

Protect Vulnerable Adults from Financial Exploitation Act; Kansas Contract for Deed Act; Restrictive Covenants; HB 2562

HB 2562 creates the Protect Vulnerable Adults from Financial Exploitation Act and amends the Kansas Uniform Securities Act (KUSA) relating to reporting of instances of suspected financial exploitation, grounds for discipline, and civil and administrative immunity in certain instances; creates the Kansas Contract for Deed Act and authorizes the Kansas Real Estate Commission to issue cease-and-desist orders when the Commission has determined a person is practicing without a valid broker's or salesperson's license; and makes any restrictive covenant on real property in violation of the Kansas Acts Against Discrimination (KAAD) void and unenforceable.

Protect Vulnerable Adults from Financial Exploitation Act

Definitions

The bill establishes several definitions within the act, including:

- “Agent” is assigned its definition from the KUSA and means an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities;
- “Broker-dealer” also is assigned its definition from the KUSA and means a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account [*Note: Under this uniform act, “broker-dealer” does not include an agent; an issuer; certain banks, savings institutions, or trusts that meet specified conditions in the federal Securities Exchange Act of 1934; an international banking institution; or persons excluded by a rule or order adopted under the KUSA.*];
- “Eligible adult” means an elder person or dependent adult as defined in a section in the Kansas Criminal Code pertaining to the mistreatment of a dependent adult and the mistreatment of an elder person;
 - Under the Criminal Code provisions, an elder adult means a person 60 years of age or older; and
 - A dependent adult means an individual 18 years of age or older who is unable to protect the individual's own interest;
 - This term also includes an individual who is (1) a resident of an adult care home; (2) an adult cared for in a private residence; (3) an individual kept, cared for, treated, boarded, confined, or otherwise accommodated in a medical care facility; (4) an individual with intellectual disability or a developmental disability receiving services through a community facility for people with

intellectual disability or residential facility; (5) an individual with a developmental disability receiving services provided by a community service provider as provided in the Developmental Disability Reform Act; or (6) an individual kept, cared for, treated, boarded, confined, or otherwise accommodated in a state psychiatric hospital or state institution for people with intellectual disability;

- “Financial exploitation” means the unlawful or improper use, control, or withholding of an eligible adult’s property, income, resources, or trust funds by any other person or entity to obtain or use an eligible adult’s property, income, resources, or trust funds in a manner that is not for the profit of or advantage of the eligible adult. This term includes, but is not limited to:
 - Use of deception, intimidation, coercion, extortion, or undue influence by a person or entity to obtain or use an eligible adult’s property, income, resources, or trust funds in a manner for the profit of or to the advantage of such person or entity;
 - Breach of a fiduciary duty, including, but not limited to, the misuse of a power of attorney, trust, or a guardianship or conservator appointment, as it relates to property, income, resources, or trust funds of the eligible adult; or
 - Obtainment or use of an eligible adult’s property, income, resources, or trust funds, without lawful authority, by a person or entity who knows or clearly should know that the eligible adult lacks the capacity to consent to the release or use of such eligible adult’s property, income, resources, or trust funds;

- “Investment adviser” is assigned its definition from the KUSA and means a person that, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. The term includes a financial planner or other person that, as an integral component of other financially related services, provides investment advice to others for compensation as part of a business or that holds itself out as providing investment advice to others for compensation.
 - Under the KUSA, “investment adviser” does not include an investment adviser representative; a lawyer, accountant, engineer, or teacher whose performance of investment advice is solely incidental to the practice of the person’s profession; a broker-dealer or its agents whose performance of investment advice is solely incidental to the conduct of business as a broker-dealer and that does not receive special compensation for the investment advice; a publisher of a *bona fide* newspaper, news magazine, or business or financial publication of general and regular circulation; a federally regulated investment adviser; a bank, savings institution, or trust

company; any other person excluded by the federal Investment Advisers Act of 1940 from the definition of investment adviser; or any other person excluded by rule adopted or order issued under the KUSA;

- “Protective agencies” means the state Securities Commissioner (Commissioner) and the Kansas Department for Children and Families (DCF); and
- “Qualified person” means any agent, broker-dealer, investment adviser, investment adviser representative, or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.

The bill also defines the terms “act,” “commissioner,” “investment adviser representative,” and “person reasonably associated with the eligible adult.”

Governmental Disclosures; Immunity for Such Disclosures

The bill requires, if a qualified person reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted, the broker-dealer or investment adviser to promptly report the matter as permitted or required by law. [Note: KSA 38-1431 requires certain persons or entities to report instances when the person or entity has reasonable cause to suspect or believe that an adult is in need of protective services or being harmed as a result of abuse, neglect, or financial exploitation. Bank trust officers and other officers of financial institutions are required to make such reports. That act does not currently include those defined persons in the bill that are subject to regulation under the KUSA and the Commissioner.]

The bill also provides that a qualified person who, in good faith and exercising reasonable care, makes a disclosure of information as required by the bill’s provisions (section 3) shall be immune from administrative and civil liability that might otherwise arise from such disclosure or for any failure to notify the eligible adult of this disclosure.

Third-party Disclosures; Immunity for Such Disclosures

The bill provides that any person who, in good faith and exercising reasonable care, makes a disclosure of information as required by the bill’s provisions (section 3) may notify any person reasonably associated with the eligible adult of the disclosure, unless the qualified person suspects that such person reasonably associated with the eligible adult has committed or attempted financial exploitation of such eligible adult.

The bill also provides that a qualified person who, in good faith and exercising reasonable care, complies with the bill’s provisions (section 5) shall be immune from any administrative and civil liability that might otherwise arise from such disclosure.

Delaying of Transactions and Disbursements; Immunity for Delaying

The bill permits a broker-dealer or investment adviser to delay a transaction associated with or a disbursement from an account of an eligible adult or an account on which the eligible adult is a beneficiary if:

- A qualified person reasonably believes, after initiating an internal review of the requested transaction or disbursement and the suspected financial exploitation, that the requested transaction or disbursement may further the financial exploitation of an eligible adult; and
- The broker-dealer or investment adviser:
 - Immediately, and within two business days after the date for the request to delay the transaction or disbursement, provides written notification of the delay and the reason for such delay to all parties authorized to transact business on the account, unless such qualified person reasonably believes that any such party is engaged in suspected or attempted financial exploitation of the eligible adult;
 - Immediately, and within two business days after the requested transaction or disbursement is delayed, notifies the protective agencies; and
 - Continues such internal review of the suspected or attempted financial exploitation of the eligible adult, as necessary, and reports the result of this investigation to the protective agencies upon request.

The bill also provides that any authorized delay of a transaction or disbursement will expire on the soonest of:

- A determination by the broker-dealer or investment adviser that the transaction or disbursement will not result in financial exploitation of the adult; or
- Fifteen business days following the date on which the broker-dealer or investment adviser first delayed the transaction or disbursement, unless either of the protective agencies requests that the broker-dealer or investment adviser extend the delay;
 - If the delay is extended, it shall expire not more than 25 business days after the date on which the transaction or disbursement was first delayed if not terminated sooner or further extended by either of the protective agencies or a court of competent jurisdiction.

The bill permits a court of competent jurisdiction to enter an order extending the delay of the transaction or disbursement or may order other protective relief based on the petition of either of the protective agencies, the broker-dealer or investment adviser that initiated the delay, or another interested party.

Immunity. The bill provides that a broker-dealer or investment adviser that, in good faith and exercising reasonable care, complies with the bill's provisions (section 7) shall be immune from any administrative and civil liability that might otherwise arise from such delay of a transaction or disbursement in accordance with this act.

Records

The bill requires a broker-dealer or investment adviser to provide access to or copies of records that are relevant to the suspected or attempted financial exploitation of an eligible adult to the protective agencies or to law enforcement agencies, either as part of a referral to the protective agencies or to law enforcement agencies or upon request of either protective agency or law enforcement agency pursuant to an investigation. The records could include historical records and records relating to the most recent transaction or transactions that may constitute financial exploitation of an eligible adult.

The bill specifies that no record made available to the Commissioner or other agencies under this act will be considered a public record under the Kansas Open Records Act (KSA 45-215 *et seq.*). The provisions pertaining to confidentiality of public records will expire on July 1, 2029, unless the Legislature reviews and acts to continue such provisions.

The bill requires the protective agencies, notwithstanding any provision of law to the contrary, to respond to reasonable inquiries from the notifying qualified person and allow disclosure to the notifying qualified person of the general status or final disposition of any investigation that arose from a report made by such qualified person.

The bill further states that nothing in this act shall limit or otherwise impede the authority of the Commissioner to access or examine the books and records of broker-dealers and investment advisers as otherwise provided by law.

Kansas Contract for Deed Act

The bill enacts the Kansas Contract for Deed Act. Under this act, a seller is prohibited from executing a contract for deed with a buyer if the seller does not hold title to the property. The bill requires the seller to maintain fee simple title to the property free from certain encumbrances, and it establishes that any violation of provisions pertaining to the execution of a contract for deed is deemed a deceptive act or practice under the Kansas Consumer Protection Act.

The bill requires a buyer who fails to cure a default within a specified time frame to record a release of a recorded affidavit of equitable interest or contract for deed and vacate the premises. The bill also provides the seller with remedies should the buyer fail to satisfy such requirements.

Definitions

The bill defines terms applicable to the Kansas Contract for Deed Act, including:

- “Contract for deed,” to mean an executory agreement in which the seller agrees to convey title to real property to the buyer and the buyer agrees to pay the purchase price in five or more subsequent payments, exclusive of a down payment, while the seller retains title to the property as security for the buyer’s obligation. The term specifically excludes option contracts for the purchase of real property; and
- “Property,” to mean real property located in Kansas upon which there is located or will be located a structure designed principally for occupancy by one, two, three, or four families that is or will be occupied by the buyer as the buyer’s principal place of residence.

The bill also defines the terms “buyer” and “seller” for this purpose.

Recording of Contract for Deed

The bill provides that any contract for deed or affidavit of equitable interest may be recorded by any interested person in the office of the county register of deeds where the property is located.

Clearing Title Upon Buyer Default; Seller’s Remedies

The bill provides that, following the notice of the intent to forfeit and the opportunity to cure the default as outlined in the bill, the buyer will have 15 calendar days to:

- Record a release of affidavit of equitable interest or contract for deed, if such affidavit or contract were recorded; and
- Vacate the premises under contract, if applicable.

If the buyer fails to satisfy the above conditions, the bill provides that such buyer will be responsible for the seller’s reasonable attorney fees, costs, and expenses for the removal of the affidavit of equitable interest or contract for deed from the title and eviction of the buyer from the premises, if applicable.

Seller to Hold Title to the Property; Exceptions

The bill prohibits a seller from executing a contract for deed if the seller does not hold fee simple title to the property, free from any mortgage, lien, or other encumbrances (liability). The prohibition would not apply to a mortgage, lien, or encumbrance:

- Due to the conduct of the buyer;
- With the agreement of the buyer as a condition of a loan obtained to make improvements to the property; or

- By the seller prior to the execution of the contract for deed if:
 - The seller disclosed the liability to the buyer;
 - The seller continues to make timely payments on the outstanding liability;
 - The seller disclosed the contract for deed to a party of interest to the liability; and
 - The seller satisfies and obtains a release of the liability not later than the date of the final contract for deed payment by the buyer, unless the buyer assumes the liability as part of such contract.

Violations of the specified title liability prohibitions will be considered a deceptive act and be subject to enforcement under the Kansas Consumer Protection Act.

Contract for Deed: Buyer's Rights

The bill provides that a buyer's rights under a contract for deed will not be forfeited or canceled except as specified in the bill. However, under the bill, a contract may provide for forfeiture of a buyer's rights. Additionally, the bill contains a statement that the provisions on a buyer's rights could not be construed to limit the power of a district court to require equitable foreclosure proceedings.

A buyer's rights will not be forfeited until the buyer has been notified of the intent to forfeit and has been given a right to cure the default and has not done so within the time period allowed. A notice of default and intent to forfeit must:

- Reasonably identify the contract and describe the property covered by it;
- Specify the terms and conditions of the contract with which the buyer has not complied; and
- Notify the buyer that the contract will be forfeited unless the buyer performs the terms and conditions within the following time periods:
 - 30 days from completed service of notice if the buyer has paid less than 50 percent of the purchase price; or
 - 90 days from completed service of notice if the buyer has paid 50 percent or more of the purchase price.

The bill requires such notice be served on the buyer in person, delivered directly to the buyer's residence, or delivered by certified or priority mail to the buyer's residence with return receipt requested.

Restrictive Covenants

The bill also makes any restrictive covenant on real property on any deed, plat, declaration, restriction, covenant, or other conveyance in violation of the KAAD void and unenforceable. The bill allows the owner of the real property to release such covenants from their property by recording a certificate of release of prohibited covenants with the register of deeds. The certificate of release is subject to recording fees set by the county. The bill requires the certificate of release to have the following information:

- The name of the current owner of the real property;
- A legal description of the real property;
- The volume and page or the document number in which the original document containing the restrictive covenant is recorded;
- A brief description of the restrictive covenant; and
- The citation to the location of the restrictive covenant in the original document.

Reporting of Instances of Suspected Financial Exploitation

The bill amends provisions in the KUSA applying to discipline of applicants and registrants to add to the criteria provided for grounds for discipline, which includes censure, a bar or suspension with a broker-dealer or investment adviser registered in the state, and a civil penalty up to \$25,000 for each violation. The bill adds a knowing failure to make a report required under the Protect Vulnerable Adults from Financial Exploitation Act or knowingly causing such report to not be made within the previous ten years.

Cease-and-desist Orders

The bill amends law pertaining to real estate brokers and salespersons to provide recourse against individuals practicing without a license. If the Kansas Real Estate Commission determines a person has practiced without a valid broker's or salesperson's license issued by the Commission, the Commission may issue a cease-and-desist order in accordance with the Kansas Administrative Procedure Act against such unlicensed person or associated association, corporation, limited liability company, limited liability partnership, partnership, professional corporation, or trust.

Homeowners Associations

The bill amends the KAAD to state, when a board of directors of an association removes a restrictive covenant in violation of the KAAD, the recording of the amended document is subject to county recording fees.

The bill allows a city or county to adopt a resolution to record a certificate of release of prohibited covenants (certificate) if the homeowners association that established the prohibited covenant is not active and unable to release the prohibited covenants. The resolution could also remove more than one prohibited covenant. The bill does not require the signature or consent of any affected property owner to record a certificate.

The bill does not affect the validity of any property interest recorded within the original or redacted plat and states no city or county will incur any liability arising from the recording of a certificate. The bill also states that no fee could be charged to record a certificate, and any record of a certificate will be exempt from land surveys.