Representative
Teamsters Union

Dick Nichols
President & Chairman
Home State Bank & Trust

Harland Priddle
Secretary
Department of Commerce

Ladd Seaberg
President
Midwest Grain Products

Bill Wohlford
Executive Vice President
Slawson Company Oil Products

February 28, 1990

KANSAS INC./COMMERCE DEPARTMENT STATUTORY CHANGES

The Board of Directors of Kansas Inc. supports the proposed changes to the Kansas Inc. and Department of Commerce statutes. The Board recommends that the Legislature should enact new statutory guidelines to provide better clarification of agency purpose and duties and a more practical financing formula.

Strategic Planning. The most important element in economic development is a coordinated and effective strategic planning mechanism. This importance was recognized by the Legislature in 1986 in creating Kansas Inc. and reorganizing the Department of Economic Development (now the Department of Commerce). In Kansas Inc., the Legislature wanted to create an organization which would be responsible for coordinating the development of a state economic development strategy.

In the statutes for Kansas Inc. and the Department of Commerce, the Legislature included sections outlining the agencies' responsibilities with regard to strategic planning. These mandates, though, conflict with what is expressed as the general purposes of these two agencies.

K.S.A. 74-8002 (a)(1) states that the purpose of Kansas Inc. shall be to "undertake ongoing strategic analysis in order to determine the state's areas of potential and continuing competitive economic advantage". The Commerce Department's mandated purpose includes passages such as, "promote economic diversification", "maintain and revitalize economically depressed rural areas..." and "facilitate the growth...of new wealth-generating enterprises". These purposes indicate that Kansas Inc. is responsible for strategic planning and the Commerce Department for implementation.

Several sections in the agency's mandated duties are related to strategic planning. To alleviate any inconsistencies and conflict, the staffs of Kansas Inc. and the Department of Commerce met to discuss these differences. It was decided that the passages in the Department of Commerce's legislation that deals specifically with strategic planning (K.S.A. 74-5005 (a) and (b)) should be placed in the Kansas Inc. statute. This change would firmly place the responsibility of economic development strategic planning with Kansas Inc. and leave the Department of Commerce the pivotal role of implementation.

9-3-6
3/26/90

PRIVATE SECTOR INVESTORS OF KANSAS, INC.

* * * *

Southwestern Bell Telephone
Bank IV
Hallmark Cards, Inc.
Kansas Bankers Association

Kansas City Power and Light Company
Texaco USA
United Telephone System

* * *

Ernst & Young
SCKEDD
ARCO Oil and Gas Company
KPL Gas Service
Yellow Freight Systems
Bartlett and Company Grain
Black & Veatch

Kansas Gas and Electric, Company
Boeing Military Airplanes
Midwest Grain Products, Inc.
Prudential-Bache
Salina Airport Authority
Devlin Ventures, Inc.

* *

ADM Milling
American Investors Life
ARCO Pipeline
ATSF Railway
American Telephone & Telegraph
Burns & McDonnell
Dillons Store Division
J.E. Dunn Construction
Farmland Industries
George K. Baum & Co.
IBM
J.P. Fogel
Kansas Farm Bureau Services

Kansas City Star Company
Marion Laboratories
The Marley Company
Metcalf State Bank
National Pizza
KMPG Peat Marwick
Puritan-Bennett
Rockwell International
Seaton Publishing
Stauffer Communication
UtiliCorp United
Wichita Eagle

*

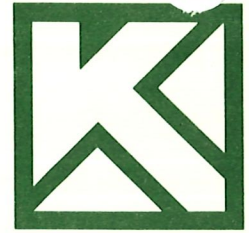
Commerce Bank & Trust
Dan Carney
The Dane G. Hansen Trust
Howard, Needles, Tammen & Bergendoff
Kansas State Bank
K&E Petroleum, Inc.
Lario Oil Company
Martin Tractor Company
Murfin Drilling Company
NCRA
Packer Plastics
Pete McGill and Associates
Union Gas System, Inc.
Ark City Packing

Armstrong, Teasdale, Schlafly, Davis & Dicus
DeBauge Brothers, Inc.
FMC Corporation
Gill Studios, Inc.
Lathrop, Koontz & Norquist
McPherson Bank & Trust
Morton International, Inc.
Multimedia Cablevision
Philips Lighting Company
Reece Construction Company
Security Benefit Life
Home Bank & Trust
George R. Shaw
Taylor Forge Engineered Systems, Inc.

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 Bank IV Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321



A consolidation of the
Kansas State Chamber
of Commerce,
Associated Industries
of Kansas,
Kansas Retail Council

SB 652

March 22, 1990

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the
House Committee on Economic Development

by

Ed Bruske
President

Madam Chairperson and members of the Committee:

My name is Ed Bruske, president of the Kansas Chamber of Commerce and Industry.

KCCI would like to take this opportunity to support SB 652.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

We supported the concept of Kansas Inc., the business-government partnership created by this legislature back in '86. We continue to support Kansas Inc. and have been very pleased with the initiative this agency has shown on a number of important issues.

*House Eco. Devo. Committee
Attachment 4
3/24/90*

However, since it's conception, we have had concerns as it relates to the funding of the organization. KCCI believes that yearly private funding on a matching one-third basis is impractical. This has been proven in a number of similar situations, primarily in local communities starting with the Philadelphia Plan in the early '70's. This concern was confirmed when we met with a number of private fund raisers who have participated in similar economic development efforts across the country. All advised us that our initial effort hinged too heavily on a limited number of issues.

It is our contention that Kansas Inc. should be financed by state government as it relates to its basic needs. In other words, state funds should be utilized to support the facilities and staff and any special research projects designated by the legislature or the executive branch. SB 652 addresses many of those concerns.

It is also the opinion of KCCI that Kansas Inc. should be able to receive private contributions and grants as it relates to research projects only. If the private sector determines that it needs a specific study or issue reviewed, then it should be prepared to initiate that study with its own funds, or, a matching grant concept with Kansas Inc. But, it is obvious that the co-mingling of government and private funds to pay for operational expenses is a hindrance and basically unacceptable to private enterprise. Most companies and/or their foundations are reluctant or prohibited from giving funds that are utilized for staff or physical facilities unless the recipient organization has a mission that encompasses their specific interests.

Therefore, it would be KCCI's recommendation that private contributions and grants be directed into a private foundation that would utilize the dollars as potential matching funds with Kansas Inc. on the above suggested basis. If sufficient funds could be accumulated within the foundation, the interest alone would generate enough funds to initiate and match Kansas Inc. activities for a number of years without soliciting the private sector on a yearly basis.

It would be more appropriate to solicit the business community if a long-range menu of development concerns were established. Companies could then be solicited on a three-year, five-year, or perhaps one-time basis for private funding for specific projects

within their area of interest. This would give Kansas Inc. the certainty of existence and the staying power needed to establish its credibility. It would also eliminate the Kansas Inc. staff and Board of Directors from spending a large percent of their time as fund raisers. And, most important, it would broaden the base of contributors and help alleviate the appearance of conflict of interest as it relates to special studies.

"SENATE BILL NO. 652"

prepared for

The House Committee on Economic Development
The Kansas Legislature

by

Gregg Svoboda
Southwestern Bell Telephone Company
220 East Sixth Street, Room 505
Topeka, Kansas 66603
(913) 276-1945

March 22, 1990

House Eco. Dev. Committee
Attachment 5 *3/26/90*

"In Support of Senate Bill No. 652"

Mister Chairman and members of the committee, good afternoon. It's a privilege to have the opportunity to file this testimony before you today.

My name is Gregg Svoboda, and I'm writing as a representative of Southwestern Bell Telephone Company. My title is District Manager-Economic Development, and my responsibility in that position is the coordination of the company's statewide efforts in the economic development arena. In that capacity, I have had the privilege to work for and with the president and staff of Kansas Inc.

In December 1988, I became a loaned executive, assigned to work with Charles R. Warren, president of Kansas Inc. My general responsibilities were: 1) to assist the president in implementing and managing the required fundraising with the business community of the state; 2) to help plan and organize the development of new strategic plans for the state's economy; and 3) to act as a facilitator between Kansas Inc. and the print and electronic media statewide to focus attention on the past and ongoing accomplishments of the organization.

Southwestern Bell Telephone has a proud and continuing tradition of providing support to state and community organizations through its loaned executive program. Personnel have been loaned to the Department of Commerce, to various United Way organizations and most recently to Kansas Inc. In each instance there has occurred a win-win situation. We are absolutely convinced that these types of private/public partnerships are essential to the

quality of life and the economic well-being of our cities, state and company. In addition to the in-kind value of the loaned executive, Southwestern Bell has provided other types of support/investment to Kansas Inc.

- In 1988, \$5000 cash investment
- In 1989, \$5000 cash investment
- In 1989, \$1750 cash support for the
"Workforce Training Conference
- In 1990, \$5000 cash investment

Again, we are convinced that our continuing support of this important organization is a good investment for Kansas and Southwestern Bell Telephone Company.

During my assignment to Kansas Inc., I was impressed with the willingness of many companies to provide financial support. On the other hand, it was my impression that a disproportionate amount of time was spent by the president, relative to the private sector fundraising requirement. While private sector investment is essential, I remain unconvinced that this responsibility should be borne by the president of Kansas Inc. and/or his staff. An alternative method, perhaps driven by the business community, would seem appropriate as they represent the ultimate beneficiaries of increased economic development.

Finally, as it pertains to new section #3 of the bill, we are in support of the position that private sector funds be raised and utilized for research and program development. It is entirely appropriate that salaries, rents and other operating expenses be covered by annual appropriations of the legislature.

In summary, we strongly support SB 652, its intent, purposes and goals. We recommend approval of same.

ROBERT N. PARTRIDGE
RICHARD C. HARRIS
GERALD SAWATZKY
ROBERT L. HOWARD
CHARLES J. WOODIN
MIKEL L. STOUT
BENJAMIN C. LANGEL
WILLIAM H. DYE
PHILLIP S. FRICK
STANLEY G. ANDEEL
FREDERICK L. HAAG
RICHARD D. EWY
DARRELL L. WARTA
HARVEY R. SORENSEN
JAMES M. ARMSTRONG
MARY KATHLEEN BABCOCK
CHARLES P. EFFLANDT
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TESTIMONY BEFORE THE KANSAS HOUSE OF REPRESENTATIVES ECONOMIC DEVELOPMENT COMMITTEE

FROM: Stanley G. Andeel of
Foulston & Siefkin, Wichita, Kansas

DATE: March 26, 1990

RE: House Bill No. 3064 - Limited Liability Companies

I am here speaking as a proponent of House Bill 3064. For over 23 years, I have been a practicing attorney specializing in tax and corporate law with the firm of Foulston & Siefkin, Wichita, Kansas. I have been a partner in that firm for approximately 20 of those years.

Al Martin, also a senior partner with the firm of Shook, Hardy & Bacon, Overland Park, Kansas, has been practicing tax law in the Kansas City area for almost as long. He and I have jointly studied the provisions of the limited liability statutes in Florida and Wyoming, and both of us urge the passage of House Bill 3064 as modified by comments in Al Martin's submitted testimony. I join in those comments.

The principal reasons for the need to pass limited liability company legislation in Kansas are as follows. Generally, when businessmen organize an entity for a business or investment purpose, their choices of entity are limited to either a corporation or a partnership. Corporations provide protection from personal liability to shareholder-investors but they are taxed as separate entities. Partnerships, on the other hand, are taxed on a "pass through" basis directly to the partner-owners, but generally provide no personal liability protection to the partners from partnership debts. Some refinements of both of these concepts are provided to a corporation by an "S" election (corporation

electing pass-through treatment for taxation purposes) or by the formation of a limited partnership (limited liability to all limited partners but full liability to the general partner).

Suffice it to say that the use of "S" corporations and limited partnerships are both legitimate recognized efforts to afford these entities pass-through tax treatment combined with limited liability for investors. The problem is that complexities in both "S" corporations and limited partnerships give rise to certain situations which dictate a need for a third alternative and we believe the limited liability company would fulfill that need. The passage of limited liability legislation would provide a more complete alternative for this objective, i.e., complete partnership taxation coupled with complete protection and limited liability of its investors.

CONCLUSION

Al Martin and I have both specialized in tax and corporate law in the two most populated areas of the state for over 20 years. We have jointly reviewed both the Florida and Wyoming limited liability company statutes and many sources of secondary materials. We believe that the passage of this concept in Kansas would not only provide a legitimate business alternative to those choices presently in existence, but would do so with no violation or abuse of public policy. Finally, we believe that implementation of this concept in Kansas could attract investors and businessmen to Kansas as a choice of entity available here but not available in most surrounding states.

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M E M O R A N D U M

TO: ECONOMIC DEVELOPMENT COMMITTEE

FROM: ALSON R. MARTIN

CC: STAN ANDEEL

DATE: FEBRUARY 28, 1990

RE: HOUSE BILL #3064

Introduction

Stanley G. Andeel, a senior partner at the Foulston & Siefkin law firm, Wichita, Kansas, and I have reviewed the Florida and Wyoming limited liability company statutes, and we generally endorse House Bill #3064 with minor recommended changes. These written comments incorporate the thoughts of Mr. Andeel and myself with respect to House Bill #3064, about which we are very supportive. Florida and Wyoming are presently the only two states in the United States with a limited liability company statute. H.B.#3064 is patterned after the Florida statute. We think this is a wise choice, but we will recommend, as stated below, some changes to the proposed bill due to the problems with incorporating Florida law in Kansas.

Mr. Andeel and I have several decades of experience as practicing attorneys in Kansas. We are speaking as practicing attorneys, not as representatives of the Kansas Bar Association. However, it is important for you to understand that both of us have been actively involved with business attorneys throughout the state. I am co-author of the book published by the Kansas Bar Association entitled Kansas Corporation Law and Practice (3d edition 1988). Mr. Andeel is also an attorney of considerable experience having practiced for several decades in Kansas. We are both past presidents of the Kansas Bar Association Tax Section.

State Law Issues

House Bill #3064 is generally well drafted and we support it with five proposed changes as follows:

1. Proposed Change to Section 17. The last sentence of Section 17 should be deleted. That sentence says: "A distribution shall be deemed a 'dividend' under s. 316 of the Internal Revenue Code, etc."

House Eco. Dev. Committee

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Reason for proposed change: This sentence involves the tax treatment of the limited liability company. It is the only sentence dealing with the tax treatment in the entire H.B. 3064. This provision does not fit within the Kansas tax scheme for several reasons. First, there are no dividends under Kansas or federal tax law if the limited liability company is taxed as a partnership and not as a corporation. The situation is different in Florida; see the attached article by Richard A. Josepher, first page, second column. Since the limited liability company can be structured to be taxed as a partnership (see the discussion below), this sentence is incorrect in that situation. Moreover, not all distributions from a corporation (also called "association" for federal income tax purposes) are treated as a dividend for federal tax law purposes (and for Kansas purposes). Consequently, it seems inappropriate to provide for any tax treatment of any type of distribution in this statute.

Since Kansas state law provides that federal income tax consequences governing Kansas income tax, no sentence is needed on the tax treatment in this statute.

2. Proposed Change to Section 14: We recommend that you delete the current Section 14 and substitute in its place the language below. The reason for this new proposed language is to make clear what is now not addressed at all in the statute concerning procedures for meetings, proxies, voting, quorums, and who may sign contracts and other documents of the limited liability company. We propose you substitute the following:

"The Company shall adopt such rules and regulations in written bylaws as shall be determined by the members of the company unless the power to adopt same is vested in the manager or managers of the company by the articles of organization. Bylaws adopted by the members or by the manager(s) may be repealed or altered; new regulations may be adopted by the members (or manager(s) if managers are given that power in the articles of organization). The members may prescribe in any regulations made by them that such bylaws may not be altered, amended or repealed by the manager(s), however, but only by the members. The bylaws may contain any provisions for the regulation and management of the affairs of the limited liability company which are not inconsistent with the law or articles of organization. In addition, they shall provide for the following: (1) location of principal office, annual meetings of the members, which may be held at such times as prescribed in the bylaws or upon a minimum of ten (10) days written notice, with notice deemed to have been given if sent by mail or other means of written communication to the members of record of the company. Special meetings may be called at

any time by the president or by members holding not less than one-fifth of the voting power of the limited liability company. Such meeting shall be called upon a minimum of ten (10) days written notice and not more than sixty (60) days written notice. The members may take action without a meeting by a writing signed by all of the persons who would be entitled to vote at a meeting. Members may execute a written proxy and which shall be valid for three years unless the person executing it specifies therein the length and time for which such proxy is to continue in force. The presence in person or by proxy of persons entitled to vote a majority of the voting interest of the company shall constitute a quorum for the transaction of business. The limited liability company, whether or not it selects a manager(s) shall select a president and secretary annually at the annual meeting of the members and shall record the identity of same in the written minutes of such meeting. In addition, at the discretion of the members, additional officers can be selected whose titles and functions shall be designated in the bylaws. All written contracts of whatever type whatsoever shall be signed by the president and secretary of the limited liability company, or by any other officer or person designated at a properly-called meeting of the members of the limited liability company."

Reasons for proposed change to Section 14: In the Kansas corporate statutes, there are specific provisions management of a corporation. We believe some similar, simplified concepts are appropriate for a limited liability company because they provide some certainty in operating rules, much like Roberts Rules of Order do. The rules provided above deal with the amount of notice to be given for meetings, where the meetings are to be held, the determination of a quorum at meetings, the provision for proxies for those people who are absent and unable to attend meetings, and the selection of officers to run the limited liability company.

The reason for the proposed change about who can sign contracts is to create a procedure and eliminate uncertainty about who can obligate the limited liability company. The concept behind the above amendment is that no one person should be able to obligate the entire entity. This procedure would distinguish the limited liability company from a partnership and grant some additional structure to those persons desiring it. If persons want one member to be able to obligate all members of an organization, even without their consent through the doctrines of apparent authority, for example, those persons may use the general partnership vehicle.

The above provision would make clear that the limited liability company, like a corporation, can have bylaws to set forth its procedures and sets forth a definite method by which they can be

adopted. In addition, it requires that there be a president and secretary and allows for the existence of other officers, whose titles and functions, if any are created, are simply set forth in the bylaws of the organization. The present statute merely provides that if there are managers, the managers are to manage the business but does not provide a mechanism for creating a hierarchy or division of authority among the managers. The proposed change would do that by allowing the managers, in effect, to be designated as officers with specific titles and functions.

Finally, by deleting the current Section 14 and substituting the above proposed section, it will be clear that no one member can obligate the entire membership of the limited liability company if that is not allowed in the bylaws of the organization. This is now literally permitted in the current Sections 14 and 15 of the proposed statute. In addition, these current sections do not specifically make clear one of the purposes of the limited liability company, namely, that investors shall have liability only for the amount of their investment in the limited liability company. Thus, the proposed change to Section 14 and Section 15 should be viewed together in this regard. Section 15, which is also proposed to be deleted, now provides in its present form that any one manager may obligate the limited liability company, as may any one member. While this may be acceptable to a specific group of investors, it may not be acceptable to others. Thus, the provisions for the bylaws are suggested for Section 14 to make clear who (and under what conditions or limitations) can obligate and make contracts for the limited liability company.

3. Proposed Change to Section 15. We propose Section 15 be deleted and be replaced by the following language based upon the Wyoming Limited Liability Company statute at 17-15-113 making clear that members have limited liability:

"Neither the members of a limited liability company nor the managers or officers of a limited liability company are liable under a judgment, decree or order of a court, or in any other manner, for a debt, obligation or liability of the limited liability company. (Laws 1977, ch. 158, § 1; W.S. 1957, § 17-306.)"

Reasons for proposed change: The above Wyoming statutory language is simpler and easier to understand than the Florida statute. For your reference, a copy of § 17-15-113 from the Wyoming statute is enclosed.

In addition, no provision of the current proposed bill (H.B.3064) makes clear that members of the limited liability do in fact have limited liability as they would in a corporate entity. The proposed

change mentioned above would do that. The existing Section 15 then becomes superfluous and is recommended to be deleted because the procedures to allow a member or manager to sign contracts for or otherwise create obligations or debts would be spelled out in the bylaws of the organization pursuant to the proposed revised Section 14 of the bill.

4. Proposed Minor Changes to Section 16. We recommend that the word "shall" in the first sentence of Section 608.425 entitled "Limited Liability Company Property" be changed to "may" to allow for property to be held in the name of a nominee or agent. Certainly this is consistent with other business entities and would allow but not require a property beneficially owned by a limited liability company to be owned in its own name but would also allow agents or other persons to own such property. In addition, the underlined words "by one or more members" in the last sentence should be replaced by "the President and Secretary" due to the designation of those persons as persons who can sign on behalf of the limited liability company.

Reasons for proposed change: These changes would allow more flexibility in terms of who can own property on behalf of the limited liability company. This provision would specifically allow agents or nominees to own property on behalf of the limited liability company, as they can now do for other types of organizations. In addition, by designating the President and Secretary as responsible parties to sign on behalf of the limited liability company, this would distinguish the limited liability company from the general partnership, as discussed in the proposed change to the Bill Section of 14 described above.

5. Proposed Change of Section 21. Finally, Section 21 should be amended by adding the words after "articles of organization" the following: "or other contract" and add those same words at the end of the sentence in Section 21(b).

Reasons for proposed change: This change would make clear that members may agree to capital contributions either in the articles or by private contract.

Tax Considerations

The Tax Reform Act of 1986 created the situation where neither a regular corporation nor a limited or general partnership is the best business entity for tax and state law reasons for certain types of business ventures. A regular corporation requires distributions to be taxed, both at the corporate and shareholder level. A general partnership or limited partnership cannot be

structured with the same management attributes as the corporation, but both general and limited partnerships allow distributions to be taxed to the individual partners without a tax to the partnership itself because the partnership functions as a "conduit" with the taxation of the partnership income being divided among the partners taxed to them personally. While a subchapter S corporation was designed to be a combination of a corporation for state law purposes and a partnership for tax purposes by allowing a state law corporation to, for federal and state income tax purposes, not to be taxed itself but to have the tax on its various items of income and deduction flow through to individual shareholders, the subchapter S corporation cannot be used for a variety of reasons by many types of businesses. The limited liability company provides another way for businesses to be structured which is similar to subchapter S corporation but which allows problems now existing with the subchapter S corporation to be solved in ways not now possible. It is important to understand that a subchapter S corporation is merely a creature of federal tax law. A subchapter S corporation utilizes existing state corporate law for formation under Kansas law. The limited liability company could be structured as either a corporation or a partnership for tax purposes but would have its own special attributes under Kansas law if this statute is adopted.

The limited liability company can be either a corporation or a partnership for tax purposes. The limited liability company gives another important choice of form of business. It will be most useful to those who want to have limited liability, such as through a limited partnership or Subchapter S corporation, but do not want or cannot meet the requirements of those statutes. A limited partnership requires a general partner with full management capability and liability for debt. A Subchapter S corporation eliminates the need for such a general partner but substitutes other problems, such as the federal tax requirements of one class of stock and a limit on 35 individual investors.

A Subchapter S corporation for tax purposes has three disadvantages to a partnership. Thus, for tax purposes many Kansas residents would prefer to establish a partnership but for state law purposes would prefer to have a corporation. The limited liability company offers them the opportunity to achieve both objectives. The tax disadvantages of a Subchapter S corporation, which do not exist for a partnership, are three-fold, namely:

1. Unlike a partnership, a Subchapter S corporation cannot make tax-free in-kind property distributions. This is especially useful when one member is retiring or getting out of the entity. If the entity owns several pieces of real estate, for example, some of them can be distributed to a retiring

"partner" to redeem that retiring partner's interest in the entity without income tax. This same type of distribution of property can trigger tax in a Subchapter S corporation where the property has increased in value.

2. A partnership may refinance property it owns and distribute the cash proceeds from this refinancing tax free to the individual partners. An S corporation cannot do this, and the distribution of the cash proceeds is a taxable event to the individuals to whom the cash is distributed.
3. If an S corporation borrows funds to purchase an asset, such as real estate, the individual shareholders of the S corporation do not get "basis" credit for federal tax purposes against which to deduct any losses incurred from the real estate. This is not true for a partnership debt, especially if nonrecourse in nature, can create "basis" to the individual partners.

These above three items are tax limitations to an S corporation which exist under federal tax law. If Kansas statutes permitted a limited liability company to exist, then these disadvantages under federal tax law could be eliminated by utilizing a limited liability company rather than a Subchapter S corporation. Thus, we are proposing that Kansas adopt this limited liability company to give persons another option for forming businesses.

The limited liability company concept has been approved by the Internal Revenue Service. See attached article by Richard A. Josepher.

Conclusion

Stan Andeel and I have both spent more than two decades each as practicing attorneys dealing with business matters. We both believe that the limited liability company statute fits an important need for those persons who wish to be taxed as a partnership for federal and Kansas tax purposes but who otherwise want to be treated like a corporation in many respects. Frequently businesses cannot now do that and must make a choice of whether they want some undesirable aspects of federal tax law or some undesirable aspects of state law. This simply would modernize our statutes to give a third choice of a hybrid which could be a partnership for federal and

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state tax purposes and yet an entity much like a corporation for Kansas state law purposes. Since creditors of these entities would know in advance what type of entity they are dealing with, we see no public policy reason which should prevent the implementation of this concept.

Enclosures:

- 1) Portion of Wyoming LLC Statute
- 2) Article on Tax Treatment

WYOMING STATUTES 1977

§ 17-15-112

LIMITED LIABILITY COMPANIES

§ 17-15-113

(c) Any registered agent of a limited liability company may resign as agent upon filing a written notice thereof, executed in duplicate, with the secretary of state, who shall forthwith mail a copy thereof to the limited liability company at its registered office. The appointment of the agent shall terminate upon the expiration of thirty (30) days after receipt of notice by the secretary of state. (Laws 1977, ch. 158, § 1; W.S. 1957, § 17-304.)

Meaning of "this act". — For the definition of "this act," referred to in the second sentence in subsection (b), see § 17-15-102(a)(vi).

§ 17-15-112. Failure to maintain registered agent or registered office or pay annual fee.

If any limited liability company has failed for thirty (30) days to appoint and maintain a registered agent in this state, or has failed for thirty (30) days after change of its registered office or registered agent to file in the office of the secretary of state a statement of the change, or has failed to pay the fee required by W.S. 17-15-132(a)(vi) it shall be deemed to be transacting business within this state without authority and to have forfeited any franchises, rights or privileges acquired under the laws thereof and the forfeiture shall be made effective in the following manner. The secretary of state shall mail by certified mail a notice of its failure to comply with aforesaid provisions. Unless compliance is made within thirty (30) days of the delivery of notice, the limited liability company shall be deemed defunct and to have forfeited its certificate of organization acquired under the laws of this state. Provided, that any defunct limited liability company may at any time within one (1) year after the forfeiture of its certificate, in the manner herein provided, be revived and reinstated, by filing the necessary statement under this act and paying the prescribed fee, together with a penalty of one hundred dollars (\$100.00). (Laws 1977, ch. 158, § 1; W.S. 1957, § 17-305.)

Meaning of "this act". — For the definition of "this act," referred to in the last sentence, see § 17-15-102(a)(vi).

§ 17-15-113. Liability of members and managers.

Neither the members of a limited liability company nor the managers of a limited liability company managed by a manager or managers are liable under a judgment, decree or order of a court, or in any other manner, for a debt, obligation or liability of the limited liability company. (Laws 1977, ch. 158, § 1; W.S. 1957, § 17-306.)

Cross references. — As to action of quo warranto against an association of persons who act as a corporation, see § 1-31-101.

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IRS Privately Rules on Florida Limited Liability Company

by Richard A. Josepher

On June 16, 1989, nearly 7 years after the July 1, 1982, effective date of Florida's "Limited Liability Company Act," F.S. 608 (the "Act"), the Internal Revenue Service, in a private letter ruling, ruled for the first time that a Limited Liability Company ("L.C.") formed under the Act may be classified as a partnership for federal income tax purposes. Prior to this ruling, in September, 1988, the IRS had issued a public revenue ruling that a Wyoming L.C. could be treated for federal income tax purposes as a partnership. Therefore, while it would appear that the conclusion reached in the Florida ruling was not surprising, it is significant for two reasons. First, the Florida and Wyoming Statutes are not identical; and second, the Florida ruling was issued subsequent to the issuance of Revenue Procedure 89-12, a long-awaited IRS ruling which specified the conditions under which the IRS would consider a ruling request for classification of an organization for federal tax purposes as a partnership. The Wyoming ruling was issued prior to Rev. Proc. 89-12. Consequently, the Florida private letter ruling sheds additional light on requirements that must be met before the IRS will rule that a Florida L.C. is a partnership for federal income tax purposes.

The Florida L.C. ruling was a private letter ruling, not a public revenue ruling. This is significant because a private ruling is directed only to the taxpayer who requested it, and may not be used or cited as precedent by other taxpayers. In contrast, a publicly issued revenue ruling was issued for the Wyoming L.C., and as a public ruling, it may be relied upon and cited as precedent by practitioners generally. The IRS is considering the issuance of a public ruling regarding the federal income tax classification of entities formed under the Act.

The L.C. has the potential to become a significant form of business entity because if it is formed to qualify as a partnership for federal income tax purposes, it blends the more desirable characteristics of a corporation with those of a partnership. Similar to a corporation it provides limited liability to its owners. Similar to a partnership it allows for the pass-through of income and tax losses. Other partnership tax advantages may also be realized. For example, partners may receive distributions of appreci-

ated property from partnerships without recognizing gain on the receipt of such property. In addition, a partner may increase its tax basis in its partnership interest by that partner's proportionate share of partnership liabilities. In contrast, corporations generally recognize gain on distributions of appreciated property, and a shareholder does not increase its tax basis in stock by its share of the corporation's liabilities. While an "S" corporation shareholder may avoid "double taxation" and achieve a pass-through of losses, he generally will not be able to increase his basis in corporate stock as a result of liabilities incurred by the "S" corporation. In addition, an "S" corporation will recognize gain upon a distribution of appreciated property and an "S" shareholder might recognize income upon such a distribution.

For state law purposes, the L.C. may be described as a limited partnership that does not contain a general partner who would have unlimited liability. A general partnership, as compared to the L.C., results in unlimited liability to its partners.

A major distinction between the Florida and Wyoming Limited Liability Company Act is found in F.S. Section 608.471, which provides that an L.C. is an "artificial entity" within the purview of Chapter 220 of Florida Statutes, and is subject to the tax imposed upon Florida corporations. Consequently, although the L.C. will not be subject to federal income tax if it qualifies as a partnership for federal income tax purposes, it will be subject to Florida corporate income tax, generally imposed at a rate of 5.5% ("S" corporations are not subject to Florida corporate income tax).

Undaunted by Florida's income tax classification of the L.C. as a corporation, the IRS based its conclusion that the Florida L.C. was a partnership for federal income tax purposes primarily on application of the "2 out of 4 test" described in Income Tax Regulation Section 301.7701-2. In essence, assuming an entity has associates and an objective to carry on business and to divide the gains therefrom, the "2 out of 4 test" provides that an entity will be classified as a partnership if it lacks at least 2 of the following corporate characteristics: continuity of life, centralization of management, limited liability, and free transferability of interests.

continued . . .

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FLORIDA L.C.

from preceding page

In the Wyoming ruling, the subject entity was held to lack both continuity of life and free transferability of interests, and therefore was classified as a partnership. A similar ruling was sought by the Florida L.C., i.e., that an entity formed under the Act would lack continuity of life, and free transferability of interests and, therefore, would be taxed as a partnership for federal income tax purposes.

The IRS concluded that the Florida L.C. lacked the corporate characteristic of free transferability of interests based upon the wording of the Act, which provides that although a member of an L.C. can assign or transfer such member's interest to another who is not a member of the organization, the assignee or transferee does not become a substitute member and does not acquire all of the attributes of that member's interest in the entity unless all remaining members approve the assignment or transfer. This language satisfies the IRS regulations that specify the conditions necessary for an entity to be considered to lack the characteristic of free transferability of interests.

While the IRS was able to conclude that any L.C. formed under the Wyoming L.C. statute would lack continuity of life, the IRS noted that an L.C. formed under the Act did not necessarily lack continuity of life. Instead, the IRS required the review of the L.C.'s Articles of Organization to make such a determination. The Act provides that a right to continue the business of the L.C. may be stated in its Articles of Organization. Therefore, its business will not necessarily be discontinued upon the death, retirement, resignation, bankruptcy, or dissolution of a member or its managers and it may therefor possess the corporate characteristic of continuity of life. Because the Articles of Organization of the L.C. that requested the Florida ruling did not contain a right to continue the business without the consent of all remaining members, the IRS ruled that the L.C. lacked continuity of life. (In contrast to the Act, the Wyoming statute does not provide that a right to continue may be stated in the entity's organizational articles, it merely provides that certain events (death, retirement, etc.) result in termination of the business of a Wyoming L.C. unless its business is continued by the consent of all remaining members. As such, the language in the Wyoming statute satisfies IRS regulations for an entity to lack continuity of life).

Revenue Procedure 89-12 provides that the IRS will not rule that a partnership lacks continuity of life unless the partnership agreement provides that not less than a majority in interest of the limited partners are required to elect a new general partner to continue the partnership. Consequently, if less than a majority of the members of an L.C. may elect to continue the business of the L.C. in the event of the death or dissolution of a manager or member, the IRS would likely contend that the L.C. possesses the corporate characteristic of continuity of life. Because an L.C. formed under the Act will not automatically lack the corporate characteristic of continuity of life, care must be taken in the drafting of the Articles of Organization to ensure that it does not possess continuity of life (if this test must be met in order to satisfy the "2 out of 4 test" for partnership treatment).

There is a likelihood that an entity formed under the Act also lacks the corporate characteristic of centralization of management if it is managed by its members, instead of by designated "managers." (The Act provides that an L.C. may be managed either by its members or by designated managers). The Articles of Organization of the entity ruled upon specifically provided that it would be ruled by managers and, it was specifically conceded for ruling purposes, that the L.C. possessed the corporate characteristic of centralized management. Therefore, the IRS' position with respect to this issue under the Act is not known.

The issuance of the Florida ruling was expressly conditioned upon compliance with the requirements set forth in Sections 4.01 and 4.03 of Revenue Procedure 89-12. Rev. Proc. 89-12 applies to all ruling requests received by the IRS subsequent to February 13, 1989. Section 4.01 of Rev. Proc. 89-12, as applied to an L.C., generally requires that in no event shall any members of the L.C., taken together, have interests in each material item of income, gain, loss, deduction, or credit which do not equal at least 1% of each of such items at all times during the existence of the L.C. Section 4.03 in general, as applied to an L.C., requires that all members must maintain a minimum capital account balance equal to either 1% of the total positive capital account balances for the L.C., or \$500,000.00, whichever is less.

The Florida L.C. has the potential of becoming a viable alternative to the use of S corporations and partnerships. However, Florida taxation of the entity as a corporation presents a significant obstacle to its use in many situations.

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In addition, the Act presents a trap for the unwary with respect to its federal income tax classification as regards the "continuity of life" test because an entity formed pursuant to the Act will not necessarily lack continuity of life. The Act contains other potential pitfalls, for example, an omission of the words "limited company" or the abbreviation "L.C." in the use of the name of the L.C. renders persons who participate in the omission or knowingly acquiesce in it, liable for any indebtedness, damage, or liability occasioned by the omission. Certain non-

tax considerations are unsettled, for example, recognition of the L.C. by other states.

Florida has the opportunity of becoming a leader in the development of this new business entity. If the Legislature acts to conform its state tax treatment with federal tax treatment, the L.C. may become a very useful tool for the realization of the benefits of partnership taxation without the necessity of subjecting persons to unlimited liability, or of utilizing limited partnerships with corporate general partners as liability insulators.

Tax Section Report

Liaison Tax Committee of Southeast Region

by Thomas A. Donahoo, Chairman

The Liaison Tax Committee of the Southeast Region has traditionally been comprised of the past three chairmen of the Tax Section of The Florida Bar who represent the Tax Section at the Southeast Region Tax Committee Meeting held annually at different places throughout the Southeast. Last year the meeting took place in New Orleans and the meeting scheduled for 1989 will be in Charlotte, North Carolina. The Southeast Regional Special Tax Liaison Committee includes leaders of major divisions of the Southeast Region of the Internal Revenue Service as well as tax attorneys from Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Tennessee, South Carolina and North Carolina. The participants from the Internal Revenue Service normally include the Regional Commissioner from Atlanta along with his assistant and representatives from numerous departments including Examinations, Data Processing, Collection, Criminal Investigation, Resources Management and members of Regional Counsel's Office and staff participants. The purpose of the meeting is to review ongoing taxpayer problems that are being experienced by the tax practitioner and which the members of the Internal Revenue Service may not be aware or may have some awareness and also suggested solutions and answers. At each annual meeting the Internal Revenue Service Representatives are most gracious in preparing an agenda that is circulated among the attendees and which highlights the several issues that they present and discuss with opportunity for exchange and rebuttal (if not argument) from the tax practi-

tioners. Some of the issues of last year included the Taxpayer's Civil Rights Bill, offers of compromise, service center workload problems, criminal tax fraud problems, employee plans and Exempt Organization Department and specific issues dealing with employee versus independent contractor abuse, failure to file, failure to pay, tax accounting years for trusts, estates, partnerships and P.A.'s and similar matters.

This Liaison Committee offers an excellent opportunity for continued dialogue and input between the practitioner and the Service and should be promoted and encouraged. In preparation for the annual meeting this fall in Charlotte, North Carolina, it would be most helpful if members of The Tax Section of The Florida Bar would make known to Tom Donahoo, as a member of the Liaison Committee, the several problems that are existing in their representation of the taxpayer before the Internal Revenue Service. These issues can be forwarded to the Service and placed on the agenda for in-depth review and discussion and possibly some solution. In addition to the annual meeting, this Southeast Region Tax Committee also normally sponsors a special meeting in the Spring dealing with retirement benefit plans or other specialized areas and the Tax Section of The Florida Bar is always invited to have representatives attend. Our Tax Section has been an active participant in the Southeast Region over the years and we should encourage future active participation. Tom Donahoo's mailing address is 1400 First Union Bank Building, Jacksonville, Florida 32202.

A-7-12
3/26/90

Bill Graves
Secretary of State



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STATE OF KANSAS

TESTIMONY BEFORE THE HOUSE ECONOMIC DEVELOPMENT COMMITTEE HOUSE BILL NO. 3064 March 26, 1990

House Bill No. 3064 would authorize limited liability companies in Kansas. Since the IRS has recently ruled that this form of business entity would be treated as a partnership for income tax purposes, limited liability companies offer an attractive, alternative form of organization for certain businesses. We strongly encourage the committee to make this option available to Kansas investors.

Because only Florida and Wyoming now make this form of organization available, there is little guidance available and no uniform law to serve as the basis for our act. You have received some excellent advice from experienced tax attorneys and we encourage you to make their recommended changes.

In addition, we suggest that you adopt the conformity amendments contained in the lengthy attachment to this testimony. The changes do not affect the rights of the parties but only conform the act to existing corporate and limited partnership laws in Kansas. The first five pages amend sections of the bill to provide for consistency in signature requirements, name availability, filing procedures, resident agents and terminology.

Pages six through 19 add provisions that are already in the Kansas Revised Uniform Limited Partnership Act and conform to the Kansas General Corporation Code. They include provisions for name reservation, restated articles, the authorization of foreign limited liability companies to do business in Kansas, filing fees, annual reports with franchise taxes, forfeiture, reinstatement and merger.

Existing corporate farming laws will also need to be amended to prevent limited liability companies from forming with corporate members and owning agricultural land. In the alternative, limited liability companies could be permitted to own agricultural land if they meet the requirements corporations and limited partnerships now meet.

We encourage you to amend and recommend favorably for passage House Bill 3064.

John Wine, Assistant Secretary of State

*House Eco. Dev. Committee
Attachment 8 3/26/90*

House Bill No. 3064
Proposed Conformity Amendments
Office of the Secretary of State

Page 1, lines 30 - 34, replace Sec. 3 with: "A limited liability company may conduct or promote any lawful business or purposes, except as otherwise provided by law of this state, which a general corporation or partnership may conduct or promote."

Page 3, line 7, delete "acknowledging and delivering to" and replace with "filing with" .

Page 3, line 12, delete the word "may" and delete lines 14 -17 and replace with: "must be such as to distinguish it upon the records in the office of the secretary of state from the name of any corporation, limited partnership or limited liability company reserved, registered or organized under the laws of the state of Kansas or qualified to do business or registered as a foreign corporation, limited partnership or limited liability company in the state of Kansas. A limited liability company may register under any name which is such as to distinguish it upon the records in the office of the secretary of state from the name of any domestic or foreign corporation, limited partnership or limited liability company reserved registered or organized under the laws of the state of Kansas with the consent of the other corporation, limited partnership or limited liability company, which written consent shall be filed with the secretary of state."

Page 3, line 30, replace "place of business" with "registered office".

Page 3, line 31, replace "registered" with "resident".

Page 4, lines 17 - 23, replace Sec. 8 with: "(a) The original signed copy, together with a duplicate copy which may be either a signed or conformed copy, of the articles of organization, any certificate of amendment, statement of intent to dissolve or articles of dissolution shall be filed with the secretary of state. A person who executes a certificate, statement or articles as an agent or fiduciary shall not be required to exhibit evidence of the person's

authority as a prerequisite to filing. Unless the secretary of state finds that any filing does not conform to law, upon receipt of all filing fees required by law, the secretary of state shall:

(1) Certify that the articles of organization, certificate of amendment, statement of intent to dissolve, or articles of dissolution have been filed in the secretary of state's office by endorsing upon the original filing the word "Filed" and the date and hour of the filing; in the absence of actual fraud this endorsement is conclusive of the date and time of its filing;

(2) file and index the endorsed document; and

(3) return the duplicate copy, similarly certified, to the person who filed it or that person's representative.

(b) The articles of organization shall be amended as provided in a certificate of amendment upon the filing of the certificate of amendment in the office of the secretary of state or upon the future effective date specified in the certificate of amendment. The articles of organization are canceled upon the issuance of a certificate of dissolution by the office of the secretary of state.

(c) The fee required by this act shall be paid at the time of the filing of any articles of organization, certificate of amendment, statement of intent to dissolve or articles of dissolution.

(d) The fee required by this act shall be paid for a certified copy of any paper on file pursuant to this act and the fee fixed pursuant to this act shall be paid for each page copied."

Page 4, line 24, delete the word "issuance" and replace with "filing".

Page 4, line 42, delete the words "and acknowledgment".

Page 5, replace lines 20 - 28 with: "(b) The certificate of amendment shall be signed by all members, and an amendment adding a new member shall also be signed by the member to be added."

Pages 5 - 6, replace lines 33 - 43 on page 5 and lines 1 - 37 on page 6 (renumbering sections that follow) with:

"(2) a resident agent for service of process on the limited liability company at the registered office, which agent may be either an individual or a domestic corporation or the limited liability company itself.

(b) A resident agent may change the address of the registered office of the limited liability companies for which the agent is resident agent to another address in the state of Kansas by paying a fee as set forth in this act and filing with the secretary of state a certificate in duplicate executed by the resident agent. The certificate shall set forth the names of all the limited liability companies represented by the resident agent and the address at which the resident agent has maintained the registered office for each of such limited liability companies and shall certify the new address the resident agent will thereafter maintain the registered office for each of the limited liability companies recited in the certificate. Upon the filing of the certificate the secretary of state shall furnish to the resident agent a certified copy of the certificate and, until further change of address as authorized by law, the registered office in the state of Kansas of each limited liability company recited in the certificate shall be located at the new address of the resident agent thereof as given in the certificate. Filing of the certificate shall be deemed to be an amendment of the articles of organization of each limited liability company affected thereby, and each such limited liability company shall not be required to take any further action with respect thereto to amend its articles of organization. Any resident agent filing a certificate under this section shall promptly, upon such filing, deliver a copy of the certificate to each limited liability company affected thereby. The resident agent shall furnish the secretary of state one additional copy of the certificate for each limited liability company affected.

(c) The resident agent of one or more limited liability companies may resign and appoint a successor resident agent by paying the fee required by this act and filing a certificate in duplicate with the secretary of state, stating that the resident agent resigns and the name and address of the successor resident agent. There shall be attached to the certificate a statement executed by each affected limited liability company ratifying and approving such change of resident agent. Upon the filing, the successor resident agent shall become the resident agent of the limited liability companies that have ratified and approved the substitution and the successor resident agent's address, as stated in the certificate, shall become the address of each such limited liability company's registered office in the state of Kansas. Filing of the certificate of resignation

shall be deemed to be an amendment of the articles of organization of each limited liability company affected thereby, and each such limited liability company shall not be required to take any further action with respect thereto to amend its articles of organization. The resident agent shall furnish the secretary of state one additional copy of the certificate for each limited liability company affected.

(d) The resident agent of one or more limited liability companies may resign without appointing a successor resident agent by paying the fee required by this act and filing a certificate in duplicate with the secretary of state stating the resident agent resigns as resident agent for the limited liability companies that are identified in the certificate, but the resignation shall not become effective until 60 days after the certificate is filed. There shall be attached to the certificate an affidavit, that at least 30 days prior to the date of the filing of the certificate, notice of the resignation of the resident agent was sent by certified or registered mail to each limited liability company for which the resident agent is resigning as resident agent. The affidavit shall be sworn to by the resident agent, as an individual, or the president, a vice-president or the secretary of the resident agent, if a corporation. The affidavit shall state that the notice was sent to the principal office of each of the limited liability companies within or outside the state of Kansas, if known to the resident agent or, if not, to the last known address of the attorney or other individual at whose request the resident agent was appointed for the limited liability company. After receipt of the notice of the resignation of its resident agent, the limited liability company for which the resident agent was acting shall obtain and designate a new resident agent, to take the place of the resident agent resigning. If a limited liability company fails to obtain and designate a new resident agent within 60 days after the filing by the resident agent of the certificate of resignation, the articles of organization shall be considered canceled. After the resignation of the resident agent shall have become effective as provided in this section and if no new resident agent shall have been obtained and designated in the time and manner aforesaid, service of legal process against the limited liability company for which the resigned resident agent had been acting shall thereafter be upon the secretary of state in accordance with K.S.A. 60-304 and amendments

thereto.

(e) If a domestic limited liability company's resident agent dies or moves from the registered office, the limited liability company shall designate and certify to the secretary of state the name of another resident agent within 30 days of the death or move. If no new resident agent is designated, the service of legal process on the limited liability company may be made as prescribed in K.S.A. 60-304 and amendments thereto. If any domestic limited liability company fails to designate a new resident agent as required by this subsection, the secretary of state, after giving 30 days' notice of the intended action, may declare the articles of organization canceled."

Page 10, line 19, replace "delivered to" with "filed with".

Page 10, line 21, replace "license" with "franchise".

Page 10, line 22, replace "articles of dissolution" with "statement of intent to dissolve".

Page 11, lines 26 - 27, delete the words following "executed" in line 26 and before "shall" in line 27 and replace with ". The articles".

Page 11, line 43, replace "delivered to" with "filed with".

Page 12, line 2, replace "license" with "franchise".

Page 12, line 4, replace "statement of intent to dissolve" with "articles of dissolution".

Page 12, line 19, replace "certificate" with "articles".

Pages 12 - 14, delete lines 35 - 43 on page 12, all of page 13 and lines 1 - 31 on page 14 and renumber the sections appropriately.

The following new sections should be added:

New Sec. 1:

The exclusive right to the use of a name may be reserved in the same manner as corporation names are reserved as set forth in K.S.A. 17-7402. A fee of \$20.00 shall be paid at the time of the reservation of any name.

New Sec. 2:

Each certificate required by this act to be filed in the office of the secretary of state shall be executed in the following manner, unless another manner is specified in this act:

- (1) Articles of organization must be signed by all members;
- (2) a certificate of amendment must be signed by every member and by every member who is designated in the certificate of amendment as a new member; and
- (3) a statement of intent to dissolve and articles of dissolution must be signed by all members.

(b) Any person may sign any certificate by an attorney-in-fact, but a power of attorney to sign a certificate relating to the admission of a member must describe the admission. Powers of attorney relating to the signing of a certificate by an attorney-in-fact need not be filed in the office of the secretary of state but must be retained by the company.

(c) The execution of a certificate by a member constitutes an oath or affirmation, under the penalties of perjury, that the facts stated in the certificate are true and that any power of attorney used in connection with the execution of the certificate is in proper form and substance.

New Sec. 3:

A limited liability company may, whenever desired, integrate into a single instrument all of the provisions of its articles of organization which are then in effect and operative as a result of there having previously been filed with the secretary of state one or more certificates or other instruments pursuant to this act, and it may at the same time also further amend its articles of organization by adopting restated articles of organization.

(b) If the restated articles of organization merely restate and

integrate but do not further amend the initial articles of organization, as previously amended or supplemented by any certificate or instrument that was executed and filed pursuant to this act, it shall be specifically designated in its heading as "restated articles of organization" together with such other words as the company may deem appropriate and shall be executed and filed in the office of the secretary of state. If the restated articles restate and integrate and also further amends in any respect the articles of organization, as previously amended or supplemented, it shall be specifically designated in its heading as "amended and restated articles of organization" together with such other words as the company may deem appropriate and shall be executed and filed in the office of the secretary of state.

(c) Restated articles of organization shall be specifically designated as such in the heading. It shall state, either in its heading or in an introductory paragraph, the company's present name; if it has been changed, the name under which it was originally filed; and the date of filing of its original articles of organization with the secretary of state. Restated articles shall also state that they were duly executed and filed in accordance with the provisions of this section. If the restated articles only restate and integrate and do not further amend the provisions of the articles of organization as previously amended or supplemented and there is no discrepancy between those provisions and the provisions of the restated articles, it shall state that fact as well.

(d) Upon the filing of the restated articles of organization with the secretary of state, the initial articles, as previously amended or supplemented, shall be superseded. Thereafter the restated articles of organization, including any further amendment or changes made by the restated articles shall be the articles, but the original effective date of formation shall remain unchanged.

(e) Any amendments or change made in connection with the restatement and integration of the articles of organization shall be subject to any other provision of this act, not inconsistent with this section, which would apply if a separate certificate of amendment were filed to make the amendment or change.

New Sec. 4:

Subject to the Kansas constitution:

- (a) The laws of the state, territory, possession, county or other jurisdiction under which a foreign limited liability company is organized govern its organization and internal affairs and the liability of its members; and
- (b) a foreign limited liability company may not be denied registration by reason of any difference between those laws and the laws of the state of Kansas.

New Sec. 5:

Before doing business in the state of Kansas, a foreign limited liability company shall register with the secretary of state. In order to register, a foreign limited liability company shall submit to the secretary of state together with payment of the fee required by this act, an original copy executed by a member, together with a duplicate copy, of an application for registration as a foreign limited liability company, setting forth:

- (a) The name of the foreign limited liability company;
- (b) the state or other jurisdiction or country where organized, the date of its organization and a statement issued by an appropriate authority in that jurisdiction that the foreign limited liability company exists in good standing under the laws of the jurisdiction of its organization.
- (c) the nature of the business or purposes to be conducted or promoted in the state of Kansas;
- (d) the address of the registered office and the name and address of the resident agent for service of process required to be maintained by this act;
- (e) an irrevocable written consent of the foreign limited liability company that actions may be commenced against it in the proper court of any county where there is proper venue by the service of process on the secretary of state as provided for in K.S.A. 60-304 and amendments thereto and stipulating and agreeing that such service shall be taken and held, in all courts to be as valid and binding as if due service had been made upon the members of the foreign limited liability company;
- (f) the name and business, residence or mailing address of each of the members; and
- (g) the date on which the foreign limited liability company first did, or intends to do, business in the state of Kansas.

New Sec. 6:

If the secretary of state finds that an application for registration conforms to law and all requisite fees have been paid, the secretary of state shall:

- (1) Certify that the application has been filed in the secretary of state's office by endorsing upon the original application the word "Filed" and the date and hour of the filing, and the endorsement is conclusive of the date and time of its filing in the absence of actual fraud; and
 - (2) file and index the endorsed application.
- (b) The duplicate of the application, similarly certified, shall be returned to the person who filed the application or that person's representative.

New Sec. 7:

(a) The secretary of state shall not issue a registration to a foreign limited liability company unless the name of the limited liability company is such as to distinguish it upon the records of the office of the secretary of state from the names of other limited liability companies, corporations or limited partnerships organized under the laws of this state or reserved or registered as a foreign limited liability company, foreign corporation or foreign limited partnership under the laws of this state, except that a foreign limited liability company may register under a name which is not such as to distinguish it upon the records of the office of the secretary of state from the name of other limited liability companies, corporations or limited partnerships organized under the laws of this state or reserved or registered as a foreign limited liability company, foreign corporation or foreign limited partnership under the laws of this state if:

- (1) Written consent is obtained from the other limited liability company, corporation or limited partnership and filed with the secretary of state; or
 - (2) it indicates as a means of identification and in its advertising within this state, the state in which the limited liability company was formed, and the application sets forth this condition.
- (b) Each foreign limited liability company shall have and maintain in the state of Kansas:

- (1) A registered office which may but need not be its place of business in the state of Kansas; and
- (2) a resident agent for service of process on the limited liability company, which agent may be either an individual resident of the state of Kansas whose business office is identical with the limited liability company's registered office or a domestic corporation.
- (c) A resident agent may change the address of the registered office of the foreign limited liability company's for which the resident agent is resident agent to another address in the state of Kansas by (1) paying the fee required by this act; (2) filing with the secretary of state a certificate in duplicate, executed by the resident agent, setting forth the names of all the foreign limited liability companies represented by the resident agent and the address at which the resident agent has maintained the registered office for each of such foreign limited liability companies; and (3) certifying to the new address to which each such registered office will be changed on a given day and at which the resident agent will thereafter maintain the registered office for each of the foreign limited liability companies recited in the certificate. Upon the filing of the certificate, the secretary of state shall furnish to the resident agent a certified copy of it. Thereafter, or until further change of address, as authorized by law, the registered office in the state of Kansas of each of the foreign limited liability companies recited in the certificate shall be located at the new address of the resident agent of the company given in the certificate. Filing of the certificate shall be considered an amendment of the application of each foreign limited liability company affected by the certificate, and the foreign limited liability company shall not be required to take any further action with respect thereto, to amend its application. Any resident agent filing a certificate under this section shall promptly, upon such filing, deliver a copy of such certificate to each foreign limited liability company affected thereby. The resident agent shall furnish the secretary of state one additional copy of the certificate for each limited liability company affected.
- (d) The resident agent of one or more foreign limited liability companies may resign and appoint a successor registered agent by paying the fee required by this act and filing a certificate in duplicate with the secretary of state, stating that the resident agent resigns as resident agent for the foreign limited liability

company identified in the certificate and giving the name and address of the successor resident agent. There shall be attached to the certificate a statement executed by each affected foreign limited liability company ratifying and approving the change of resident agent. Upon the filing, the successor resident agent shall become the resident agent of those foreign limited liability companies that have ratified and approved the substitution and the successor resident agent's address, as stated in the certificate, shall become the address of each such foreign limited liability company's registered office in the state of Kansas. Filing of the certificate of resignation shall be deemed to be an amendment of the application of each foreign limited liability company affected by the certificate, and the foreign limited liability company shall not be required to take any further action with respect thereto, to amend its application. The resident agent shall furnish the secretary of state one additional copy of the certificate for each limited liability company affected.

(e) The resident agent of one or more foreign limited liability companies may resign without appointing a successor resident agent by paying the fee required by this act and filing a certificate in duplicate with the secretary of state stating that the resident agent resigns as resident agent for the foreign limited liability companies identified in the certificate, but the resignation shall not become effective until 60 days after the certificate is filed. There shall be attached to the certificate an affidavit that, at least 30 days prior to the date of the filing of the certificate, notice of the resignation of the resident agent was sent by certified or registered mail to each foreign limited liability company for which the resident agent is resigning as resident agent. The affidavit shall be sworn to by the resident agent, if an individual, or the president, or vice-president or the secretary of the resident agent, if a corporation. The affidavit shall state that the notice was sent to the principal office of each of the foreign limited liability companies within or outside the state of Kansas, if known to the resident agent or, if not, to the last known address of the attorney or other individual at whose request the resident agent was appointed for the foreign limited liability company. After receipt of the notice of the resignation of its resident agent, the foreign limited liability company for which the resident agent was acting shall obtain and

designate a new resident agent, to take the place of the resident agent resigning. If a foreign limited liability company fails to obtain and designate a new resident agent within 60 days after the filing by the resident agent of the certificate of resignation, that foreign limited liability company shall not be permitted to do business in the state of Kansas and its registration shall be considered canceled.

New Sec. 8:

If any statement in the application for registration of a foreign limited liability company was false when made or any arrangements or other facts described have changed, making the application inaccurate in any respect, the foreign limited liability company shall promptly file in the office of the secretary of state a certificate, executed by a member, correcting the statement, together with the fee required by this act.

New Sec. 9:

A foreign limited liability company may cancel its registration by filing with the secretary of state a certificate of cancellation executed by the members, together with the fee required by this act and the annual report and franchise tax for any tax period which has ended. A cancellation does not terminate the authority of the secretary of state to accept service of process on the foreign limited liability company with respect to causes of action arising out of the doing of business in the state of Kansas.

New Sec. 10:

A foreign limited liability company doing business in the state of Kansas may not maintain any action, suit or proceeding in the state of Kansas until it has registered in this state and has paid to the state all fees and penalties for the years, or parts thereof, during which it did business in the state without having registered.

(b) The failure of a foreign limited liability company to register in the state of Kansas does not:

- (1) Impair the validity of any contract or act of the foreign limited liability company;
- (2) impair the right of any other party to the contract to maintain any action, suit or proceeding on the contract; or
- (3) prevent the foreign limited liability company from defending any

action, suit or proceeding in any court of the state of Kansas.

(c) a member of a foreign limited liability company is not personally liable for the foreign limited liability company solely by reason of the limited liability company's having done business in the state of Kansas without registration.

New Sec. 11:

The district court shall have jurisdiction to enjoin any foreign limited liability company or any agent of a foreign limited liability company, from doing any business in the state of Kansas if the foreign limited liability company has failed to register under this act. The attorney general shall, upon the attorney general's own motion or upon the relation of proper parties, proceed for this purpose by petition in any county in which the foreign limited liability company is doing or has done business.

New Sec. 12:

Service of process in any action against any foreign limited liability company, whether or not that limited liability company is qualified to do business in the state, shall be made in the manner prescribed by K.S.A. 60-304 and amendments thereto. Any person who has a cause of action against any foreign limited liability company, whether or not the limited liability company is qualified to do business in this state may file suit against the limited liability company in the district court of a county in which there is proper venue if the cause of action arose in Kansas out of the limited liability company's doing business in Kansas or while the limited liability company was doing business in Kansas.

New Sec. 13:

If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application. To this end, the provisions of this act are severable.

New Sec. 14:

(a) The secretary of state shall charge each domestic and foreign limited liability company the following fees:

(1) For issuing or filing and indexing any of the documents described below, a fee of \$20:

(A) A certificate of amendment of articles of organization;

(B) a restated articles of organization;

(C) a statement of intent to dissolve;

(D) articles of dissolution;

(E) a certificate of change of location of registered office or registered agent; and

(F) any certificate, affidavit, agreement or any other paper provided for in this act, for which no different fee is specifically prescribed;

(2) for certified copies, a fee of \$7.50 for each copy certified plus a fee per page, if the secretary of state supplies the copies, in an amount fixed by the secretary of state and approved by the director of accounts and reports for copies of corporate documents under K.S.A. 45-204 and amendments thereto;

(3) for each certificate of good standing and certificate of fact issued by the secretary of state, a fee of \$7.50;

(4) for a report of record search, a fee of \$5, but furnishing the following information shall not be considered a record search and no charge shall be made therefor: name of the limited liability company and the address of its registered office; name and address of the resident agent; the state of the limited liability company's formation; the date of filing of its articles of organization or annual report; and date of expiration; and

(5) for photocopies of instruments on file or prepared by the secretary of state's office and which are not certified, a fee per page in an amount fixed by the secretary of state and approved by the director of accounts and reports for copies of corporate documents under K.S.A. 45-204 and amendments thereto.

(b) Every limited liability company hereafter formed in this state shall pay to the secretary of state at the time of filing its articles of organization, an application and recording fee of \$150.

(c) At the time of filing its application to do business, every foreign limited liability company shall pay to the secretary of state an application and recording fee of \$150.

(d) The secretary of state shall not charge any fees for the documents or services described in this section upon an official request by an agency of this state or the United States, or by any officer or employee thereof.

New Sec. 15:

(a) Every limited liability company organized under the laws of this state shall make an annual report in writing to the secretary of state, showing the financial condition of the limited liability company at the close of business on the last day of its tax period next preceding the date of filing. If the limited liability company's tax period is other than the calendar year, it shall give notice of its different tax period in writing to the secretary of state prior to December 31 of the year it commences the different tax period. The annual report shall be filed at the time prescribed by law for filing the limited liability company's annual Kansas income tax return. If the limited liability company applies for an extension of time for filing its annual income tax return under the internal revenue code, the limited liability company shall also apply, not more than 90 days after the due date of its annual report, to the secretary of state for an extension of the time for filing its report and an extension of the time for filing its report and an extension shall be granted for a period of time corresponding to that granted under the internal revenue code. The application shall include a copy of the application to income tax authorities.

(b) The annual report shall be made on a form prescribed by the secretary of state. The report shall contain the following information:

- (1) The name of the limited liability company;
- (2) a reconciliation of the capital accounts for the preceding taxable year as required to be reported on the federal partnership return of income; and
- (3) a balance sheet showing the financial condition of the limited liability company at the close of business on the last day of its tax period next preceding the date of filing.

(c) The annual report shall be signed by a member of the limited liability company and forwarded to the secretary of state. At the time of filing the report, the limited liability company shall pay to the secretary of state an annual franchise tax in an amount equal to \$1 for each \$1,000 of the net capital accounts located in or used in this state at the end of the preceding taxable year as required to be reported on the federal partnership return of income, except that no annual tax shall be less than \$20 or more than \$2,500.

(d) The provisions of K.S.A. 17-7509 and amendments thereto,

relating to penalties for failure of a corporation to file an annual report or pay the required franchise tax, and the provisions of subsection (a) of K.S.A. 17-7510 and amendments thereto, relating to penalties for failure of a corporation to file an annual report or pay the required franchise tax, shall be applicable to the articles of organization of any limited liability company which fails to file its annual report or pay the franchise tax within 90 days of the time prescribed in this section for filing and paying the same. Whenever the articles of organization of a limited liability company is forfeited for failure to file an annual report or to pay the required franchise tax, the limited liability company may be reinstated by filing a certificate of reinstatement, in the manner and form to be prescribed by the secretary of state and paying to the secretary of state all fees and taxes, including any penalties thereon, due to the state. The fee for filing a certificate of reinstatement shall be the same as that prescribed by K.S.A. 17-7506 and amendments thereto for filing a certificate of extension, restoration, renewal or revival of a corporation's articles of incorporation.

New Sec. 16:

(a) Every foreign limited liability company shall make an annual report in writing to the secretary of state, showing the financial condition of the limited liability company at the close of business on the last day of its tax period next preceding the date of filing. If the limited liability company's tax period is other than the calendar year, it shall give notice in writing of its different tax period to the secretary of state prior to December 31 of the year it commences the different tax period. The annual report shall be filed at the time prescribed by law for filing the limited liability company's annual Kansas income tax return. If the limited liability company applies for an extension of time for filing its annual income tax return under the internal revenue code, the limited liability company shall also apply, not more than 90 days after the due date of its annual report, to the secretary of state for an extension of the time for filing its report and an extension shall be granted for a period of time corresponding to that granted under the internal revenue code. The application shall include a copy of the application to income tax authorities.

(b) The annual report shall be made on a form prescribed by the

secretary of state. The report shall contain the following:

- (1) The name of the limited liability company;
- (2) a reconciliation of the capital accounts for the preceding taxable year as required to be reported on the federal partnership return of income; and
- (3) a balance sheet showing the financial condition of the limited liability company at the close of business on the last day of its tax period next preceding the date of filing.

(c) The annual report shall be signed by a member of the limited liability company and forwarded to the secretary of state. At the time of filing the report, the limited liability company shall pay to the secretary of state an annual franchise tax in an amount equal to \$1 for each \$1,000 of the net capital accounts located in or used in this state at the end of the preceding taxable year as required to be reported on the federal partnership return of income, except that no annual tax shall be less than \$20 or more than \$2,500.

(d) The provisions of K.S.A. 17-7509 and amendments thereto, relating to penalties for failure of a corporation to file an annual report or pay the required franchise tax, and the provisions of subsection (a) of K.S.A. 17-7510 and amendments thereto, relating to penalties for failure of a corporation to file an annual report or pay the required franchise tax, shall be applicable to the authority of any foreign limited liability company which fails to file its annual report or pay the franchise tax within 90 days of the time prescribed in this section for filing and paying the same. Whenever the authority of a foreign limited liability company is forfeited for failure to file an annual report or to pay the required franchise tax, the authority of the foreign limited liability company may be reinstated by filing a certificate of reinstatement, in the manner and form to be prescribed by the secretary of state and paying to the secretary of state all fees and taxes, including any penalties thereon, due to the state. The fee for filing a certificate of reinstatement shall be the same as that prescribed by K.S.A. 17-7506 and amendments thereto for filing a certificate of extension, restoration, renewal or revival of a corporation's articles of incorporation.

New Sec. 17:

No limited liability company shall be required to file its first annual report under this act, or pay annual franchise tax required to

accompany such report, unless such limited liability company has filed its articles of organization or application for authority at least six months prior to the last day of its tax period. If any limited liability company files with the secretary of state a notice of change in its tax period and the next annual report filed by such limited liability company subsequent to such notice is based on a tax period of less than 12 months, the annual tax liability shall be determined by multiplying the annual franchise tax liability for such year by a fraction, the numerator of which is the number of months or any portion thereof covered by the annual report and the denominator of which is 12, except that the tax shall not be less than \$20.

New Sec. 18:

- (a) Pursuant to an agreement, a domestic limited liability company may merge or consolidate with or into one or more limited liability companies formed under the laws of this state or any other state, with such limited liability company as the agreement shall provide being the surviving or resulting limited liability company.
- (b) A domestic limited liability company that is not the surviving or resulting limited liability company in the merger or consolidation shall file articles of dissolution which shall have an effective date not later than the effective date of the merger or consolidation.
- (c) If following a merger or consolidation of one or more domestic limited liability companies or one or more limited liability companies formed under the laws of any state, the surviving or resulting limited liability company is not a domestic limited liability company, there shall be attached to the articles of dissolution for each such domestic limited liability company a certificate executed by the surviving or resulting limited liability company, stating that such surviving or resulting limited liability company may be served with process in the state of Kansas in any action, suit or proceeding for the enforcement of any obligation of such domestic limited liability company, irrevocably appointing the secretary of state as such surviving or resulting limited liability company's agent to accept service of process in any such action, suit or proceeding and specifying the address to which a copy of such process shall be mailed to such surviving or resulting limited liability company by the secretary of state.

(d) When the articles of dissolution required by subsection (b) of this section shall have become effective, for all purposes of the laws of the state of Kansas, all of the rights, privileges and powers of each of the limited liability companies that have merged or consolidated, and all property, real, personal and mixed, and all debts due to any of such limited liability companies, as well as all other things and causes of action belonging to each of such limited liability companies shall be vested in the surviving or resulting limited liability company as they were of each of the limited liability companies that have merged or consolidated, and the title to any real property vested by deed or otherwise, under the laws of the state of Kansas, in any such limited liability company's that have merged or consolidated shall thenceforth attach to the surviving or resulting limited liability company, and may be enforced against such surviving or resulting limited liability company to the same extent as if such debts, liabilities and duties had been incurred or contracted by such surviving or resulting company.

New Sec. 19: K.S.A. 17-5904 should be amended to add limited liability companies to the list of entities prohibited from owning agricultural land. In the alternative, the corporate farming provisions in K.S.A. 17-5902, *et seq*, could be amended to treat limited liability companies similar to limited partnerships. For example, a limited liability company could be permitted to own agricultural land if none of its members are corporations and at least one of its members has a management interest in the property. If certain limited liability companies are permitted to own agricultural land, New Sec. 15 and New Sec. 16 will need to be changed to include reporting requirements similar to those of limited partnerships and corporations owning agricultural land.