

## HOUSE BILL No. 2613

By Committee on Judiciary

1-28

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AN ACT concerning securities; relating to the definition thereof; amending K.S.A. 40-436 and K.S.A. 2003 Supp. 17-1252 and repealing the existing sections.

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

Section 1. K.S.A. 2003 Supp. 17-1252 is hereby amended to read as follows: 17-1252. When used in this act, unless the context otherwise requires:

(a) "Commissioner" means the securities commissioner of Kansas, appointed as provided in K.S.A. 75-6301, and amendments thereto.

(b) "Agent" means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities. "Agent" does not include an individual who represents an issuer only in transactions in securities exempted by K.S.A. 17-1261, and amendments thereto, or who represents a broker-dealer in effecting transactions in this state limited to those transactions described in section 15(h)(2) of the securities and exchange act of 1934. A partner, officer or director of a broker-dealer or issuer, or a person occupying a similar status or performing similar functions, is an agent only if such person otherwise comes within this definition.

(c) "Broker-dealer" means any person engaged in the business of purchasing, offering for sale or selling securities for the account of others or for such person's own account; but the term does not include an agent, issuer, bank, savings institution, insurance company, or a person who effects transactions in this state exclusively with the issuer of the securities involved in the transactions or with any person to whom a sale is exempt under subsection (f) of K.S.A. 17-1262, and amendments thereto.

(d) "Guaranteed" means guaranteed as to payment of principal, interest or dividends.

(e) "Issuer" means any person who issues or proposes to issue any security. With respect to certificates of deposit, voting-trust certificates, collateral-trust certificates, or certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management or unit type; the term "issuer" also means the person or persons performing

1 the acts and assuming the duties of depositor or manager pursuant to the  
2 provisions of the trust or other agreement or instrument under which the  
3 security is issued. The issuer of a certificate of interest in an oil and gas  
4 royalty, lease or mineral deed is the owner of the interest in the oil and  
5 gas royalty, lease or mineral deed who creates the certificate of interest  
6 for purpose of sale.

7 (f) “Nonissuer” means not directly or indirectly for the benefit of the  
8 issuer.

9 (g) “Person” means an individual, a corporation, a partnership, a limited  
10 liability company, an association, a joint-stock company, a trust where  
11 the interests of the beneficiaries are evidenced by a security, an unincor-  
12 porated organization, a government or a political subdivision of a  
13 government.

14 (h) (1) “Sale” or “sell” includes every contract of sale, contract to  
15 sell, or disposition of, a security or interest in a security for value.

16 (2) “Offer” or “offer to sell” includes every attempt or offer to dispose  
17 of, or solicitation of an offer to buy, a security or interest in a security for  
18 value.

19 (3) Any security given or delivered with, or as a bonus on account of,  
20 any purchase of securities or any other thing is considered to constitute  
21 part of the subject of the purchase and to have been offered and sold for  
22 value.

23 (4) Every sale or offer of a warrant or right to purchase or subscribe  
24 to another security of the same or another issuer, and every sale or offer  
25 of a security which gives the holder a present or future right or privilege  
26 to convert into another security of the same or another issuer, is consid-  
27 ered to include an offer of the other security.

28 (5) A purported gift of assessable stock is considered to involve an  
29 offer and sale of such stock.

30 (i) “Securities act of 1933,” “securities exchange act of 1934,” “public  
31 utility holding company act of 1935,” “investment advisers act of 1940”  
32 and “investment company act of 1940” mean the federal statutes of those  
33 names.

34 (j) “Security” means any note; stock; treasury stock; bond; debenture;  
35 evidence of indebtedness; certificate of interest or participation in any  
36 profit-sharing agreement; collateral-trust certificate; preorganization cer-  
37 tificate or subscription; transferable share; investment contract; voting-  
38 trust certificates; thrift certificates or investment certificates, or thrift  
39 notes issued by investment companies; certificate of deposit for a security;  
40 certificate of interest in oil and gas royalties, leases or mineral deeds; or,  
41 in general, any interest or instrument commonly known as a “security,”  
42 or any certificate of interest or participation in, temporary or interim  
43 certificate for, guarantee of, or warrant or right to subscribe to or pur-

1 chase, any of the foregoing. “Security” does not include any insurance or  
2 endowment policy or annuity contract under which an insurance company  
3 promises to pay *a fixed sum of* money either in a lump sum or periodically  
4 for life or some other specified period.

5 (k) “State” means any state, territory, or possession of the United  
6 States, as well as the District of Columbia and Puerto Rico.

7 (l) “Investment adviser” means any person who, for compensation,  
8 engages in the business of advising others, either directly or through  
9 publications or writings, as to the value of securities or as to the advisa-  
10 bility of investing in, purchasing, or selling securities, or who, for com-  
11 pensation and as a part of a regular business, issues or promulgates anal-  
12 yses or reports concerning securities. The term does not include:

13 (1) An investment adviser representative;

14 (2) a bank, savings institution, or trust company;

15 (3) a lawyer, accountant, engineer or teacher whose performance of  
16 these services is solely incidental to the practice of the individual’s  
17 profession;

18 (4) a broker-dealer or its agent whose performance of these services  
19 is solely incidental to the conduct of its business as a broker-dealer and  
20 who receives no special compensation for them;

21 (5) a publisher of any bona fide newspaper, news column, news mag-  
22 azine, newsletter, or business or financial publication or service, whether  
23 communicated in hard copy form or by electronic means, or otherwise  
24 that does not consist of the rendering of advice on the basis of the specific  
25 investment situation of each client;

26 (6) any person that is a federal covered adviser; or

27 (7) such other persons not within the intent of this definition as the  
28 commissioner designates by order or by rules and regulations.

29 (m) (1) “Investment adviser representative” means any partner, of-  
30 ficer or director, or a person occupying a similar status or performing  
31 similar functions or any other individual except clerical or ministerial per-  
32 sonnel, who is employed by or associated with:

33 (A) An investment adviser that is registered or required to be regis-  
34 tered under this act and who does any of the following:

35 (i) Makes any recommendations or otherwise renders advice regard-  
36 ing securities;

37 (ii) manages accounts or portfolios of clients;

38 (iii) determines which recommendation or advice regarding securities  
39 should be given;

40 (iv) solicits, offers or negotiates for the sale of or sells investment  
41 advisory services; or

42 (v) supervises employees who perform any of the foregoing; or

43 (B) a federal covered adviser, subject to the limitations of section

1 203A of the investment advisers act of 1940, as the commissioner may  
2 designate by rule or order.

3 (2) "Investment adviser representative" does not include such other  
4 persons employed by or associated with either an investment adviser or  
5 federal covered adviser not within the intent of this subsection as the  
6 commissioner may designate by rule or order.

7 (n) "Federal covered security" means any security that is a covered  
8 security under section 18(b) of the securities act of 1933 or rules or reg-  
9 ulations promulgated thereunder.

10 (o) "Federal covered adviser" means a person who is registered under  
11 section 203 of the investment advisers act of 1940 or excluded from the  
12 definition of "investment adviser" under section 202(a)(11) of the invest-  
13 ment advisers act of 1940.

14 Sec. 2. K.S.A. 40-436 is hereby amended to read as follows: 40-436.

15 (a) Any domestic life insurance company may after adoption of a reso-  
16 lution by its board of directors, establish one or more separate accounts,  
17 and may allocate to such separate account or accounts any amounts, in-  
18 cluding without limitation proceeds applied under optional modes of set-  
19 tlement or under dividend options, paid to the company which are to be  
20 applied under the terms of an individual or group life or annuity contract  
21 issued in connection therewith to provide benefits payable in fixed or in  
22 variable amounts, or in both, and such contracts may provide other  
23 benefits.

24 (b) The amounts allocated to each such account and accumulations  
25 ~~thereon~~ may be invested and reinvested in any class of investments which  
26 may be authorized in the contracts without regard to any requirements  
27 or limitations prescribed by the laws of this state governing the invest-  
28 ments of life insurance companies. ~~Provided, except~~ that to the extent  
29 that the company's reserve liability with regard to: (1) Benefits guaranteed  
30 as to amount and duration; and (2) funds guaranteed as to principal  
31 amount or stated rate of interest is maintained in any separate account,  
32 a portion of the assets of such separate account at least equal to such  
33 reserve liability shall be invested in accordance with the laws of this state  
34 governing the investments of life insurance companies. The investments  
35 in such separate account or accounts shall not be taken into account in  
36 applying the investment limitations applicable to other investments of the  
37 company.

38 (c) The income, if any, and gains and losses, realized or unrealized,  
39 on each account shall be credited to or charged against the amounts  
40 allocated to the account in accordance with the contracts, without regard  
41 to other income, gains or losses of the company.

42 (d) Assets allocated to a separate account shall be valued at their  
43 market value on the date of valuation, or if there is no readily available

1 market, then in accordance with the terms of the contracts. ~~Provided,~~  
2 ~~except~~ that the portion of the assets of such separate account at least equal  
3 to the company's reserve liability with regard to the guaranteed benefits  
4 and funds referred to in subsection (b) ~~hereof~~, if any, shall be valued in  
5 accordance with the rules otherwise applicable to the company's assets.

6 (e) Amounts allocated to a separate account in the exercise of the  
7 power granted by this act shall be owned by the company, and the com-  
8 pany shall not be, nor hold itself out to be, a trustee with respect to such  
9 amounts. If and to the extent so provided under the applicable contracts,  
10 that portion of the assets of any such separate account equal to the re-  
11 serves and other contract liabilities with respect to such account shall not  
12 be chargeable with liability arising out of any other business the company  
13 may conduct.

14 (f) The company shall maintain in each such separate account assets  
15 with a value at least equal to the reserves and other contract liabilities  
16 with respect to such account, except as may otherwise be approved by  
17 the commissioner of insurance. No sale, exchange or other transfer of  
18 assets may be made by a company between any of its separate accounts  
19 or between any other investment account and one or more of its separate  
20 accounts unless, in case of a transfer into a separate account, such transfer  
21 is made solely to establish the account or to support the operation of the  
22 contracts with respect to the separate account to which the transfer is  
23 made, and unless such transfer, whether into or from a separate account,  
24 is made: (1) By a transfer of cash; or (2) by a transfer of securities having  
25 a readily determinable market value, provided that such transfer of se-  
26 curities is approved by the commissioner. The commissioner may approve  
27 other transfers among such accounts if, in ~~his~~ *the commissioner's* opinion,  
28 such transfers would not be inequitable.

29 (g) If any contract provides for payment of benefits in variable  
30 amounts, it shall contain a statement of the essential features of the pro-  
31 cedure to be followed by the company in determining the dollar amount  
32 of such variable benefits. Any such contract, including a group contract,  
33 and any certificate issued ~~thereunder~~ shall state that such dollar amount  
34 may decrease or increase and shall contain on its first page a statement  
35 that the benefits ~~thereunder~~ are on a variable basis.

36 (h) A foreign or alien life insurance company authorized to do busi-  
37 ness in this state may be authorized to issue or deliver contracts in this  
38 state providing for payments which vary directly according to investment  
39 experience only if authorized to issue such contracts under the laws of its  
40 domicile.

41 (i) No domestic life insurance company shall be authorized to issue  
42 such contracts, and no foreign or alien life insurance company shall be  
43 authorized to issue or deliver such contracts in this state, until such com-

1 pany has satisfied the commissioner that its condition and methods of  
2 operation in connection with the issuance of such contracts will not be  
3 such as to render its operation hazardous to the public or to its policy-  
4 holders in this state. In determining the qualification of a company to  
5 issue or deliver such contracts in this state, the commissioner shall con-  
6 sider, among other things, the history and financial condition of the com-  
7 pany; the character, responsibility, and general fitness of the officers and  
8 directors of the company; and in the case of a foreign or alien company,  
9 whether the regulation provided by the laws of its domicile provides a  
10 degree of protection to policyholders and the public substantially equal  
11 to that provided by this section and the rules and regulations issued by  
12 the commissioner pursuant thereto. The state of entry of an alien com-  
13 pany shall be deemed its place of domicile for this purpose.

14 (j) Every life insurance company which issues or delivers such con-  
15 tracts in this state shall file with the commissioner, in addition to the  
16 annual statement required by K.S.A. 40-225, *and amendments thereto*,  
17 such other periodic or special reports as the commissioner may prescribe.

18 (k) Any domestic life insurance company which establishes one or  
19 more separate accounts pursuant to this section, may amend its charter  
20 or bylaws to provide for special voting rights and procedures for the own-  
21 ers of contracts under such separate account relating to investment policy,  
22 investment advisory services and selection of independent public account-  
23 ants, in relation to the administration of the assets in any such separate  
24 account and such other matters as the company deems necessary in the  
25 management of the assets in any such separate account. This provision  
26 shall not in any way affect existing laws pertaining to the voting rights of  
27 the company's policyholders.

28 (l) The commissioner shall have the sole and exclusive jurisdiction  
29 and authority to regulate the ~~issuance and sale of terms and provisions in~~  
30 ~~such contracts and the obligations of insurance companies under such~~  
31 ~~contracts~~ and to promulgate such reasonable rules and regulations as may  
32 be necessary to carry out the purposes and provisions of this act, ~~and such~~  
33 ~~contracts, the companies which issue them, and the agents or other per-~~  
34 ~~sons who sell them, shall not be subject to the provisions of article 12 of~~  
35 ~~chapter 17 of the Kansas Statutes Annotated nor to the jurisdiction of the~~  
36 ~~securities commissioner of this state.~~

37 Sec. 3. K.S.A. 40-436 and K.S.A. 2003 Supp. 17-1252 are hereby  
38 repealed.

39 Sec. 4. This act shall take effect and be in force from and after its  
40 publication in the statute book.

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