

SESSION OF 2017

SUPPLEMENTAL NOTE ON SENATE BILL NO. 23

As Amended by House Committee of the Whole

Brief*

SB 23, as amended, would establish the Office of the Securities Commissioner of Kansas as a division under the jurisdiction of the Insurance Commissioner and amend law by consolidating certain prosecutorial functions of the Attorney General. Descriptions of specific bill provisions follow.

***Office of the Securities Commissioner as a Division
Under the Jurisdiction of the Insurance Commissioner
(Section 12)***

The bill would amend the statute that establishes the Office of the Securities Commissioner of Kansas (KSC) as a separate agency, in which the Securities Commissioner serves at the pleasure of the Governor. The bill would instead establish the KSC under the jurisdiction of the Insurance Commissioner and the KSC would no longer be a stand-alone agency.

***Appointment and Compensation of the Securities
Commissioner***

Under the bill, the Securities Commissioner would be appointed by the Insurance Commissioner, subject to confirmation by the Senate. The Insurance Commissioner would be authorized to fix the compensation of the Securities Commissioner. Further, the Insurance Commissioner would be permitted to remove the Securities Commissioner for official misconduct.

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

Term of Office

The bill would specify that a duly-confirmed Securities Commissioner currently serving on July 1, 2017, would continue in office for an initial term ending on January 14, 2019. The bill would require when this initial term expires, and for each term expired thereafter, the Insurance Commissioner appoint a person as Securities Commissioner, subject to Senate confirmation, for a four-year term to run concurrently with the term of the Insurance Commissioner. [*Note*: the Insurance Commissioner is an elected, not an appointed, position.]

The bill would specify the Insurance Commissioner would appoint a successor when a vacancy for Securities Commissioner occurs. Further, the bill would provide if the vacancy occurs before the expiration of a term of office, the appointment would be for the unexpired term and subject to Senate confirmation.

Appointment of Directors and Employees within the Office of the Securities Commissioner

The bill would permit the Securities Commissioner to appoint directors and other employees within the KSC. Directors appointed by the Securities Commissioner would receive compensation fixed by the Securities Commissioner, but the Insurance Commissioner would be required to approve such compensation.

Cooperation and Consolidation for Efficiency

The KSC would be required to cooperate with the Kansas Insurance Department (KID) to consolidate administrative functions and cross-appoint employees as necessary to provide efficiency.

Agreements and Rules and Regulations

The bill would authorize the Insurance Commissioner and the Securities Commissioner to enter into agreements and adopt rules and regulations, as needed, to administer the provisions of the bill related to the consolidation of administrative functions and cross-appointment of employees.

Securities Commissioner—Limits on Outside Employment (New Section 4)

The bill would prohibit the Securities Commissioner and any attorney licensed to practice law in Kansas who works in the Office of the Securities Commissioner from having any outside additional professional employment.

Attorney General—New Funding Source (New Section 1)

Fraud and Abuse Criminal Prosecution Fund

The bill would establish the Fraud and Abuse Criminal Prosecution Fund (Fund) in the State Treasury and administered by the Attorney General.

Expending Moneys from the Fund

The bill would require all moneys credited to the Fund to be expended for the prevention and detection of fraud and abuse and for support of criminal investigations and prosecutions within the jurisdiction of the Attorney General. The bill would require the Attorney General, in expending moneys from the Fund, to give priority to criminal cases referred to the Attorney General for investigation or prosecution by or pursuant to the KSC, the Criminal Anti-Fraud Division of KID, and the Abuse, Neglect and Exploitation of Persons Unit of the Office of the Attorney General (OAG).

Transfer of Certain Fees to the Fund

The bill would require the Director of Accounts and Reports of the Department of Administration to transfer to the Fund \$200,000 from the Securities Act Fee Fund and \$200,000 from the Insurance Department Service Regulation Fund on July 1 of each year, or thereafter as unencumbered funds are available. Upon making these transfers, the Director would be required to give notice to the Attorney General, the Insurance Commissioner, and the Securities Commissioner. The Attorney General, Insurance Commissioner, and the Securities Commissioner would then be required to make proper entries on the records of their offices to show these transfers.

Attorney General—Public Policy (New Section 2)

The bill would declare in order to promote efficiency in staffing and operations and consistency in the enforcement of criminal law, the public policy of Kansas would be for prosecuting attorneys who bring criminal actions in the name of the state, other than county and district attorneys, to be located in the OAG under the jurisdiction of the Attorney General.

Coordination of Efforts between the Attorney General, Insurance Commissioner, and Securities Commissioner and Their Offices (New Section 3)

The bill would require the Attorney General, the Insurance Commissioner, and the Securities Commissioner to coordinate and cooperate to prevent, detect, investigate, and criminally prosecute crimes related to insurance and securities.

The Criminal Anti-Fraud Unit of KID and the KSC would be required, upon request of the Attorney General, to provide the Attorney General access to all records, reports, filings, investigation documents, and other records the Attorney

General has reasonable suspicion to believe are relevant to any criminal investigation or prosecution of suspected insurance or securities fraud.

At the Attorney General's discretion, the bill would permit the Attorney General to assist in any criminal investigation conducted by the Criminal Anti-Fraud Unit of KID of suspected fraud or by the KSC of suspected securities fraud.

The bill would authorize the Attorney General to enter into agreements with the Insurance Commissioner, the Securities Commissioner, or both, as necessary to carry out the provisions of the bill.

Attorney General—Rules and Regulations (New Section 3)

The Attorney General would be permitted to adopt rules and regulations, as deemed appropriate, for the administration of provisions of the bill related to the coordination of efforts between the Attorney General, the Insurance Commissioner, and the Securities Commissioner.

Consolidation of Prosecutorial Authority in the Attorney General (Sections 5-11)

The bill would also amend provisions of the Kansas Mortgage Business Act, the Kansas Uniform Securities Act, the Insurance Code, the Workers Compensation Act, Employment Security Law, and law generally referred to as the Loan Brokers Act to transfer certain functions to the Attorney General. Details of amendments to these acts are described below.

Kansas Mortgage Business Act

The bill would amend the Kansas Mortgage Business Act (KMBA) to empower the State Bank Commissioner to refer violations of the KMBA or any rule and regulation related

to the KMBA to the Attorney General or, in consultation with the Attorney General, to the appropriate county or district attorney, who could initiate criminal proceedings. The bill would delete references to the powers and duties of a duly employed attorney of the State Bank Commissioner as a special prosecutor.

Kansas Uniform Securities Act

The bill would amend the Kansas Uniform Securities Act to require the Securities Commissioner to prepare and refer evidence of criminal violations of the Kansas Uniform Securities Act to the Attorney General or, in consultation with the Attorney General, to the appropriate county or district attorney who could institute criminal proceedings. The bill would require the Securities Commissioner and employees to assist in the prosecution of criminal cases, as requested by the Attorney General or county or district attorney.

Additionally, the Securities Commissioner would be authorized to pay extradition and witness expenses and other costs associated with the case. The bill would delete references to the powers and duties of a duly employed attorney of the Securities Commissioner as a special prosecutor.

Insurance Code

The bill would amend a provision of the Insurance Code relating to the Criminal Anti-Fraud Division of KID to require this Division to prepare and refer criminal cases to the Attorney General or, in consultation with the Attorney General, to the proper county or district attorney, who would be permitted to institute appropriate criminal proceedings. The Insurance Commissioner would be permitted to pay extradition and witness expenses and other costs associated with the case.

The Division would be required to assist in the preparation and presentation of criminal cases, as requested by the Attorney General or county or district attorney. The Division would be required to perform other such duties in the prevention, detection, investigation, and prosecution of insurance fraud, as necessary. The preparation would be permitted, but not required, to include affidavits, interviews, preservation of evidence, and securing the attendance of individuals involved in the case. Members of the Division would be permitted to testify as to the facts of the case.

Workers Compensation Act

The bill would amend provisions of the Workers Compensation Act. The bill would specify that if a district attorney fails to prosecute a fraudulent or abusive act or practice or any other violation of the Workers Compensation Act within 90 days, the Assistant Attorney General assigned to the Division of Workers Compensation would be required to notify the Attorney General. [Note: Current law applies the 90-day deadline only to cases not prosecuted by a county attorney within that time frame.] The bill would then require the Attorney General to prosecute the case, if it is the Attorney General's opinion the acts and practices involved warrant prosecution.

Additionally, the bill would further amend the duties of the Assistant Attorney General assigned to the Division of Workers Compensation by requiring the Assistant Attorney General to investigate and refer to the Attorney General for criminal prosecution acts, practices, or violations constituting crimes. [Note: Current law requires the Assistant Attorney General to investigate and criminally prosecute these acts, practices, or violations constituting crimes without referral for prosecution to the Attorney General.]

Employment Security Law

The bill would amend the Employment Security Law to require the Special Assistant Attorney General assigned to the Kansas Department of Labor to notify the Attorney General if a county or district attorney fails to prosecute a case related to Employment Security Law violations within 90 days. The bill would then require the Attorney General to prosecute the case, if it is the Attorney General's opinion the acts and practices involved warrant prosecution. [Note: Current law requires the Special Assistant Attorney General to prosecute the case without referral for prosecution to the Attorney General.]

Loan Brokers Act

The bill would amend law generally referred to as the Loan Brokers Act. The bill would require the Securities Commissioner to prepare and refer evidence concerning criminal violations relating to loan brokers to the Attorney General or, in consultation with the Attorney General, to the proper county or district attorney. The county or district attorney would be permitted to institute appropriate criminal proceedings in their discretion.

The Securities Commissioner would be permitted to pay extradition and witness expenses and other costs associated with the case. The Securities Commissioners and employees would be required to assist in the prosecution of criminal cases, as requested by the Attorney General or county or district attorney.

Updates to References to the Federal Securities Act (Section 13)

Finally, the bill would update references to section 18(b)(4)(E) of the Federal Securities Act of 1933 to section 18(b)(4)(F).

Background

SB 23 – Securities Commissioner Structure and Criminal Prosecutions for Fraud and Abuse

The bill was introduced by the Senate Committee on Financial Institutions and Insurance at the request of the OAG, on behalf of the OAG, KID, and KSC. In the Senate Committee hearing, the Attorney General, Insurance Commissioner, Securities Commissioner, and a representative of Advisors Excel testified in favor of the bill. The proponents generally stated the bill would be a major step forward in the State's ability to prosecute financial crimes. The proponents also stated the bill would create savings to the State General Fund (SGF) by coordinating the administrative, regulatory, and investigatory functions of KSC with KID. Written-only proponent testimony was provided by the Office of the State Bank Commissioner and the Kansas Department of Labor.

A former Securities Commissioner and former general counsel for KSC provided opponent testimony. The opponents generally stated the bill would result in little to no cost savings to the State and would consolidate two disparate state agencies that enforce very different laws. Written-only opponent testimony was provided by an attorney in private practice.

In the House Committee on Judiciary hearing, the Attorney General and the Securities Commissioner testified in support of the bill. A deputy Insurance Commissioner testified in support of the bill and also provided written-only testimony supporting the bill by the Insurance Commissioner and representatives of Advisors Excel, Kansas Association of Insurance Agents, National Association of Insurance and Financial Advisors of Kansas, and Security Benefit.

A former Securities Commissioner and a financial services professional provided opponent testimony

The House Committee amended the bill to require Senate confirmation of any person reappointed as Securities Commissioner or when a vacancy occurs before the expiration of a term of office. The House Committee also amended the bill by adding the contents of SB 120, updating references to section 18(b)(4)(E) of the Federal Securities Act of 1933 to section 18(b)(4)(F). Further background information regarding SB 120 is provided below.

The House Committee of the Whole adopted an amendment prohibiting the Securities Commissioner and attorneys in the Office of the Securities Commissioner from having outside professional employment.

According to the fiscal note prepared by the Division of the Budget, SB 23, as introduced, would create savings totaling \$650,000 in KID and KSC in FY 2018. Of the total amount, \$350,000 would be from KID and \$300,000 would be from KSC. As required by the bill, \$400,000 would be transferred to the OAG for criminal fraud prosecutions, including \$200,000 each from KID and KSC. The remaining total savings of \$250,000 is recommended in the Governor's budget to be transferred to the SGF, \$125,000 each from KID and KSC.

For FY 2019, it is estimated the bill could create total savings of \$900,000 in KID and KSC. Of the total savings, \$500,000 would be from KID and \$400,000 would be from KSC. The OAG would continue to receive \$400,000 (\$200,000 from KID and \$200,000 from KSC). The remaining efficiency savings of \$500,000 is recommended to be transferred to the SGF in the Governor's budget and includes \$250,000 each from KID and KSC.

The OAG would use the \$400,000 annual transfer for the salaries and wages and other operating expenses of 3.50 FTE positions (3.00 FTE attorney and 0.50 FTE legal assistant) to prosecute cases of insurance and securities fraud. The fiscal effect associated with enactment of the bill is reflected in *The FY 2018 Governor's Budget Report*.

SB 120 – Updating References to the Federal Securities Act

In the Senate and House Committees on Judiciary, no proponent or opponent testimony was provided. An assistant revisor stated SB 120 would make a technical change and the reference would refer to the same provision of federal law concerning notice filing requirements for federal covered securities.

The Senate Committee recommended the bill be placed on the Consent Calendar.

According to the fiscal note prepared by the Division of the Budget, the Office of the Kansas Securities Commissioner indicates SB 120 would have no fiscal effect on state revenues or expenditures.