

SENATE BILL No. 405

By Committee on Financial Institutions and Insurance

1-26

1 AN ACT concerning the Kansas uniform securities act; relating to
2 violations thereof; holding a control person liable for the violations
3 committed by an individual subject to discipline under the act unless
4 the control person was unaware and could not have reasonably have
5 known of the violations of such individual; amending K.S.A. 17-
6 12a412, 17-12a603 and 17-12a604 and repealing the existing sections.
7

8 *Be it enacted by the Legislature of the State of Kansas:*

9 Section 1. K.S.A. 17-12a412 is hereby amended to read as follows:
10 17-12a412. (a) *Disciplinary conditions—applicants.* An order issued under
11 this act may deny an application, or may condition or limit registration of
12 an applicant to be a broker-dealer, agent, investment adviser, or investment
13 adviser representative if the administrator finds that the order is in the
14 public interest and that there is a ground for discipline under subsection (d)
15 against the applicant or, if the applicant is a broker-dealer or investment
16 adviser, against any partner, officer, director, person having a similar status
17 or performing similar functions, or person directly or indirectly controlling
18 the broker-dealer or investment adviser.

19 (b) *Disciplinary conditions — registrants.* An order issued under this
20 act may revoke, suspend, condition, or limit the registration of a registrant
21 if the administrator finds that the order is in the public interest and that
22 there is a ground for discipline under subsection (d) against the registrant
23 or, if the registrant is a broker-dealer or investment adviser, against any
24 partner, officer, or director, any person having a similar status or
25 performing similar functions, or any person directly or indirectly
26 controlling the broker-dealer or investment adviser. However, the
27 administrator:

28 (1) May not institute a revocation or suspension proceeding under
29 this subsection based on an order issued by another state that is reported to
30 the administrator or designee later than one year after the date of the order
31 on which it is based; and

32 (2) under subsection (d)(5)(A) and (d)(5)(B), may not issue an order
33 on the basis of an order under the state securities act of another state unless
34 the other order was based on conduct for which subsection (d) would
35 authorize the action had the conduct occurred in this state.

36 (c) *Disciplinary penalties — registrants.* If the administrator finds

1 that the order is in the public interest and that there is a ground for
2 discipline under subsection (d)(1) through (d)(6), (d)(8), (d)(9), (d)(10),
3 (d)(12) or (d)(13) against a registrant or, if the registrant is a broker-dealer
4 or investment adviser, against any partner, officer, or director, any person
5 having similar functions, or any person directly or indirectly controlling
6 the broker-dealer or investment adviser, then the administrator may enter
7 an order against the registrant containing one or more of the following
8 sanctions or remedies:

9 (1) A censure;

10 (2) a bar or suspension from association with a broker-dealer or
11 investment adviser registered in this state;

12 (3) a civil penalty up to \$25,000 for each violation. If any person is
13 found to have violated any provision of this act, and such violation is
14 committed against elder or disabled persons, as defined in K.S.A. 50-676,
15 and amendments thereto, in addition to any civil penalty otherwise
16 provided by law, the administrator may impose an additional penalty not to
17 exceed \$15,000 for each such violation. The total penalty against a person
18 shall not exceed \$1,000,000;

19 (4) an order requiring the registrant to pay restitution for any loss or
20 disgorge any profits arising from a violation, including, in the
21 administrator's discretion, the assessment of interest from the date of the
22 violation at the rate provided for interest on judgments by K.S.A. 16-204,
23 and amendments thereto;

24 (5) an order charging the registrant with the actual cost of an
25 investigation or proceeding; or

26 (6) an order requiring the registrant to cease and desist from any
27 action that constitutes a ground for discipline, or to take other action
28 necessary or appropriate to comply with this act.

29 (d) *Grounds for discipline.* A person may be disciplined under
30 subsections (a) through (c) if the person:

31 (1) Has filed an application for registration in this state under this act
32 or the predecessor act within the previous 10 years, which, as of the
33 effective date of registration or as of any date after filing in the case of an
34 order denying effectiveness, was incomplete in any material respect or
35 contained a statement that, in light of the circumstances under which it was
36 made, was false or misleading with respect to a material fact;

37 (2) willfully violated or willfully failed to comply with this act or the
38 predecessor act or a rule adopted or order issued under this act or the
39 predecessor act within the previous 10 years;

40 (3) has been convicted of a felony or within the previous 10 years has
41 been convicted of a misdemeanor involving a security, a commodity future
42 or option contract, or an aspect of a business involving securities,
43 commodities, investments, franchises, insurance, banking, or finance;

1 (4) is enjoined or restrained by a court of competent jurisdiction in an
2 action instituted by the administrator under this act or the predecessor act,
3 a state, the securities and exchange commission, or the United States from
4 engaging in or continuing an act, practice, or course of business involving
5 an aspect of a business involving securities, commodities, investments,
6 franchises, insurance, banking, or finance;

7 (5) is the subject of an order, issued after notice and opportunity for
8 hearing by:

9 (A) The securities, depository institution, insurance, or other financial
10 services regulator of a state or by the securities and exchange commission
11 or other federal agency denying, revoking, barring, or suspending
12 registration as a broker-dealer, agent, investment adviser, federal covered
13 investment adviser, or investment adviser representative;

14 (B) the securities regulator of a state or by the securities and
15 exchange commission against a broker-dealer, agent, investment adviser,
16 investment adviser representative, or federal covered investment adviser;

17 (C) the securities and exchange commission or by a self-regulatory
18 organization suspending or expelling the registrant from membership in
19 the self-regulatory organization;

20 (D) a court adjudicating a United States postal service fraud order;

21 (E) the insurance regulator of a state denying, suspending, or
22 revoking the registration of an insurance agent; or

23 (F) a depository institution regulator suspending or barring a person
24 from the depository institution business;

25 (6) is the subject of an adjudication or determination, after notice and
26 opportunity for hearing, by the securities and exchange commission, the
27 commodity futures trading commission, the federal trade commission, a
28 federal depository institution regulator, or a depository institution,
29 insurance, or other financial services regulator of a state that the person
30 willfully violated the securities act of 1933, the securities exchange act of
31 1934, the investment advisers act of 1940, the investment company act of
32 1940, or the commodity exchange act, the securities or commodities law of
33 a state, or a federal or state law under which a business involving
34 investments, franchises, insurance, banking, or finance is regulated;

35 (7) is insolvent, either because the person's liabilities exceed the
36 person's assets or because the person cannot meet the person's obligations
37 as they mature, but the administrator may not enter an order against an
38 applicant or registrant under this paragraph without a finding of insolvency
39 as to the applicant or registrant;

40 (8) refuses to allow or otherwise impedes the administrator from
41 conducting an audit or inspection under K.S.A. 17-12a411(d), and
42 amendments thereto, refuses access to a registrant's office to conduct an
43 audit or inspection under K.S.A. 17-12a411(d), and amendments thereto,

1 fails to keep or maintain sufficient records to permit an audit disclosing the
2 condition of the registrant's business, or fails willfully and without cause to
3 comply with a request for information by the administrator or person
4 designated by the administrator in conducting investigations or
5 examinations under this act;

6 (9) has failed to reasonably supervise an agent, investment adviser
7 representative, or other individual, if the agent, investment adviser
8 representative, or other individual was subject to the person's supervision
9 and committed a violation of this act or the predecessor act or a rule
10 adopted or order issued under this act or the predecessor act within the
11 previous 10 years;

12 (10) has not paid the proper filing fee within 30 days after having
13 been notified by the administrator of a deficiency, but the administrator
14 shall vacate an order under this paragraph when the deficiency is
15 corrected;

16 (11) after notice and opportunity for a hearing, has been found within
17 the previous 10 years:

18 (A) By a court of competent jurisdiction to have willfully violated the
19 laws of a foreign jurisdiction under which the business of securities,
20 commodities, investment, franchises, insurance, banking, or finance is
21 regulated;

22 (B) to have been the subject of an order of a securities regulator of a
23 foreign jurisdiction denying, revoking, or suspending the right to engage in
24 the business of securities as a broker-dealer, agent, investment adviser,
25 investment adviser representative, or similar person; or

26 (C) to have been suspended or expelled from membership by or
27 participation in a securities exchange or securities association operating
28 under the securities laws of a foreign jurisdiction;

29 (12) is the subject of a cease and desist order issued by the securities
30 and exchange commission or issued under the securities, commodities,
31 investment, franchise, banking, finance, or insurance laws of a state;

32 (13) has engaged in dishonest or unethical practices in the securities,
33 commodities, investment, franchise, banking, finance, or insurance
34 business within the previous 10 years;

35 (14) is not qualified on the basis of factors such as training,
36 experience, and knowledge of the securities business. However, in the case
37 of an application by an agent for a broker-dealer that is a member of a self-
38 regulatory organization or by an individual for registration as an
39 investment adviser representative, a denial order may not be based on this
40 paragraph if the individual has successfully completed all examinations
41 required by subsection (e). The administrator may require an applicant for
42 registration under K.S.A. 17-12a402 or 17-12a404, and amendments
43 thereto, who has not been registered in a state within the two years

1 preceding the filing of an application in this state to successfully complete
2 an examination; or

3 (15) lacks sufficient character or reputation to warrant the public
4 trust.

5 (e) *Examinations.* A rule adopted or order issued under this act may
6 require that an examination, including an examination developed or
7 approved by an organization of securities regulators, be successfully
8 completed by a class of individuals or all individuals. An order issued
9 under this act may waive, in whole or in part, an examination as to an
10 individual and a rule adopted under this act may waive, in whole or in part,
11 an examination as to a class of individuals if the administrator determines
12 that the examination is not necessary or appropriate in the public interest
13 and for the protection of investors.

14 (f) *Summary process.* In accordance with the Kansas administrative
15 procedures act, the administrator may use summary or emergency
16 proceedings to suspend or deny an application; restrict, condition, limit, or
17 suspend a registration; or censure, bar, or impose a civil penalty or cease
18 and desist order on a registrant before final determination of an
19 administrative proceeding. If a hearing is not requested and none is
20 ordered by the administrator within 30 days after the date of service of the
21 order, the order becomes final by operation of law. If a hearing is requested
22 or ordered, the administrator, after notice of and opportunity for hearing to
23 each person subject to the order, may modify or vacate the order or extend
24 the order until final determination.

25 (g) *Procedural requirements.* (1) An order issued may not be issued
26 under this section, except under subsection (f), without:

27 (A) Appropriate notice to the applicant or registrant;

28 (B) opportunity for hearing; and

29 (C) findings of fact and conclusions of law in a record.

30 (2) Proceedings under this subsection shall be conducted in
31 accordance with the Kansas administrative procedures act.

32 (h) *Control person liability.* A person that controls, directly or
33 indirectly, a person ~~not in compliance with this section~~ *subject to*
34 *discipline under subsection (d)* may be disciplined by order of the
35 administrator under subsections (a) through (c) to the same extent as the
36 noncomplying person, unless the controlling person did not know, and in
37 the exercise of reasonable care could not have known, of the existence of
38 *the* conduct that is a ground for discipline under this section.

39 (i) *Limit on investigation or proceeding.* The administrator may not
40 institute a proceeding under subsection (a), (b); or (c) based solely on
41 material facts actually known by the administrator unless an investigation
42 or the proceeding is instituted within one year after the administrator
43 actually acquires knowledge of the material facts.

1 Sec. 2. K.S.A. 17-12a603 is hereby amended to read as follows: 17-
2 12a603. (a) *Civil action instituted by administrator.* If the administrator
3 believes that a person has engaged, is engaging, or is about to engage in an
4 act, practice, or course of business constituting a violation of this act or a
5 rule adopted or order issued under this act or that a person has, is, or is
6 about to engage in an act, practice, or course of business that materially
7 aids a violation of this act or a rule adopted or order issued under this act,
8 the administrator may maintain an action in any court of competent
9 jurisdiction to enjoin the act, practice, or course of business and to enforce
10 compliance with this act or a rule adopted or order issued under this act.

11 (b) *Relief available.* In an action under this section and on a proper
12 showing, the court may:

13 (1) Issue a permanent or temporary injunction, restraining order, or
14 declaratory judgment;

15 (2) order other appropriate or ancillary relief, which may include:

16 (A) An asset freeze, accounting, writ of attachment, writ of general or
17 specific execution, and appointment of a receiver or conservator, that may
18 be the administrator, for the defendant or the defendant's assets;

19 (B) ordering the administrator to take charge and control of a
20 defendant's property, including investment accounts and accounts in a
21 depository institution, rents, and profits; to collect debts; and to acquire
22 and dispose of property;

23 (C) imposing a civil penalty up to \$25,000 for each violation. If any
24 person is found to have violated any provision of this act, and such
25 violation is committed against elder or disabled persons, as defined in
26 K.S.A. 50-676, and amendments thereto, in addition to any civil penalty
27 otherwise provided by law, the court may impose an additional penalty not
28 to exceed \$15,000 for each such violation. The total penalty against a
29 person shall not exceed \$1,000,000;

30 (D) an order of rescission, restitution, or disgorgement directed to a
31 person that has engaged in an act, practice, or course of business
32 constituting a violation of this act or the predecessor act or a rule adopted
33 or order issued under this act or the predecessor act; and

34 (E) ordering the payment of prejudgment and postjudgment interest;
35 or

36 (3) order such other relief as the court considers appropriate.

37 (c) *No bond required.* The administrator may not be required to post a
38 bond in an action or proceeding under this act.

39 (d) *Control person liability.* *A person that controls, directly or*
40 *indirectly, a person who has engaged, is engaging or is about to engage in*
41 *an act, practice or course of business constituting a violation of this act or*
42 *a rule adopted or order issued under this act may be subjected to relief*
43 *under subsection (b) to the same extent as the violating person, unless the*

1 *controlling person did not know, and in the exercise of reasonable care*
2 *could not have known, of the existence of the act, practice or course of*
3 *business that is a ground for relief under this section.*

4 Sec. 3. K.S.A. 17-12a604 is hereby amended to read as follows: 17-
5 12a604. (a) *Cease and desist order.* If the administrator finds that a person
6 has engaged, is engaging, or is about to engage in an act, practice, or
7 course of business constituting a violation of this act or a rule adopted or
8 order issued under this act or that a person has materially aided, is
9 materially aiding, or is about to materially aid an act, practice, or course of
10 business constituting a violation of this act or a rule adopted or order
11 issued under this act, the administrator may:

12 (1) Issue an order directing the person to cease and desist from
13 engaging in the act, practice, or course of business or to take other action
14 necessary or appropriate to comply with this act;

15 (2) issue an order denying, suspending, revoking, or conditioning the
16 exemptions for a broker-dealer under K.S.A. 17-12a401(b)(1)(D) or 17-
17 12a401(b)(1)(F), and amendments thereto, or an investment adviser under
18 K.S.A. 17-12a403(b)(1)(C), and amendments thereto; or

19 (3) issue an order under K.S.A. 17-12a204, and amendments thereto.

20 (b) *Additional administrative sanctions and remedies.* If the
21 administrator finds, by written findings of fact and conclusions of law, that
22 a person has violated this act or a rule adopted or order issued under this
23 act, the administrator, in addition to any other power granted under this
24 act, may enter an order against the person containing one or more of the
25 following sanctions or remedies:

26 (1) A civil penalty up to \$25,000 for each violation. If any person is
27 found to have violated any provision of this act, and such violation is
28 committed against elder or disabled persons, as defined in K.S.A. 50-676,
29 and amendments thereto, in addition to any civil penalty otherwise
30 provided by law, the administrator may impose an additional penalty not to
31 exceed \$15,000 for each such violation. The total penalty against a person
32 shall not exceed \$1,000,000;

33 (2) a bar or suspension from association with a broker-dealer or
34 investment adviser registered in this state;

35 (3) an order requiring the person to pay restitution for any loss or
36 disgorge any profits arising from the violation, including, in the
37 administrator's discretion, the assessment of interest from the date of the
38 violation at the rate provided for interest on judgments by K.S.A. 16-204,
39 and amendments thereto; or

40 (4) an order charging the person with the actual cost of the
41 investigation or proceeding.

42 (c) *Procedures for orders.* (1) An order under subsection (b) shall not
43 be entered unless the administrator first provides notice and opportunity

1 for hearing in accordance with the provisions of the Kansas administrative
2 procedures act.

3 (2) An order under subsection (a) is effective on the date of issuance.
4 Upon issuance of the order, the administrator shall promptly serve each
5 person subject to the order with a copy of the order. The order must
6 include a statement of the reasons for the order and notice that upon
7 receipt of a written request the matter will be set for a hearing which shall
8 be conducted in accordance with the provisions of the Kansas
9 administrative procedures act. If a person subject to the order does not
10 request a hearing and none is ordered by the administrator within 30 days
11 after the date of service of the order, the order becomes final as to that
12 person by operation of law. If a hearing is requested or ordered, the
13 administrator, after notice of and opportunity for hearing to each person
14 subject to the order, may modify or vacate the order or extend it until final
15 determination.

16 (3) An order under subsection (a) may contain a notice of the
17 administrator's intent to seek administrative sanctions or remedies under
18 subsection (b). If the person subject to the order does not request a hearing
19 and none is ordered by the administrator within 30 days after service of the
20 order, the administrator may modify the order to include sanctions or
21 remedies under subsection (b). If a hearing is requested or ordered, the
22 administrator, after notice and opportunity for hearing, shall by written
23 findings of fact and conclusions of law vacate, modify, or make permanent
24 the order, and the administrator may modify the order to include sanctions
25 or remedies under subsection (b).

26 (d) *Filing of certified final order with court; effect of filing.* If a
27 petition for judicial review of a final order is not filed in accordance with
28 K.S.A. 17-12a609, and amendments thereto, the administrator may file a
29 certified copy of the final order with the clerk of a court of competent
30 jurisdiction. The order so filed has the same effect as a judgment of the
31 court and may be recorded, enforced, or satisfied in the same manner as a
32 judgment of the court.

33 (e) *Enforcement by court; further civil penalty.* If a person does not
34 comply with an order under this section, the administrator may petition a
35 court of competent jurisdiction to enforce the order. The court may not
36 require the administrator to post a bond in an action or proceeding under
37 this section. If the court finds, after service and opportunity for hearing,
38 that the person was not in compliance with the order, the court may
39 adjudge the person in civil contempt of the order. The court may impose a
40 further civil penalty against the person for contempt in an amount not
41 greater than \$25,000 for each violation and may grant any other relief the
42 court determines is just and proper in the circumstances.

43 (f) *Control person liability.* A person that controls, directly or

1 *indirectly, a person who has violated this act or a rule adopted or order*
2 *issued under this act may be sanctioned by order of the administrator*
3 *under subsection (b) to the same extent as the violating person, unless the*
4 *controlling person did not know, and in the exercise of reasonable care*
5 *could not have known, of the existence of the conduct that is a ground for*
6 *sanctions under this section.*

7 Sec. 4. K.S.A. 17-12a412, 17-12a603 and 17-12a604 are hereby
8 repealed.

9 Sec. 5. This act shall take effect and be in force from and after its
10 publication in the statute book.