

Approved *Clyde Graeber* 2-20-90
Date

MINUTES OF THE HOUSE COMMITTEE ON Commercial and Financial Institutions

The meeting was called to order by Representative Clyde D. Graeber at
Chairperson

3:30 ~~am~~/p.m. on February 15, 1990, in room 527-S of the Capitol.

All members were present except: Representatives Cates, Johnson, Roper,
Watson and Wilbert

Committee staff present: Bill Wolff, Research Department
Bruce Kinzie, Revisor of Statutes
June Evans, Secretary

Conferees appearing before the committee: M. Douglas Mays, Securities Commissioner
Grant Brooks, Legal Counsel, Kansas Banking
Department

The Chairman opened the meeting and stated that Doug Mays, Securities Commissioner, was the first conferee to appear, requesting introduction of three bills which are as follows:

1. An amendment to K.S.A. 17-1266 (a) granting the Securities Commissioner the power to bar individuals from the securities industry in Kansas.
2. An amendment to K.S.A. 17-1267 classifying securities fraud as a Class D felony and all other violations of the Securities Act as Class E felonies.
3. A technical amendment to K.S.A. 17-1261 concerning employee stock option plans. (See Attachments 1, 2, and 3).

Representative Hamm moved and Representative Francisco seconded to introduce the above legislation as Committee Bills. The motion carried.

The Chairman opened the hearing on HB 2989.

The next conferee was Grant Brooks, Legal Counsel, Kansas Banking Department, stating that HB 2989 was an Act relating to banks and banking; concerning dividends; amending K.S.A. 1989 Supp 9-910 and repealing the existing Section. There was no discussion and the hearing was closed.

The Chairman opened the hearing on HB 2991, An Act relating to banks and banking; concerning the organization thereof; amending K.S.A. 1989 Supp. 9-1801 and repealing the existing section. There was no discussion and the hearing was closed.

The Chairman opened the hearing on HB 2993, an Act relating to banks and banking; concerning records of the state bank commissioner; amending K.S.A. 1989 Supp. 9-1712 and repealing the existing section. After discussion the hearing was closed.

The Chairman opened the hearing on HB 2995, an Act relating to banks and banking; concerning trust authority; amending K.S.A. 9-1602 and repealing the existing section. There was no discussion and the hearing was closed.

Representative Ensminger moved and Representative Francisco seconded the minutes of the February 1 and 6 meetings be approved. There was no discussion and the motion carried.

The Chairman stated there would be hearings on four bills on Tuesday, February 20 and final action on the four bills that were heard on February 15. The meeting adjourned at 4:30 P.M.

STATE OF KANSAS



OFFICE OF THE SECURITIES COMMISSIONER

Second Floor

618 South Kansas Avenue
Topeka, Kansas 66603-3804
(913) 296-3307

Mike Hayden,
Governor

M. Douglas Mays,
Securities Commissioner

M E M O

TO: Representative Clyde Graeber, Chairman,
House Commercial and Financial Institutions
Committee

FROM: M. Douglas Mays *DM*
Securities Commissioner

DATE: February 15, 1990

RE: 1990 Legislative Proposals

Please find attached three legislative proposals by this agency that I am forwarding for the committee's consideration. They are as follows:

1. An amendment to K.S.A. 17-1266(a) granting the Securities Commissioner the power to bar individuals from the securities industry in Kansas.
2. An amendment to K.S.A. 17-1267 classifying securities fraud as a class D felony and all other violations of the Securities Act as class E felonies.
3. A technical amendment to K.S.A. 17-1261 concerning employee stock option plans.

If you require any further information regarding these issues, please contact this office.

MDM:dec

Enclosures

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Atch 1

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Mike Hayden,
Governor

M. Douglas Mays,
Securities Commissioner

I. Bill Summary: An amendment to K.S.A. 17-1266(a) of the Kansas Securities Act to grant the Securities Commissioner the power to bar or suspend any person from association with any registered broker-dealer or investment advisor in Kansas. K.S.A. 17-1266(a) and the proposed amendment are attached.

II. Fiscal Impact: None

III. Policy Implications/Background:

The power to bar individuals from the securities industry in Kansas is necessitated for two reasons. First, we are finding with alarming frequency that individuals who have had their licenses revoked for violations of the Securities Act are immediately reentering the industry by assuming non-licensed positions within securities firms. This "back-door" approach allows them to circumvent the law and perform the same activities (including criminal behavior) for which their original registration was revoked. They generally represent themselves either as owners or executives with no managerial responsibilities, or as "independent" consultants who have contracted with the firm.

Second, we have had a number of cases in which we have issued an order to revoke an agent licensed to conduct business in Kansas but residing in another state (there are approximately 25,000 such agents). In many cases, the agent simply withdraws his registration through the Central Registration Depository (CRD) system. This, since one cannot revoke a license that no longer exists, often negates the original proceeding and frustrates the administrative process. In most cases, the agent's record goes unblemished, allowing him to continue, unabated, his activities in other states. In addition, technically, since no final sanction was ever taken against the agent, he may at some future date successfully reapply to Kansas for registration.

A number of state (including Oklahoma), the U.S. Securities and Exchange Commission, and the National Association of Securities Dealers (NASD), have this power and have found it a valuable tool for removing the "bad apples" from the securities industry.

IV. Impact on Other State Agencies: None anticipated.

Atch # 1-2

17-1266a. Cease and desist orders; emergency temporary orders; penalties. (a) If the commissioner determines after notice and opportunity for a hearing that any person has engaged, is engaging or is about to engage in any act or practice constituting a violation of any provision of this act or any rule and regulation or order hereunder, the commissioner by order may require that such person cease and desist from the unlawful act or practice and take such affirmative action as in the judgment of the commissioner will carry out the purposes of this act.

(b) If the commissioner makes written findings of fact that the public interest will be irreparably harmed by delay in issuing an order under subsection (a), the commissioner may issue an emergency temporary cease and desist order. Such order, even when not an order within the meaning of K.S.A. 1987 Supp. 77-502 and amendments thereto, shall be subject to the same procedures as an emergency order issued under K.S.A. 1987 Supp. 77-536 and amendments thereto. Upon the entry of such an order, the commissioner shall promptly notify the person subject to the order that it has been entered, of the reasons therefor and that upon written request the matter will be set for a hearing which shall be conducted in accordance with the provisions of the Kansas administrative procedure act. If no hearing is requested and none is ordered by the commissioner, the order will remain in effect until it is modified or vacated by the commissioner. If a hearing is requested or ordered, the commissioner, after notice of and opportunity for hearing to the person subject to the order, shall by written findings of fact and conclusions of law vacate, modify or make permanent the order.

(c) If the commissioner reasonably believes

that a person has violated this act or a rule and regulation or order of the commissioner under this act, the commissioner, in addition to any specific power granted under this act, after notice and hearing in an administrative proceeding, unless the right to notice and hearing is waived by the person against whom the sanction is imposed, may:

(1) Censure the person if the person is a licensed broker-dealer, sales representative or investment adviser; or

(2) issue an order against an applicant, licensed person or other person who knowingly violates this act or a rule or order of the commissioner under this act, imposing a civil penalty up to a maximum of \$5,000 for each violation.

History: L. 1978, ch. 74, § 3; L. 1984, ch. 313, § 53; L. 1985, ch. 88, § 4; L. 1988, ch. 92, § 1; July 1.

17-1266a. Cease and desist orders; emergency temporary orders; penalties.

(c). . .

(1). . .

(2). . .

(3) bar or suspend the person from association with a broker-dealer or investment adviser registered in this state.

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Mike Hayden,
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M. Douglas Mays,
Securities Commissioner

I. Bill Summary: An amendment to K.S.A. 17-1261(j) of the Kansas Securities Act deleting the 30-day notice filing requirement now mandated as a condition of exemption from registration by employee stock option plans. A copy of the proposed amendment is attached.

II. Fiscal Impact: None

III. Policy Implications/Background:

Approximately one year ago, a problem was brought to this office's attention by a Wichita law firm that represents a number of business clients. Under the Act, K.S.A. 17-1261(j), securities issued in connection with an employee stock option plan are exempt from registration. The conditions of the exemption require a notice filing 30 days prior to inception of the plan. The problem is that it is common for many small businesses to commence such plans on a small scale and seek legal advice concerning securities and tax consequences after the fact. In such circumstances, it appears there is no way such a business can comply with the literal conditions of the exemption. No curative procedures are provided for failure to file 30 days in advance of the plan's inception. This had been a recurring problem addressed by staff on numerous occasions. This office has taken a lenient view in interpreting the conditions of the exemption, but the literal wording of the exemption still causes all parties concern.

The filing requirements are simply a notice filing and do not further any significant enforcement activity or policy under the Act. Many states have eliminated the filing requirement, and the new proposed Uniform State Act proposes to eliminate the requirement in much the same language as used in the proposed amendment. This amendment would eliminate some unnecessary bureaucratic "red tape" and would allow the exemption to function in a more rational manner.

IV. Impact on Other State Agencies: None anticipated.

Atch #2

Be it enacted by the legislature of the state of Kansas:

Section 1. K.S.A. 17-1261 is hereby amended to read as follows: 17-1261. K.S.A. 17-1255 through 17-1260, inclusive, or any amendments thereto, shall not apply to any of the following securities:

...(j) Any investment—~~contract~~ securities issued in connection with an employee's stock purchase, savings pension, profit-sharing or similar benefit plan, or a self-employed person's retirement plan, ~~if—the commissioner—is notified in writing 30 days before the inception of the plan or, with respect to plans which are in effect on the effective date of this act, within 60 days thereafter....~~

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Mike Hayden,
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Securities Commissioner

I. Bill Summary: An amendment to K.S.A. 17-1267(a) designating the level of felony for violations of the Kansas Securities Act. Specifically, this amendment would make violations of the anti-fraud provisions of the Act, i.e., securities fraud, a class D felony and any other violations of the act class E felonies.

II. Fiscal Impact:None

III. Policy Implications/Background:

Presently, violations of the Kansas Securities Act are unclassified felonies, punishable by a fine of up to \$5,000 or imprisonment of up to three years, or both, for each violation. The classification of these crimes is necessary for two reasons.

First, this office has experienced some difficulty with this issue during criminal trials. Defense attorneys have repeatedly entered motions that charges be dismissed because the statute does not specifically classify a violation of the Act as a felony. Fortunately, each judge has ruled that, based on case law and the severity of the punishment outlined in the statute, violations of the Act are, indeed, felonious.

While the state has prevailed to date, the process of arguing this point has taken nearly half a day of court time per case. In addition, while this office feels that we are on solid legal ground, one can never be certain that every court will rule in our favor.

Second, by classifying securities fraud as a D felony, it will differentiate it from all other violations of the Act, acknowledging the extreme seriousness of the crime. Securities fraud, as a type of theft, has devastating effects on the lives of innocent Kansans. Individuals who perpetrate these crimes generally prey upon middle-income retirees, in many cases wiping out the "nest-egg" that they have spent their lives accumulating. The effects of this crime are manifested in human terms through lost security and severely diminished lifestyle for the victims, and, economically, by the removal of significant funds from legitimate Kansas

enterprises and an overall diminishing of confidence in our capital markets.

Other violations of the Securities Act are presently equivalent to Class E felonies. It is the recommendation of this office that they be statutorily classified as such.

IV. Impact on Other State Agencies: None anticipated. Since first time offenders are presumed to receive probation, the classification of Securities Fraud should not result in any additional incarcerations.

17-1267. Violations of act or rules and regulations; penalties; prosecution, commencement and limitations. (a) Any person who willfully violates any provision of this act except K.S.A. 17-1264 or who willfully violates any rule and regulation adopted or order issued under this act, or who willfully violates K.S.A. 17-1264 knowing the statement made to be false or misleading in any material respect, shall upon conviction be ~~finned not more than \$5,000 or imprisoned not more than three years, or both,~~ but no person may be imprisoned for the violation of any rule and regulation or order if such person proves that such person had no knowledge of the rule and regulation or order.

No prosecution for any crime under this act may be commenced more than five years after the alleged violation. A prosecution is commenced when a complaint or information is filed, or an indictment returned, and a warrant thereon is delivered to the sheriff or other officer for execution, except that no prosecution shall be deemed to have been commenced if the warrant so issued is not executed without unreasonable delay.

(b) The commissioner may refer such evidence as may be available concerning violations of this act or of any rule and regulation or order hereunder to the attorney general or the proper county or district attorney, who may in the prosecutor's discretion, with or without such a reference, institute the appropriate criminal proceedings under this act. Upon receipt of such reference, the attorney general or the county attorney or district attorney may request that a duly employed attorney of the commissioner prosecute or assist in the prosecution of such violation or violations on behalf of the state. Upon approval of the commis-

17-1267. Violations of act or rules and regulations; penalties; prosecution, commencement and limitations.
(a). . .guilty of a felony. A conviction for a violation of K.S.A. 17-1253 shall be a class D felony. All other convictions for violations under this act shall be a class E felony;. . . .