

## HOUSE BILL No. 2029

By Special Committee on Judiciary

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9 AN ACT concerning the uniform securities act; amending section 38 of  
10 chapter 154 of the 2004 Session Laws of Kansas and repealing the  
11 existing section.  
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13 *Be it enacted by the Legislature of the State of Kansas:*

14 Section 1. Section 38 of chapter 154 of the 2004 Session Laws of  
15 Kansas is hereby amended to read as follows: Section 38. (a) *Securities*  
16 *litigation uniform standards act*. Enforcement of civil liability under this  
17 section is subject to the securities litigation uniform standards act of 1998.

18 (b) *Liability of seller to purchaser*. A person is liable to the purchaser  
19 if the person sells a security in violation of section 11, and amendments  
20 thereto, or by means of an untrue statement of a material fact or an  
21 omission to state a material fact necessary in order to make a statement  
22 made, in light of the circumstances under which it is made, not mislead-  
23 ing, the purchaser not knowing the untruth or omission and the seller not  
24 sustaining the burden of proof that the seller did not know and, in the  
25 exercise of reasonable care, could not have known of the untruth or omis-  
26 sion. An action under this subsection is governed by the following:

27 (1) The purchaser may maintain an action to recover the considera-  
28 tion paid for the security, less the amount of any income received on the  
29 security, and interest from the date of the purchase at the rate provided  
30 for interest on judgments by K.S.A. 16-204, and amendments thereto,  
31 costs, and reasonable attorneys' fees determined by the court, upon the  
32 tender of the security, or for actual damages as provided in paragraph (3).

33 (2) The tender referred to in paragraph (1) may be made any time  
34 before entry of judgment. Tender requires only notice in a record of  
35 ownership of the security and willingness to exchange the security for the  
36 amount specified. A purchaser that no longer owns the security may re-  
37 cover actual damages as provided in paragraph (3).

38 (3) Actual damages in an action arising under this subsection are the  
39 amount that would be recoverable upon a tender less the value of the  
40 security when the purchaser disposed of it, and interest from the date of  
41 the purchase at the rate provided for interest on judgments by K.S.A. 16-  
42 204, and amendments thereto, costs, and reasonable attorneys' fees de-  
43 termined by the court.

- 1       (c) *Liability of purchaser to seller.* A person is liable to the seller if  
2 the person buys a security by means of an untrue statement of a material  
3 fact or omission to state a material fact necessary in order to make the  
4 statement made, in light of the circumstances under which it is made,  
5 not misleading, the seller not knowing of the untruth or omission, and  
6 the purchaser not sustaining the burden of proof that the purchaser did  
7 not know, and in the exercise of reasonable care, could not have known  
8 of the untruth or omission. An action under this subsection is governed  
9 by the following:
- 10       (1) The seller may maintain an action to recover the security, and any  
11 income received on the security, costs, and reasonable attorneys' fees  
12 determined by the court, upon the tender of the purchase price, or for  
13 actual damages as provided in paragraph (3).
- 14       (2) The tender referred to in paragraph (1) may be made any time  
15 before entry of judgment. Tender requires only notice in a record of the  
16 present ability to pay the amount tendered and willingness to take delivery  
17 of the security for the amount specified. If the purchaser no longer owns  
18 the security, the seller may recover actual damages as provided in para-  
19 graph (3).
- 20       (3) Actual damages in an action arising under this subsection are the  
21 difference between the price at which the security was sold and the value  
22 the security would have had at the time of the sale in the absence of the  
23 purchaser's conduct causing liability, and interest from the date of the  
24 sale of the security at the rate provided for interest on judgments by  
25 K.S.A. 16-204, and amendments thereto, costs, and reasonable attorneys'  
26 fees determined by the court.
- 27       (d) *Liability of unregistered broker-dealer and agent.* A person acting  
28 as a broker-dealer or agent that sells or buys a security in violation of  
29 section 18 (a), 19 (a), or 35, and amendments thereto, is liable to the  
30 customer. The customer, if a purchaser, may maintain an action for re-  
31 covery of actual damages as specified in subsections (b)(1) through (3),  
32 or, if a seller, for a remedy as specified in subsections (c)(1) through (3).
- 33       (e) *Liability of unregistered investment adviser and investment ad-*  
34 *viser representative.* A person acting as an investment adviser or invest-  
35 ment adviser representative that provides investment advice for compen-  
36 sation in violation of section 20 (a), 21 (a), or 35, and amendments thereto,  
37 is liable to the client. The client may maintain an action to recover the  
38 consideration paid for the advice, interest from the date of payment at  
39 the rate provided for interest on judgments by K.S.A. 16-204, and amend-  
40 ments thereto, costs, and reasonable attorneys' fees determined by the  
41 court.
- 42       (f) *Liability for investment advice.* A person that receives directly or  
43 indirectly any consideration for providing investment advice to another

1 person and that employs a device, scheme, or artifice to defraud the other  
2 person or engages in an act, practice, or course of business that operates  
3 or would operate as a fraud or deceit on the other person, is liable to the  
4 other person. An action under this subsection is governed by the  
5 following:

6 (1) The person defrauded may maintain an action to recover the con-  
7 sideration paid for the advice and the amount of any actual damages  
8 caused by the fraudulent conduct, interest from the date of the fraudulent  
9 conduct at the rate provided for interest on judgments by K.S.A. 16-204,  
10 and amendments thereto, costs, and reasonable attorneys' fees deter-  
11 mined by the court, less the amount of any income received as a result  
12 of the fraudulent conduct.

13 (2) This subsection does not apply to a broker-dealer or its agents if  
14 the investment advice provided is solely incidental to transacting business  
15 as a broker-dealer and no special compensation is received for the in-  
16 vestment advice.

17 (g) *Joint and several liability.* The following persons are liable jointly  
18 and severally with and to the same extent as persons liable under subsec-  
19 tions (b) through (f):

20 (1) A person that directly or indirectly controls a person liable under  
21 subsections (b) through (f), unless the controlling person sustains the  
22 burden of proof that the person did not know, and in the exercise of  
23 reasonable care could not have known, of the existence of conduct by  
24 reason of which the liability is alleged to exist;

25 (2) an individual who is a managing partner, executive officer, or di-  
26 rector of a person liable under subsections (b) through (f), including an  
27 individual having a similar status or performing similar functions, unless  
28 the individual sustains the burden of proof that the individual did not  
29 know and, in the exercise of reasonable care could not have known, of  
30 the existence of conduct by reason of which the liability is alleged to exist;

31 (3) an individual who is an employee of or associated with a person  
32 liable under subsections (b) through (f) and who materially aids the con-  
33 duct giving rise to the liability, unless the individual sustains the burden  
34 of proof that the individual did not know and, in the exercise of reasonable  
35 care could not have known, of the existence of conduct by reason of which  
36 the liability is alleged to exist; and

37 (4) a person that is a broker-dealer, agent, investment adviser, or  
38 investment adviser representative that materially aids the conduct giving  
39 rise to the liability under subsections (b) through (f), unless the person  
40 sustains the burden of proof that the person did not know and, in the  
41 exercise of reasonable care could not have known, of the existence of  
42 conduct by reason of which liability is alleged to exist.

43 (h) *Right of contribution.* A person liable under this section has a

1 right of contribution as in cases of contract against any other person liable  
2 under this section for the same conduct.

3 (i) *Survival of cause of action.* A cause of action under this section  
4 survives the death of an individual who might have been a plaintiff or  
5 defendant.

6 (j) *Statute of limitations.* A person may not obtain relief:

7 (1) Under subsection (b) for violation of section 11, and amendments  
8 thereto, or under subsection (d) or (e), unless the action is instituted  
9 within ~~one year after the violation occurred~~ *the earlier of one year from*  
10 *the date of discovery of the facts constituting the violation or two years*  
11 *after the violation; or*

12 (2) under subsection (b), other than for violation of section 11, and  
13 amendments thereto, or under subsection (c) or (f), unless the action is  
14 instituted within the earlier of two years after discovery of the facts con-  
15 stituting the violation or five years after the violation.

16 (k) *No enforcement of violative contract.* A person that has made, or  
17 has engaged in the performance of, a contract in violation of this act or  
18 a rule adopted or order issued under this act, or that has acquired a  
19 purported right under the contract with knowledge of conduct by reason  
20 of which its making or performance was in violation of this act, may not  
21 base an action on the contract.

22 (l) *No contractual waiver.* A condition, stipulation, or provision bind-  
23 ing a person purchasing or selling a security or receiving investment ad-  
24 vice to waive compliance with this act or a rule adopted or order issued  
25 under this act is void.

26 (m) *Survival of other rights or remedies.* The rights and remedies  
27 provided by this act are in addition to any other rights or remedies that  
28 may exist, but this act does not create a cause of action not specified in  
29 this section or section 28 (e), and amendments thereto.

30 Sec. 2. Section 38 of chapter 154 of the 2004 Session Laws of Kansas  
31 is hereby repealed.

32 Sec. 3. This act shall take effect and be in force from and after its  
33 publication in the statute book.