

MINUTES

JOINT COMMITTEE ON ADMINISTRATIVE RULES AND REGULATIONS

February 26, 2010
Room 546-S—Statehouse

Members Present

Senator Vicki Schmidt, Chairperson
Representative Carl Holmes, Vice-chairperson
Senator Karin Brownlee
Senator Janis Lee
Senator Ralph Ostmeyer
Representative John Faber
Representative Shirley Palmer
Representative Joe Patton
Representative Jan Pauls

Members Absent

Senator Chris Steineger
Representative Steve Huebert
Representative Ed Trimmer

Staff Present

Raney Gilliland, Kansas Legislative Research Department
Sharon Wenger, Kansas Legislative Research Department
Jill Shelley, Kansas Legislative Research Department
Nobuko Folmsbee, Office of the Revisor of Statutes
Judy Glasgow, Committee Assistant

Others Present

Cheryl Magathan, Real Estate Appraisal Board
Jeff Barnes, Kansas Home Inspectors Registration Board
Kathleen Selzler Lippert, Kansas State Board of Healing Arts
Greg Arnett, Kansas State Board of Healing Arts
Chris Tymeson, Kansas Department of Wildlife and Parks
Berend Koops, Hein Law Firm
Randy Forbes, Kansas Pharmacy Board

Lou Henry, Sandstone Group, LLC
John Wine, Kansas Insurance Department
Rob Mealy, Kearney and Associates
Theresa M. Schwatz, Kansas Board of Regents
Gary Alexander, Kansas Board of Regents
Jacqueline Johnson, Kansas Board of Regents
Julie Ehler, Kansas Department of Agriculture
Angela Kohls, Kansas Department of Agriculture
Steve Moris, Kansas Department of Agriculture
Erik Wisner, Kansas Department of Agriculture
Dave Starkey, Kansas Department of Agriculture
Jeff Bottenberg, Polsinelli Shughart PC
Tim Boese, Groundwater Management District No.2
Sharon Falk, Groundwater Management District No. 5
Lane Letourneau, Kansas Department of Agriculture

Chairperson Senator Vicki Schmidt called the meeting to order at 1:00 p.m.

Chris Tymeson was welcomed by the Chairperson to speak to the proposed rules and regulations noticed for hearing by the Kansas Wildlife and Parks Commission. KAR 115-4-2, big game and wild turkey; general provisions; KAR 115-4-6, deer; management units; KAR 115-7-1, fishing; legal equipment, methods of taking, and other provisions; and KAR 115-25-14, fishing; creel limit, size limit, possession limit, and open season.

Staff suggested that KAR 115-4-2, page 1, line 10 be changed to read "digital photograph of sufficient clarity of the deer head and of the completed carcass tag" to highlight that it is the photo that needs to be clear. Senator Lee requested that the map of the new boundaries of the four northeast units as referenced in KAR 115-4-6 be sent to her. Mr. Tymeson stated that this would be done.

Chairperson Schmidt recognized Cheryl Magathan to speak to the proposed rules and regulations noticed for hearing by the Kansas Real Estate Appraisal Board. KAR 117-6-1, continuing education; renewal requirements; and KAR 117-6-3, education; obtaining course approval.

The Committee noted that USPAP should be included in parentheses after "uniform standards of professional appraisal practice" in KAR 117-6-1(b), on page 2. The acronym could be used then throughout the following regulations.

Chairperson Schmidt welcomed Kathleen Selzler Lippert to address the proposed rule and regulation noticed for hearing by the Kansas Board of Healing Arts. KAR 100-69-12, application.

The Committee suggested the addition of "driver's license number" to the list of identity forms permitted on applications by the agency. The Committee also suggested adding "card" after non-driver's identifications to reflect the statutory name of the document.

Randy Forbes was recognized by the Chairperson to speak to the proposed rules and regulations noticed for hearing by the State of Kansas Pharmacy Board. KAR 68-1-1b, continuing educational unit; KAR 68-7-21, institutional drug rooms; and KAR 68-20-10a, electronic prescription transmission of controlled substances.

The Committee had no questions for Mr. Forbes concerning these rules and regulations.

Chairperson Schmidt welcomed Jeff Barnes to speak to the proposed rules and regulations noticed for hearing by the Kansas Home Inspectors Registration Board. KAR 130-1-2, registration renewal; KAR 130-1-3, examination; KAR 130-1-4, registration expiration; renewal; KAR 130-3-1, approval of education providers; and KAR 130-5-2, approval of continuing education providers.

In response to a question concerning KAR 130-1-3(a), (2) and who would determine if an examination was psychometrically sound, Mr. Barnes stated there are people who can review a test and whether it tests subject matter knowledge or test-taking ability.

Jacqueline Johnson, Director of Private Postsecondary Education, was recognized by the Chairperson to speak to the proposed rule and regulation noticed for hearing by the Kansas Board of Regents (Attachment 1). KAR 88-28-6, fees.

Committee members expressed concern that the fees were being increased so drastically, and thought that a more moderate increase might be more appropriate. Ms. Johnson stated that the increase was necessary to hire additional people to keep up with the additional workload. In response to a question, Ms. Johnson stated that the additional positions had been approved. The Committee noted that the economic information included in the attachment provided by Ms. Johnson to Committee members should have been provided in the economic impact statement that went out with the notice of hearing and should have included a cost analysis showing that the fees are needed by the agency to complete its work. Ms. Johnson stated that the Division is fee-supported rather than supported by state general funds.

Chairperson Schmidt asked for action on the January 4, 2010, minutes. *Representative Holmes moved that the minutes of the Committee be approved as presented. Senator Ostmeyer seconded the motion. The motion was approved.*

Chairperson Schmidt welcomed Julie Ehler to address the proposed rules and regulations noticed for hearing by the Department of Agriculture. KAR 4-27-1, lodging establishment application fees; KAR 4-27-2, definitions; KAR 4-27-3, licensure; plans and specifications; variances; KAR 4-27-4, food service and food safety; KAR 4-27-5, imminent health hazard; KAR 4-27-6, general requirements; KAR 4-27-7, personnel; health, cleanliness, and clothing; KAR 4-27-8, guest and public safety; KAR 4-27-9, guest rooms; KAR 4-27-10, dishware and utensils; KAR 4-27-11, housekeeping and laundry facilities; maintenance supplies and equipment; KAR 4-27-12, poisonous or toxic materials; KAR 4-27-13, public indoor areas; KAR 4-27-14, ice and ice dispensing; KAR 4-27-15, exterior premises; KAR 4-27-16, swimming pools, RWFs, and hot tubs; KAR 4-27-17, water supply systems; KAR 4-27-18, sewage systems; KAR 4-27-19, electrical systems; KAR 4-27-20, plumbing systems; KAR 4-27-21, heating, ventilation, and air-conditioning (HVAC) systems; KAR 4-27-22, lodging establishment inspections by qualified individuals, private entities, or public entities; KAR 4-28-1, definitions; KAR 4-28-2, adoption by reference; KAR 4-28-8, definitions; KAR 4-28-11, equipment, utensils, and linens; KAR 4-28-12, water, plumbing, and waste; KAR 4-28-18, guaranty; definition; KAR 4-28-19, definitions and standards of identity for miscellaneous beef products; KAR 4-28-20, definitions and standards of identity for miscellaneous meat food products; KAR 4-28-21, definitions and standards of identity for miscellaneous pork products; KAR 4-28-22, breaded products; KAR 4-28-23, sidewalk or street display of food products; prohibitions; KAR 4-28-24, rooms where food is handled; KAR 4-28-25, temperature requirements; KAR 4-28-26; means for cleansing and sterilizing tools and equipment; KAR 4-28-27, toilet and handwashing facilities; KAR 4-28-28, inspection by plant operator; KAR 4-28-29, products to be frozen before storage; and KAR 4-28-30, place for processing.

The following are being revoked: KAR 28-21-1; KAR 28-21-6; KAR 28-21-7; KAR 28-21-8; KAR 28-21-9; KAR 28-21-10; KAR 28-21-11; KAR 28-21-20a; KAR 28-21-21a; KAR 28-21-22a; KAR 28-21-23a; KAR 28-21-24a; KAR 28-21-25a; KAR 28-21-26a; KAR 28-21-27a; KAR 28-21-28a;

KAR 28-21-29a; KAR 28-21-30a; KAR 28-21-31a; KAR 28-21-32a; KAR 28-21-33a; KAR 28-21-34a; KAR 28-21-35a; KAR 28-21-40a; KAR 28-21-41a; KAR 28-21-42a; KAR 28-21-43a; KAR 28-21-44a; KAR 28-21-50a; KAR 28-21-51a; KAR 28-21-52a; KAR 28-21-53a; KAR 28-21-54a; KAR 28-21-55a; KAR 28-21-56a; KAR 28-21-57a; KAR 28-21-58a; KAR 28-21-59a; KAR 28-21-60a; KAR 28-21-61a; KAR 28-21-62a; KAR 28-21-63; KAR 28-21-64; KAR 28-21-70a; KAR 28-21-71a; KAR 28-21-72a; KAR 28-21-82; KAR 28-21-83; KAR 28-21-84; KAR 28-21-85; KAR 28-23-4; KAR 28-23-9; KAR 28-23-10; KAR 28-23-20; KAR 28-23-21; KAR 28-23-22; KAR 28-23-23; KAR 28-23-24; KAR 28-23-26; KAR 28-23-27; KAR 28-23-28; KAR 28-23-29; KAR 28-23-30; KAR 28-23-31; KAR 28-23-32; KAR 28-23-34; KAR 28-23-35; KAR 28-23-36; KAR 28-23-41; KAR 28-23-42; KAR 28-23-43; KAR 28-23-44; KAR 28-23-45; KAR 28-23-46; KAR 28-23-47; KAR 28-23-48; KAR 28-23-49; KAR 28-23-50; KAR 28-23-51; KAR 28-23-52; KAR 28-23-53; KAR 28-23-54; KAR 28-23-55; KAR 28-23-70; KAR 28-23-71; KAR 28-23-73; KAR 28-23-75; KAR 28-23-78; KAR 28-23-79; KAR 28-23-80; KAR 28-36-30; KAR 28-36-31; KAR 28-36-70; KAR 28-36-71; KAR 28-36-72; KAR 28-36-73; KAR 28-36-74; KAR 28-36-75; KAR 28-36-76; KAR 28-36-77; KAR 28-36-78; KAR 28-36-79; KAR 28-36-80; KAR 28-36-81; KAR 28-36-82; KAR 28-36-83; KAR 28-36-84; KAR 28-36-85; KAR 28-36-86; KAR 28-36-87; KAR 28-36-88; KAR 28-36-89; KAR 28-36-101; KAR 28-36-102; KAR 28-36-103; KAR 28-36-104; KAR 28-36-105; KAR 28-36-106; KAR 28-36-107; KAR 28-36-108; and KAR 28-36-109.

Ms. Ehler stated that these regulations are ones that were transferred from the Kansas Department of Health and Environment to the Department of Agriculture covering the inspection of lodging establishments. At this point, because of budgetary constraints, no inspections are being performed. A Committee member asked whether a self inspection process had been considered by the agency to handle all these inspections. Ms. Ehler stated that this had been discussed at one time and the agency is open to it, but the industry was not ready to undertake this. The Committee suggested that consideration of privatizing inspections be considered to give consumers some level of confidence in Kansas lodging establishments. A suggestion was made by a Committee member on KAR 4-27-17(d)(3)(A), page 1, that it be amended to read "a reasonable supply of complimentary commercially bottled drinking water."

Chairperson Schmidt recognized Sharon Falk to speak to the proposed rule and regulation noticed for hearing by the Groundwater Management District No. 5. KAR 5-25-15, exemptions for up to 15 acre-feet of groundwater.

The Committee questioned whether the term "groundwater pit" was defined anywhere in the regulations. David Barfield stated that the office would check on this and get back to the Committee.

Tim Boese was recognized by the Chairperson to address the proposed rule and regulation noticed for hearing by the Groundwater Management District No. 2. KAR 5-22-7, safe yield.

Staff suggested that on page 3(b)(1)(D) and (E) the sentences should read "does not authorize an additional quantity of water in excess of 15 acre-feet" for clarification.

Chairperson Schmidt welcomed David Barfield, Chief Engineer, to speak to the proposed rules and regulations noticed for hearing by the Department of Agriculture, Division of Water Resources. KAR 5-1-4, water flowmeter specifications; KAR 5-1-9, criteria to determine when a water flowmeter is out of compliance; KAR 5-4-1, distribution of water between users when a prior right is being impaired; KAR 5-4-1a, distribution of water between users when a prior right is being impaired due to a regional lowering of the water table; and KAR 5-7-1, due and sufficient cause for nonuse.

A Committee member questioned what the fiscal impact under KAR 5-4-1 and KAR 5-4-1a would be, especially to those found in noncompliance. The Committee member suggested that the cost of one case (for example, a case in Stevens County) that has been performed by the agency

be referenced in the economic impact statement. Staff questioned what the intent is in KAR 5-4-1, page 6, (e) (2). Mr. Barfield stated that it was the intent for the Chief Engineer to allow GMDs to make recommendations. In KAR 5-4-1, a Committee member asked that this section be reviewed so only the Chief Engineer's signature should be on the final order. Staff noted that on page 2 the term "or that person's authorized representative" is included in some portions, but others specify only the Chief Engineer, and they questioned whether the agency intended only the Chief Engineer to take certain actions. Mr. Barfield noted that if Substitute for House Substitute for SB 316 were to pass, it would accomplish the same thing as KAR 5-7-1 and this regulation would be pulled and revised to conform to the statutory changes.

Chairperson Vicki Schmidt recognized Representative Carl Holmes to address HB 2530, an act concerning the Rules and Regulations Filing Act; pertaining to filing process. Representative Holmes stated that this bill came on the House floor for action and there were several areas that were of concern to members, and rather than have the bill killed, he recommended that the bill be rereferred to the House Appropriations Committee for review and amendment. Professor Richard E. Levy was recognized to speak to HB 2530 (Attachments 2 and 3). In response to questions from the Committee, Professor Levy stated that guidance documents have no legal weight but the bill provides that notice of an agency's intent to follow these guidance documents be given. Representative Neufeld was recognized to speak against the bill as drafted and he proposed several changes (Attachments 4 and 5). A Committee member asked that the bill include better notification by the agency to interested parties on these guidance documents. After a lengthy discussion by the Committee members on the bill, the Committee unanimously proposed that the following changes be made to the provisions of 2010 HB 2530.

- The Committee recommended that the portion of the bill that would allow for a state agency to issue a non-regulation guidance document without going through the rule and regulation adoption process be deleted.
- In Section 10 of the bill, the Committee recommended adding the following persons to the list of those receiving notice of a state agency's intended action once that agency's rules and regulations have been approved by the Secretary of Administration and the Attorney General: the Vice-chairperson and Ranking Minority Member of the Joint Committee on Administrative Rules and Regulations and the Legislative Research Department.
- The Committee recommended correcting the language related to the agency's name in the portion of the bill related to rule and regulation changes for the pharmacy program in the state Medicaid Plan, indicating the Kansas Health Policy Authority should provide appropriate notice regarding changes.
- In Section 12 of the bill, the Committee recommended that a temporary rule and regulation shall be effective for a period not to exceed 120 days (rather than 180 days) adding that a state agency could request such a rule and regulation could be renewed one time, for good cause, for an additional period not to exceed 120 days.
- Finally, in Section 17, the Committee recommended that the Secretary of State add members of the Joint Committee on Administrative Rules and Regulations to the list of those to whom Kansas administrative regulations would be made available upon request.

The Chairperson adjourned the meeting at 4:50 p.m.

Committee Comments on Proposed Rules and Regulations

Kansas Department of Wildlife and Parks.. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning big game and wild turkey, general provisions; deer, management units; and fishing, legal equipment, methods of taking, and other provisions. After discussion, the Committee had the following comment.

KAR 115-4-2. In paragraph (a)(1), the Committee suggest the movement of language in the definition of "Electronically registering." Specifically, it suggests moving "of sufficient clarity" to after "photographs" to clarify that it is the photographs which need to be of sufficient clarity.

Kansas Real Estate Appraisal Board. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning continuing education, renewal requirements and education, obtaining course approval. After discussion, the Committee had the following comment.

KAR 117-6-1 and KAR 117-6-3. The Committee suggests that in both regulations the term "uniform standards of professional appraisal practice" be followed by the acronym USPAP or that the acronym be preceded by the term.

Kansas Board of Healing Arts. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning application (athletic trainers). After discussion, the Committee had the following comment.

KAR 100-69-12. The Committee suggests the addition of "driver's license number" to the list of identity forms permitted on applications by the agency. The Committee also suggests adding "card" after "nondriver's identification" to reflect the statutory name of the document.

Kansas Pharmacy Board. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning continuing educational unit; institutional drug rooms; and electronic prescription transmission of controlled substances. After discussion, the Committee had no comment.

Kansas Home Inspectors Registration Board. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning registration renewal; examination; registration expiration, renewal; approval of education providers; and approval of continuing education providers. After discussion, the Committee had no comment.

Kansas Board of Regents. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning fees (private or out-of-state postsecondary institutions). After discussion, the Committee had the following comments.

Economic Impact Statement. The Committee suggests that the information contained in the material provided to the Committee regarding economic impact should be included in the Economic Impact Statement associated with this regulation, including information on the effects on the State General Fund.

Concern. The Committee is concerned with the extent of the increase in the fees and believes that a cost analysis should be done to determine whether the increases proposed by this regulation are justified.

Division of Water Resources, Kansas Department of Agriculture. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning exemptions for up to 15 acre-feet of groundwater. After discussion, the Committee had the following comment.

KAR 5-25-15. The Committee suggests that a definition of "groundwater pit" would be helpful or, if one exists, that reference be made to it in this regulation.

Division of Water Resources, Kansas Department of Agriculture. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning safe yield. After discussion, the Committee had the following comment.

KAR 5-22-7. In paragraph (b)(1)(D) and (E), the Committee suggests the placement of the words "in excess of 15 acre-feet" to after the phrase "an additional quantity of water" in order to add clarity to the sentence.

Division of Water Resources, Kansas Department of Agriculture. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning water flowmeter specifications; criteria to determine when a water flowmeter is out of compliance; distribution of water between users when a prior right is being impaired; distribution of water between users when a prior right is being impaired due to a regional lowering of the water table; and due and sufficient cause for nonuse. After discussion, the Committee had the following comments.

KAR 5-4-1. In paragraph (b), authority is given to the Chief Engineer or "that person's authorized representative." However, subsequent subsections and paragraphs refer only to the Chief Engineer's role in the complaint process. Please review all of the regulations to determine if it is the Chief Engineer's intent to allow an "authorized representative" to have the authority of the Chief Engineer.

Comment. In some of these rules and regulations reference is made to the Division of Water Resources and in some places references are made to "the agency." Please review the rules and regulations to determine if the proper term to use is Division of Water Resources or "the agency."

Economic Impact Statement. The Committee suggests the Economic Impact Statement include information on costs to the regulated community.

Kansas Department of Agriculture. The Joint Committee on Administrative Rules and Regulations reviewed for public comment rules and regulations concerning lodging establishment application fees; definitions; licensure, plans and specifications, variances; food service and food safety; imminent health hazard; general requirements; personnel, health, cleanliness, and clothing; guest and public safety; guest rooms; dishware and utensils; housekeeping and laundry facilities, maintenance supplies and equipment; poisonous or toxic materials; public indoor areas; ice and ice dispensing; exterior premises; swimming pools, RWFs, and hot tubs; water supply systems; sewage systems; electrical systems; plumbing systems; heating, ventilation, and air-conditioning (HVAC)

systems; lodging establishment inspections by qualified individuals, private entities, or public entities; definitions; adoption by reference; definitions; equipment, utensils, and linens; water, plumbing, and waste; guaranty, definition; definitions and standards of identity for miscellaneous beef products; definitions and standards of identity for miscellaneous meat food products; definitions and standards of identity for miscellaneous pork products; breaded products; sidewalk or street display of food products, prohibitions; rooms where food is handled; temperature requirements; means for cleansing and sterilizing tools and equipment; toilet and handwashing facilities; inspection by plant operator; products to be frozen before storage; place for processing; and revocations. After discussion, the Committee had the following comments.

KAR 4-27-17. The Committee suggests that the language be modified in (d)(3)(A) to indicate that the facility should provide reasonable quantities of complimentary bottled water in those cases where tap water is or may be unfit for human consumption.

Suggestion. The Committee suggests that the agency consider inspection of lodging facilities by private inspection services similar to those currently inspecting scales and scanning devices under the agency's Weights and Measures program.

Prepared by Judy Glasgow
Edited by Raney Gilliland

Approved by Committee on:

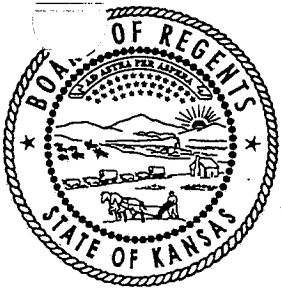
April 5, 2010

(Date)

JOINT COMMITTEE ON ADMINISTRATIVE RULES AND REGULATIONS
COMMITTEE GUEST LIST

DATE: Feb 26, 2010

NAME	REPRESENTING
Cheryl Magathran	REAL ESTATE App. Bd.
Jeff Barnes	Kansas Home Inspectors Reg. Board
Kathleen ^{Selzer} Spher ^{Lippert}	KCSBHA
Greg Arnett	KSBHA
Chris ^{Tymeson} Tymeson	KDUMP
Berend Koops	Hein Law Firm
RANDY FORBES	PHARMACY BOARD
Lari Henry	Sandstone Group LLC
John Vnie	Kansas Insurance Dept.
ROB MEHL	KERNER & ASSOC.
Theresa Marcel ^{Schwartz} Schwartz	KBOR
Gary ^{Alexander} Chapman	KBOR
Jacqueline Johnson	KBOR
Julie Ehler	KDA
^{Anaela} Angela Kehl's Kohls	KDA
Steve Morris Morris	KDA
Erik Wisor Wiener	KDA
Dave Starkey	KDA
Jeff Bohnberg	Polsinelli Shughart



KANSAS BOARD OF REGENTS

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February 26, 2010

Senator Vicki Schmidt, Chair
Joint Committee on Administrative
Rules & Regulations
Statehouse, Room 552-S
Topeka, KS 66612

Representative Carl Holmes, Vice Chair
Joint Committee on Administrative
Rules & Regulations
Statehouse, Room 174-W
Topeka, KS 66612

Dear Senator Schmidt and Representative Holmes:

On behalf of the Kansas Board of Regents, thank you for the opportunity to provide information regarding revisions to the regulations that the Board of Regents implements through its Private Postsecondary Division. As part of the process of developing these revisions, the Division undertook a self-study using the assistance of an independent business consultant for the purpose of assessing its future needs. A copy of this report's Executive Summary is attached for your reference, and I am happy of course to make the full 56-page report available to you upon request.

The Division's principal responsibility is to regulate private postsecondary sector institutions. This regulation involves such activities as authorizing private or out-of-state postsecondary institutions to operate in Kansas, annually reviewing new programs offered by these schools, annually evaluating institutions and programs for renewal purposes, and investigating complaints leveled against these schools.

The requested fee changes increase the amounts to their maximum in each individual category. The current fee schedule has been in place since 2004 and fails to take into account the increasing variety and complexity of institutions and academic programs requiring review.

Due to the explosion of private programs, the Division, which is fee-funded, is struggling to keep up with the demand. We are currently in the midst of remarkable growth in the number and complexity of institutions in the Private Postsecondary sector, both across the United States and in Kansas. For example, from January 2007 to December 2009, the number of approved institutions in Kansas increased 22.4 percent, from 107 to 131. In that same period, the number of approved academic programs increased 143 percent, from 567 to 1,380. This growth is expected to continue for the next several years. A recent *Chronicle of Higher Education* article noted that, "Enrollment in the country's nearly 3,000 career colleges has grown far faster than in the rest of higher education – by an average of 9 percent per year over the past 30 years, compared with only 1.5 percent per year for all institutions, according to an industry analyst. For-profit universities now educate about 7 percent of the nation's roughly 19 million students

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who enroll at degree-granting institutions each fall. And the proportion rises to 10 percent, or 2.6 million, if you count students who enroll year round. Just this academic year, the University of Phoenix eclipsed California State University as the second largest higher-education system in the country, with 455,600 students as of this month—behind only the State University of New York.”

It is important to note that the institutions applying to operate and offer programs in Kansas now include multi-billion dollar/Fortune 500 type institutions like the University of Phoenix and Kaplan University, which is owned by the Washington Post Corporation. In addition, degree program requests are moving toward the more complex bachelor's, master's and doctorate degrees and away from less complicated certificate and diploma programs.

The Board's Private Postsecondary Division currently employs two persons. The current workload for that division has necessitated use of temporary labor throughout most of the year. As noted above, new institutions and programs/degrees seeking approval are projected to at least double the Division's workload in the very near future.

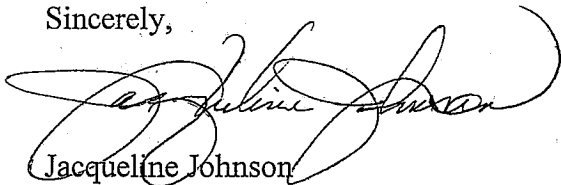
As the workload increases, costs to regulate this sector are likewise expected to grow in order to keep up with the increased demand. The current fee schedule does not cover the costs of such growth or take into consideration the varying types of institutions and academic programs that are subject to this oversight and regulation. Proposed revisions to the fees would help recover the cost of time and resources that must be devoted to reviewing and processing the variety of schools and programs.

I also want to emphasize that implementation of the proposed fee changes will enable the division to operate on a business model, tracking all costs to operate, and setting fees at a level that will cover those costs and help eliminate the current reliance on State General Funds to cover both direct and indirect costs.

The proposed fees follow a nationwide trend to increase fees in response to the growth in the industry, and the rates we seek to put in place are comparable to those charged in states similar to Kansas. Fees for states surrounding Kansas, for example, although varied in their structure, have either been increased, or are proposed to increase, in response to industry trends.

Thank you for your consideration of these revised regulations to the Private Postsecondary sector.

Sincerely,



Jacqueline Johnson
Director of Private Postsecondary Education

EXECUTIVE SUMMARY
STAFF REPORT TO KANSAS BOARD OF REGENTS
ON THE STATUS OF THE PRIVATE POST SECONDARY DIVISION
JANUARY 22, 2010

- **Purpose of the report**
 - Review the standards and history of the Division
 - Look forward to how the private postsecondary industry is expected to grow in the next several years
 - Review the ability of the Division and the resources needed to respond to the expected growth in the Private Postsecondary industry

- **History of Kansas Private Postsecondary Education**
 - In 1909 Senate Bill 507 was introduced for the purpose of regulating approval of private postsecondary institutions.
 - In 1971 the previously enacted Senate Bill 507 was completely revised by the Kansas Legislature and named the Kansas Proprietary School Act "the Act".
 - Senate Bill 345 enacted in 1999 placed control of "proprietary schools" under the Kansas Board of Regents.
 - A 2003 revision to the Act included more fee categories and increased fees and in 2004 the Kansas Private and out-of-state Postsecondary Educational Institution Act became law, improving minimum standards and created new definitions and increased fees.
 - The Kansas Board of Regents, acting pursuant to the Private and out-of-state Postsecondary Educational Institutional Act regulates "private postsecondary educational institutions that includes certain types of private and post secondary schools, colleges and universities."

- **Historical data**
 - From January 2007 to December 2009 the approved institutions in Kansas increased from 107 in January 2007 to 131 in December 2009, a 22.4% increase. Additionally, in that same time period, the certificate/diploma and degree programs approved increased from 567 in January 2007 to 1,380 in December 2009, a 143% increase.
 - It is important to note that the institutions applying are moving towards multibillion dollar/Fortune 500 type institutions and away from the smaller cottage schools. As a result, degree program requests are moving towards the more complex bachelor's, master's and doctorate degrees and away from the certificate/diploma programs.

- **Projections for the Industry**
 - High unemployment rates have driven adults and nontraditional students back to school. The impact of that is reflected in the historical data above.
 - This growth trend is expected to continue for the next several years. Based on that assumption, it is anticipated that by 2014, there will be 300 approved private postsecondary institutions in Kansas with a projection of over 3,500 certificate/diploma and degree programs. These numbers reflect a 129% increase in approved institutions and a 150% increase in approved programs and degrees.

- **What we know**
 - Currently, the Kansas private Postsecondary division employs two persons. The current workload of the two positions has required hours equivalent to 2.25 FTEs. In addition, the current workload has necessitated use of temporary labor throughout most of the year. Even at this level, the demands on the two positions continue to grow.
 - The projections of new approved institutions and programs/degrees will even more dramatically increase the workload in the Division, in fact, it is anticipated that they will at least double.
 - Currently, the indirect expenses of the Division are funded by the State general fund.
 - The Division needs to operate on a business model, tracking all costs to operate, and setting fees at a level that will cover those costs.

- o As part of operating on a business model, an operating reserve is required for unanticipated expenses or reduction in the collection of fees.
- o Expenditures are expected to grow in order to keep up with the increased demands as follows (with comparison to actual for 2009):

	Actual	Estimated	Projected			
	FY 2009*	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
Total Direct Expenditures	\$ 161,385	\$ 184,250	\$ 320,000	\$ 439,100	\$ 505,600	\$ 560,000
Total Indirect Expenditures	22,250	25,200	44,800	61,500	70,800	78,400
Operating Reserve	-	-	36,000	39,000	40,000	45,000
Total Expenditures	<u>\$ 183,635</u>	<u>\$ 209,450</u>	<u>\$ 400,800</u>	<u>\$ 539,600</u>	<u>\$ 616,400</u>	<u>\$ 683,400</u>

* - In FY 2009, indirect costs were funded by the State General Fund, along with certain direct costs

- **Proposed Fees**

- o The current fee schedule has been in existence since 2004 and does not take into consideration the varying types of institutions or degrees and programs.
- o The fees being proposed to the 2010 Kansas Legislature provide for a new fee structure that acknowledges that categories are needed to reflect the cost of time spent reviewing and processing different applications and to reflect the diversity in the types and size of institutions requesting approval.
- o These proposed fees are designed to supplant the resources previously funded from the State General Fund to allow the division to be self-funded.
- o The proposed fees follow a nationwide trend to increase fees in response to the growth in the industry. Fees for States surrounding Kansas, although varied in their structure, have also increased or are proposed to increase in response to industry trends.
- o Assuming the new fee structure is enacted with the 2010 Legislative session, effective for July 1, 2010, fee collections are anticipated to be as follows (with comparison to actual for 2009):

	Actual	Estimated	Projected			
	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
Fees	<u>\$ 145,312</u>	<u>\$ 182,000</u>	<u>\$ 390,100</u>	<u>\$ 543,600</u>	<u>\$ 658,300</u>	<u>\$ 672,000</u>

- A summary comparison of the estimated fees and expenditures for 2010 and the projected fees and expenditures for FY 2011 through 2014 is as follows (with comparison to actual for 2009):

	Actual	Estimated	Projected			
	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
Revenue	\$ 145,312	\$182,000	\$390,100	\$543,600	\$658,300	\$672,000
Prior Year Carryforward	47,852	34,234	6,784	(3,916)	84	41,984
	193,164	216,234	396,884	539,684	658,384	713,984
Expenditures	<u>(158,930)</u>	<u>(209,450)</u>	<u>(400,800)</u>	<u>(539,600)</u>	<u>(616,400)</u>	<u>(683,400)</u>
Ending Cash Balance	<u>\$ 34,234</u>	<u>\$ 6,784</u>	<u>\$ (3,916)</u>	<u>\$ 84</u>	<u>\$ 41,984</u>	<u>\$ 30,584</u>

Summary

The approval of the proposed fees as presented to the 2010 Legislature is critical to continue to enable the Division to meet the growing demands of the industry.



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MEMORANDUM

TO: Joint Committee on Administrative Rules and Regulations

FROM: Kansas Judicial Council - Professor Richard Levy

DATE: February 26, 2010

RE: 2010 HB 2530

The Judicial Council recommends 2010 HB 2530, a bill amending the Kansas Rules and Regulations Filing Act, K.S.A. 77-415 *et seq.* The bill was recommended by the Council's Administrative Procedure Advisory Committee after a year-long study. The bill is intended to improve public access to and notice of the rulemaking process and to take advantage of technology by utilizing internet and electronic transmission of information.

The rationale for each recommended amendment is set out in the attached report. The most substantive recommendations for change are summarized on pages 2-3 of the report.

Joint Committee on Administrative
Rules and Regulations
February 26, 2010
Attachment 2

**REPORT OF THE JUDICIAL COUNCIL
ADMINISTRATIVE PROCEDURE ADVISORY COMMITTEE**

BACKGROUND

In June 2008, the Judicial Council's Administrative Procedure Advisory Committee requested that the Judicial Council assign it the task of studying the Rules and Regulations Filing Act, K.S.A. 77-415 *et seq.* The Committee was particularly interested in finding ways to improve notice and public participation in rulemaking and to take advantage of technology by utilizing internet and electronic transmission of information. The Judicial Council agreed and made the requested assignment.

COMMITTEE MEMBERSHIP

The members of the Administrative Procedure Advisory Committee taking part in this study were:

Carol L. Foreman, Chair, Topeka; Deputy Secretary of the Department of Administration
Yvonne Anderson, Topeka; General Counsel for the Kansas Department of Health and Environment
Martha Coffman, Lawrence; Chief Advisory Counsel for the Kansas Corporation Commission
Tracy T. Diel, Topeka; Director of the Office of Administrative Hearings
James G. Flaherty, Ottawa; practicing attorney
Jack Glaves, Wichita; practicing attorney
Hon. Steve Leben, Fairway; Kansas Court of Appeals Judge
Prof. Richard E. Levy, Lawrence; Professor at the University of Kansas School of Law
Camille A. Nohe, Topeka; Assistant Attorney General
Hon. Eric Rosen, Topeka; Kansas Supreme Court Justice
Steve A. Schwarm, Topeka; practicing attorney
John S. Seeber, Wichita; practicing attorney
Mark W. Stafford, Topeka; practicing attorney

The Committee invited two additional persons with rulemaking expertise to serve on a temporary basis during the study of rulemaking statutes:

Rep. Janice Pauls, Hutchinson; State Representative from the 102nd District and ranking Democrat on the Joint Committee on Rules and Regulations
Diane Minear, Tonganoxie; Legal Counsel for the Secretary of State

METHOD OF STUDY

In conducting its study of the rules and regulations filing act, the Administrative Procedure Advisory Committee held 8 meetings during 2009. The Committee solicited input from a variety of sources, including legal counsel for state agencies and other attorneys practicing in the area of administrative law.

COMMITTEE RECOMMENDATIONS

The Committee proposes the adoption of a number of amendments to the Rules and Regulations Filing Act, K.S.A. 77-415 *et seq.*, which are contained in 2010 HB 2530. The "Comments" section beginning at page 4 of this report discusses the reasons for each of the amendments, many of which are technical or intended for purposes of clarification. Most of the Committee's proposed changes to the Rules and Regulations Filing Act fall into two main categories: (1) amendments to improve public access to and notice of the rulemaking process and (2) amendments to give the Secretary of State's office more flexibility in the filing and publication of rules and regulations.

Improving transparency of agency action was an important overarching goal of the Committee. This includes both making the agency's views of the law and the public's obligations under the law as broadly available as possible. It also includes promoting public access to and participation in the rulemaking process, which the Committee believes is an important means of improving the content of rules and regulations as well as holding agencies accountable. Amendments that improve public access to and notice of the rulemaking process include:

- New Section 1, which allows agencies to publish non-binding "guidance documents" to provide helpful information to both the public and agency staff.
- Amendments to K.S.A. 77-421(b), which require an agency to prepare a concise statement of its principal reasons for adopting or amending a rule, including the agency's reasons for not accepting substantial arguments made in testimony and reasons for any substantial change between the text of the proposed rule and the version finally adopted. (HB 2530, Section 10.)
- New subsection (c) of K.S.A. 77-421, which provides guidance on when an agency is required to reinitiate the rulemaking process, including providing notice and another public comment period, because of changes to a proposed rule. (HB 2530, Section 10.)

Current provisions impose strict publication requirements on the Secretary of State's office and prescribe the precise form for various filings. These requirements are increasingly inappropriate as information technology develops, and impose some unnecessary costs on both the Secretary of State and the agencies. Although that office does not plan dramatic changes in the short term, increasing flexibility for the Secretary of State's office concerning the filing and publication of rules and regulations will permit the office to develop alternatives that will produce substantial cost savings in the long run. To ensure that there is some accountability in this process, the Secretary of State is to adopt rules and regulations specifying filing and publication requirements. Amendments that give the Secretary of State's office more flexibility in the filing and publication of rules and regulations include:

2-2

- Amendment to K.S.A. 77-415a, which gives the Secretary of State authority to adopt its own rules and regulations necessary for the execution of its functions under the act. (HB 2530, Section 3.)
- Amendments to K.S.A. 77-416(a) and 77-418, which remove specific technical requirements about how proposed rules are to be filed with the Secretary of State's office. Instead the Secretary of State's office may set those technical requirements itself. (HB 2530, Sections 5 and 7.)
- Amendments to K.S.A. 77-419, 77-428, 77-429, 77-430a, and 77-431 which delete requirements that rules and regulations must be published in written form. Although the Secretary of State does not intend to completely discontinue print publication in the near future, the amendments give the Secretary of State the option to move toward electronic publication, which will reduce costs. (HB 2530, Sections 8, 15, 16, 18 and 19.)
- Amendments to K.S.A. 77-430, which allow the Secretary of State to distribute copies of the Kansas administrative regulations to certain entities in an electronic or paper medium and only upon request. (HB 2530, Section 17.)

Issues raised by state agency counsel

The Committee received several responses to its request for input from state agency counsel regarding the Rules and Regulations Filing Act. The Committee considered each of the responses, and either made the requested change or rejected it for the reasons set out below.

Matt Spurgin, Litigation Counsel for the Kansas Corporation Commission, suggested it would be helpful if the Committee drafted amendments to clarify when changes to a proposed regulation rise to the level that the agency must initiate new rulemaking proceedings. The Committee agreed that some guidance in this area was needed and proposes adding a new subsection (c) to K.S.A. 77-421. (HB 2530, Section 10.) The amendment provides that if an agency proposes to adopt a final rule or regulation that (1) differs in subject matter or effect in material respects from the rule as originally proposed and (2) is not a logical outgrowth of the rule as originally proposed, then the agency must initiate new rulemaking proceedings including notice and an additional public comment period of not less than 30 days.

Patrick Hurley, Chief Counsel for the Department of Administration, suggested that the two-step process of submitting proposed rules and regulations to the Secretary of Administration for editing and then to the Attorney General for substantive review might be shortened by moving both roles to the AG's office. However, the Committee also heard from Deputy Attorney General Mary Feighny that transferring the Secretary of Administration's rule review function to the AG's office would pose personnel, budgetary, and logistical problems. The Committee found that both review steps are important. The Committee recommends no substantive change in this area.

Mr. Hurley also suggested that an electronic approval process, rather than the paper approval process articulated in K.S.A. 77-416 and 77-418, would be more efficient and would be more easily managed if set out by regulation rather than by statute. The Committee agreed, and recommends amendments that would allow the Secretary of State's office to set the technical requirements for the filing of rules and regulations. Under the Committee's recommended amendments, the Secretary of State would have the flexibility to require proposed rules and regulations to be submitted

electronically.

John Campbell, General Counsel for the Kansas Insurance Department, suggested that the 60-day notice period seems longer than necessary to obtain public comments and that the comment period should be shortened to 30 days. The Committee found that, if the notice period were shortened, the joint legislative committee might not have enough time to schedule meetings and provide its comments before the public hearing. Also, the Committee did not wish to restrict public participation in the rulemaking process by shortening the period for public comment. Accordingly, the Committee does not recommend shortening the 60-day notice period.

COMMENTS TO 2010 HB 2530

New Section 1.

The Advisory Committee recommends a new section designed to encourage agencies to advise the public of its current opinions and approaches by using guidance documents (also often called interpretive rules or policy statements). A guidance document, in contrast to a rule, lacks the force of law. The section recognizes the agencies' need to use such documents to guide both agency employees and the public. Agency law often needs interpretation, and agency discretion needs some channeling. The public has an interest in knowing the agency's position on these matters, and increasing public knowledge reduces unintentional violations and lowers transaction costs. For example, a company may find that an agency has a guidance document and that the company can reasonably comply with the document's interpretation of a statute or regulation. In that case, the company may proceed based on the guidance document rather than engaging in extensive legal consultations, regulatory proceedings, or even litigation.

This section strengthens agencies' abilities to fulfill these legitimate objectives by explicitly excusing them from having to comply with formal rulemaking procedures before issuing nonbinding statements. Meanwhile, the section incorporates safeguards to ensure that agencies will not use guidance documents in a manner that would undermine the public's interest in administrative openness and accountability. The section also encourages broad public accessibility to guidance documents through agency websites.

This section is based upon section 310 of the Revised Model State Administrative Procedure Act (Draft of September 30, 2009). This comment is based upon the comment to section 310 in the draft Model Act.

Section 2 (amending K.S.A. 77-415).

Most of the changes to this section were drafted by the Revisor of Statutes to alphabetize the definitions contained in the statute. The definition of guidance document in subsection (c) is new.

Section 3 (amending K.S.A. 77-415a).

The amendment to this section is part of a series of amendments intended to provide more flexibility for the Secretary of State's office regarding the filing and publication of rules and regulations. Other amendments remove specific requirements from the statutes about the exact number of copies of proposed rules and regulations required to be filed with the Secretary of State's office. Instead, the Secretary of State may set those technical requirements by rules and regulations. The amendment to K.S.A. 77-415a gives the Secretary of State authority to adopt such rules and regulations.

Section 4 (amending K.S.A. 77-415b).

Subsections (b) and (c) are deleted because their provisions are no longer necessary.

Section 5 (amending K.S.A. 77-416).

The amendments to subsection (a) are part of a series of amendments intended to build in more flexibility for the Secretary of State's office by allowing the Secretary of State to decide how many copies of each rule and regulation to require. The amendments remove specific requirements from the statutes about the exact number of copies of proposed rules and regulations required to be filed with the Secretary of State's office. Instead, the Secretary of State may set those technical requirements by adopting rules and regulations.

The amendments to subsection (b) affect the timing of when an economic impact statement is prepared and when it is updated. The statute currently requires an economic impact statement to be prepared at the time of drafting of a proposed rule and updated, if necessary, at the time of giving notice of hearing and again when the final rule is adopted. The Committee found that actual agency practice in this area does not conform to the requirements of the statute.

Under the amendments, the agency must consider the economic impact at the time of drafting a proposed rule or regulation; the agency must prepare the economic impact statement prior to giving notice of hearing on the proposed rule or regulation; and the agency must reevaluate and, if necessary, update the economic impact statement at the time of filing the rule or regulation with the Secretary of State.

The amendments to subsection (d) affect the timing of when an environmental impact statement is prepared and when it is updated. They parallel the amendments to subsection (b) relating to the economic impact statement.

Subsection (f) deals with a different subject matter than the rest of K.S.A. 77-416a. The Committee felt the substance of subsection (f) should be moved to new subsection (b) in K.S.A. 77-417.

Section 6 (amending K.S.A. 77-417).

New subsection (b) was moved from existing K.S.A. 77-416a(f). Because the provision addresses a power of the Secretary of State's office, the Committee believed the provision belongs in this section rather than the preceding one.

Section 7 (amending K.S.A. 77-418).

The amendment deletes unnecessary technical detail on how rules and regulations are to be filed, and leaves those details to the Secretary of State's office.

Section 8 (amending K.S.A. 77-419).

The amendments in lines 10-12 are intended to clarify the meaning of the statute.

The amendment in line 15 strikes the phrase, "and to the legislature" because the cross-reference, K.S.A. 77-426, does not require rules to be submitted to the legislature.

In lines 19-20 and 22-23, the term "strike-through" type is preferred over the term "cancelled" type. The amendment on lines 22-23 also deletes unnecessary technical detail about how rules and regulations are to be printed.

Section 9 (amending K.S.A. 77-420).

The amendments to subsections (b) and (c) clarify that, when the attorney general reviews the legality of a proposed rule or regulation, that review includes a determination of whether the making of the rule and regulation is within the authority conferred by law on the state agency.

Subsection (c)(7) is stricken because the Secretary of State's office no longer accepts for filing copies of documents adopted by reference.

Section 10 (amending K.S.A. 77-421).

This section has been amended in several respects. Two amendments are minor and require little discussion. The amendment to subsection (a) at page 12, line 3, gives more flexibility to agencies by allowing notice of hearing to be provided to the secretary of state and to the chairperson of the joint committee by means other than mailing. For instance, notice might be provided by e-mail. The amendment to subsection (d)—subsection (c) under current law—clarifies that, if a recording or transcript of a hearing on the adoption of a proposed rule or regulation is made, the agency must maintain that recording or transcript for three years from the effective date of the rule or regulation. The amendment to subsection (b) and the addition of proposed new subsection (c) and subsection (a)(4) warrant more extended explanation.

Subsection (b)—The amendment to subsection (b) requires that, whenever an agency adopts or amends a rule or regulation, the agency must provide an explanation of the reasons for adopting the rule or regulation, the reasons for rejecting any substantial arguments, and the reasons for any substantial change from the version of the rule or regulation originally proposed. The language of the amendment is adapted from section 312 of the Revised Model State Administrative Procedure Act. The language changes current law in two ways. First, K.S.A. 77-421(b) currently requires the agency to provide an explanation on request, and this language would make it mandatory. Challenges to a rule or its application may arise after the rulemaking is complete and may be raised by persons who do not participate in the rulemaking process. In such cases, there may be no request and the benefits of an agency explanation are lost. Second, the current language does not address the extent to which the agency must address arguments made during the course of the proceeding or changes in the substance from the rule as originally proposed. The proposed language concerning those issues comes from the model act, but the Committee did not include a third component of the explanation required by the model act—that the explanation must include “[t]he summary of any regulatory analysis,” such as the economic impact statement prepared under K.S.A. 77-416. This requirement was omitted from proposed K.S.A. 77-421(b) because K.S.A. 77-416 already addresses the preparation and handling of the economic impact statement, and preparation of a separate summary as part of the explanation seemed unnecessary and unduly burdensome.

The proposed changes to subsection (b) represent a compromise between two competing sets of concerns. On the one hand, it is arguably incumbent upon all agencies to explain why they adopt rules (or amendments to rules). Because an agency’s statutory authority often affords it substantial policy making discretion, verifying that an agency has acted within its statutory authority does not ensure that the agency has exercised its authority in a reasonable manner. Requiring an agency to provide reasons for adopting a rule will help to hold agencies accountable by ensuring there is reasonable basis in the record for determining that the adoption of the rule or regulation furthers the underlying statutory policy. In addition, the inclusion of an explanation facilitates review of the regulation by the Joint Committee on Rules and Regulations and by courts, who must determine whether the rule is arbitrary and capricious or unreasonable under K.S.A. 77-621(c)(8).

On the other hand, requiring agencies to prepare an explanation for their rules and regulations in every case may impose unnecessary and undesirable burdens on agencies. Many rules and regulations (or amendments) are not controversial or are expressly required by statute. For such regulations, the preparation of an explanation is arguably not needed and will consume limited agency resources that might be used more effectively to further other aspects of the agency’s mission. In addition, there is concern that the requirement will fuel litigation, and make the rulemaking process longer and more costly. A similar requirement at the federal level has arguably contributed to this problem for federal rulemaking. Insofar as most agencies are struggling to fulfill their statutory missions with limited resources, additional procedural requirements that consume agency resources must be approached with caution.

The proposed changes are intended to provide the benefits of having agencies give the reasons for their rules, while minimizing the burdens on agencies to the extent possible. Thus, if a regulation directly follows from statutory requirements, the explanation would ordinarily be very limited. But when the agency regulation involves policy judgments based upon uncertain data and information, the agency would have to explain why it resolved contested issues in the manner in which it did. In particular, the agency would have to explain why it rejected substantial arguments, and why it made substantial changes from the rule, regulation, or amendment as originally proposed.

It is to be emphasized that this requirement applies only to substantial arguments or objections, and does not require the agency to respond to objections that lack a plausible basis in fact or policy or that do not go to the substance of the rule, and that the agency need not respond separately to multiple comments that raise substantially similar arguments or concerns. Likewise, the agency is not required to explain technical or stylistic changes or other minor amendments to the rule as originally proposed that do not significantly affect the substance of the rule.

The issue is one that divided the members of the committee. All the members of the committee agree, however, that the issue represents an important policy choice that ultimately rests with the Legislature.

Subsection (c) and subsection (a)(4)--New subsection (c), as proposed, is intended to address an area of uncertainty under current law—whether and when agencies that wish to adopt rules that differ significantly from the rules originally proposed must have the revised rule approved under K.S.A. 77-420 and provide additional notice and hearing under K.S.A. 77-421. There is a large body of case law in other jurisdictions, including the federal courts, holding that when a final rule differs so significantly from the original rule that it is not the “logical outgrowth” of the original rule, a new notice and additional public comment or hearing must be provided. The underlying rationale for this rule is to ensure that those affected by the final rule were “on notice” that their interests were at stake in the rulemaking so that they could protect their interests by participating in the rulemaking proceeding. At the same time, it is natural and appropriate for agencies to change their proposed rules in response to input from the rulemaking process, and changes in response to public input should not be discouraged. In addition, affected persons should be expected to participate in the original rulemaking proceeding when the content of the rule and related notice are sufficient to apprise them that an issue will be addressed in the rulemaking.

At present, there is considerable uncertainty in Kansas regarding whether and under what circumstances agencies are required to provide a new notice and rulemaking hearing as a result of changes in a rule. The committee therefore considered it desirable to provide further guidance, and proposes new subsection (c) to accomplish this objective. Under new subsection (c), an agency must begin new rulemaking proceedings if it proposes to adopt a final rule or regulation that (1) differs in subject matter or effect in material respects from the rule originally proposed and (2) is not a logical outgrowth of the original. However, the period for public comment may be shortened to no less than 30 days.

Notice is the key to determining when a final rule is the “logical outgrowth” of the original proposed rule. A final rule is not considered to be the logical outgrowth of the original if a person affected by the final rule was not put on notice that his or her interests were affected in the original rulemaking proceeding. This provision reflects the Committee’s view that not every substantial change in a rule should require the agency to initiate a new rulemaking proceeding because many substantial changes are the natural product of the rulemaking process and resolve issues that were raised by the original rule and notice, so that affected persons had ample opportunity to participate in the rulemaking process.

Section 11 (amending K.S.A. 77-421a).

The amendments to this section are technical.

2-9

Section 12 (amending K.S.A. 77-422).

The amendment to subsection (c)(3) extends the time that temporary rule or regulation is effective from 120 to 180 days and allows a temporary rule or regulation to be renewed once for up to an additional 180 days. The Committee believes the amendments are necessary in order to give agencies sufficient time to complete the permanent rulemaking process while still carefully considering public input. Also, the amendments clarify that an agency cannot rely indefinitely on a temporary rule or regulation.

Other amendments to this section are technical.

Section 13 (amending K.S.A. 77-423).

The amendments clarify that the Attorney General, Secretary of State, and Secretary of Administration may name designees to serve on the state rules and regulations board. Naming of designees is already occurring in practice.

Section 14 (amending K.S.A. 77-424).

The last sentence of K.S.A. 77-424 currently prohibits publication of rules and regulations adopted jointly by two or more agencies in more than one place in the Kansas administrative regulations. The Committee believes this prohibition is unnecessary and recommends striking the sentence. The amendment would allow, but not require, a rule adopted jointly by two or more agencies to be published in more than one place in the Kansas administrative regulations. Publication in more than one place would still require approval by the state rules and regulations board.

Section 15 (amending K.S.A. 77-428).

The amendments to this section are part of a series of amendments intended to provide more flexibility to the Secretary of State's office by eliminating the requirement that regulations be published in written form. Although the Secretary of State does not intend to completely discontinue print publication in the near future, the amendments give the Secretary of State's office the ability to move toward electronic publication of the regulations, which will reduce costs.

Section 16 (amending K.S.A. 429).

The amendments to this section are part of a series of amendments intended to provide more flexibility to the Secretary of State's office by eliminating the requirement that regulations be published in written form.

Section 17 (amending K.S.A. 77-430).

K.S.A. 77-430 sets out which entities receive free printed copies of the Kansas administrative

regulations. The proposed amendments would make such copies available only upon request and would allow copies to be provided in an electronic or paper medium. Eliminating distribution of unnecessary copies will reduce costs.

Section 18 (amending K.S.A. 77-430a).

The amendments to this section are part of a series of amendments intended to provide more flexibility to the Secretary of State's office by eliminating the requirement that regulations be published in written form.

New language in subsections (b) and (c) relating to money received from sale of replacement volumes and fixing the price of replacement volumes is parallel to the provisions of K.S.A. 77-421(b) and (c).

Section 19 (amending K.S.A. 77-431).

The amendments to this section are part of a series of amendments intended to provide more flexibility to the Secretary of State's office by eliminating the requirement that regulations be published in written form.

Section 20 (amending K.S.A. 77-435).

Subsections (a) and (c) are stricken because they describe editing powers that the Secretary of State's office does not currently exercise and does not intend to exercise in the future.

Section 21 (amending K.S.A. 77-436).

The amendments eliminate review of forms by the Joint Committee on Rules and Regulations. The amendment reflects the current practice of the Joint Committee on Rules and Regulations, which does not review forms used by an agency unless the forms are part of a rule or regulation.

Section 22 (amending K.S.A. 77-438).

The amendment to this section is technical.

Session of 2010

HOUSE BILL No. 2530

By Committee on Judiciary

1-25

9 AN ACT concerning the rules and regulations filing act; pertaining to
10 the filing process; amending K.S.A. 77-415a, 77-415b, 77-417, 77-418,
11 77-419, 77-420, 77-421a, 77-423, 77-428, 77-429, 77-430a, 77-436 and
12 77-438 and K.S.A. 2009 Supp. 77-415, 77-416, 77-421, 77-422, 77-424,
13 77-430, 77-431 and 77-435 and repealing the existing sections.
14

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

16 New Section 1. (a) A state agency may issue a guidance document
17 without following the procedures set forth in this act for the adoption of
18 rules and regulations.

19 ~~(b) A state agency that proposes to rely on a guidance document to~~
20 ~~the detriment of a person in any administrative proceeding must afford~~
21 ~~the person a fair opportunity to contest the legality or wisdom of positions~~
22 ~~taken in the document. The agency may not use a guidance document to~~
23 ~~foreclose consideration of issues raised in the document.~~

(b) ← 24 ~~(c)~~ A guidance document may contain binding instructions to state
25 agency staff members if at an appropriate stage in the administrative
26 process, the agency's procedures provide affected persons an adequate
27 opportunity to contest positions taken in the guidance document.

(c) ← 28 ~~(d)~~ If a state agency proposes to act in an adjudication at variance
29 with a position expressed in a guidance document, it shall provide a rea-
30 sonable explanation for the variance. If an affected person in an adjudi-
31 cation may have reasonably relied on the agency's position, the explana-
32 tion must include a reasonable justification for the agency's conclusion
33 that the need for the variance outweighs the affected person's reliance
34 interests.

(d) ← 35 ~~(e)~~ (1) Each state agency shall:
36 (A) Maintain an index of all of its currently effective guidance
37 documents;

38 (B) publish the index on its website;

39 (C) make all guidance documents available to the public; and

40 (D) file the index in the manner prescribed by the secretary of state.

41 (2) The state agency may not rely on a guidance document or cite it
42 as precedent against any party to a state agency proceeding unless the
43 guidance document is published on the agency website.

- (e) ← 1 — ~~(f)~~ A guidance document may be considered by a presiding officer or
 2 agency head in an agency adjudication but it does not bind the presiding
 3 officer or the agency head in the exercise of discretion.
- (f) ← 4 — ~~(g)~~ For the purposes of this section:
 5 (1) The term “agency head” shall have the meaning ascribed to it in
 6 K.S.A. 77-502, and amendments thereto.
 7 (2) The term “party to a state agency proceeding” shall have the
 8 meaning ascribed to it in K.S.A. 77-502, and amendments thereto.
 9 (3) The term “presiding officer” shall have the meaning ascribed to
 10 it in K.S.A. 77-514, and amendments thereto.
- (g) ← 11 — ~~(h)~~ This section shall be supplemental to and a part of the rules and
 12 regulations filing act.

Comment

Because several state agencies expressed concern about New Section 1 relating to guidance documents, specifically subsection (b) which allows a person to contest the legality or wisdom of positions taken by the agency in the guidance document, the Administrative Procedure Advisory Committee recommends striking that subsection. The Committee believes that, while the subsection is a helpful reminder that persons may challenge an agency’s action, it is not an integral part of New Section 1. Under existing law, a person can already challenge the legality and reasonableness of an agency action under the Kansas Judicial Review Act. See K.S.A. 77-621(c).

1 prescribed by K.S.A. 77-421, and amendments thereto. This section shall
2 not apply to orders issued by directors of correctional institutions under
3 K.S.A. 75-5256, and amendments thereto.

4 Sec. 12. K.S.A. 2009 Supp. 77-422 is hereby amended to read as
5 follows: 77-422. (a) A rule and regulation may be adopted by a state
6 agency as a temporary rule and regulation if the state agency and the state
7 rules and regulations board finds that the preservation of the public peace,
8 health, safety or welfare necessitates or makes desirable putting such rule
9 and regulation into effect prior to the time it could be put into effect if
10 the agency were to comply with the notice, hearing and publication
11 requirements of this act or prior to the effective date prescribed by K.S.A.
12 77-426, and amendments thereto.

13 (b) Temporary rules and regulations may be adopted without the giv-
14 ing of notice and the holding of a hearing thereon.

15 (c) (1) A temporary rule and regulation shall take effect: (1)

16 (A) After approval by the secretary of administration and the attorney
17 general as provided by K.S.A. 77-420, and amendments thereto; (2)

18 (B) after approval by the state rules and regulations board as provided
19 by K.S.A. 77-423, and amendments thereto; and (3)

20 (C) upon filing with the secretary of state.

21 (2) The effective date of all or specific parts of a temporary rule and
22 regulation may be delayed to a date later than its filing date if the delayed
23 effective date of such rule and regulation, or specific parts thereof, is
24 clearly expressed in the body of such rule and regulation.

25 (3) A temporary rule and regulation shall be effective for a period not
26 to exceed ~~120~~ ~~180~~ days except that a temporary rule and regulation may
27 be renewed one time for an additional period not to exceed ~~180~~ days.

28 (d) A temporary rule and regulation which amends an existing rule
29 and regulation shall have the effect of suspending the force and effect of
30 the existing rule and regulation until such time as the temporary rule and
31 regulation is no longer effective. In such case, at the time the temporary
32 rule and regulation ceases to be effective, the existing permanent rule
33 and regulation which was amended by the temporary rule and regulation
34 shall be in full force and effect unless such existing rule and regulation is
35 otherwise amended, revoked or suspended as provided by law.

36 (e) Temporary rules and regulations shall be numbered in accordance
37 with the numbering arrangement approved by the secretary of state and
38 otherwise shall conform to the approval, adoption and filing requirements
39 of this act, insofar as the same can be made applicable.

40 Sec. 13. K.S.A. 77-423 is hereby amended to read as follows: 77-423.
41 There is hereby created a state rules and regulations board consisting of
42 the attorney general or the attorney general's designee, the secretary of
43 state or the secretary of state's designee, the secretary of administration

120

, for good cause, a state agency may request that

120

Clark County Kansas

913 Highland Street
Ashland, KS 67831
Fax (620) 635-2051

County Commissioners

Michael E. Myatt

First District

Charles R. McKinney

Second District

Howard L. Wideman

Third District

County Clerk

Rebecca Mishler

PO Box 886

Ashland, KS 67831

(620) 635-2813

(620) 635-2051 (Fax)

County Treasurer

Crystal Roberts

PO Box 185

Ashland, KS 67831

(620) 635-2745

(620) 635-2655 (Fax)

Register of Deeds

Melissa (Lynn) Young

PO Box 222

Ashland, KS 67831

(620) 635-2812

County Appraiser

Sherry Pike

PO Box 727

Ashland, KS 67831

(620) 635-2142

County Sheriff

John Ketron

PO Box 566

Ashland, KS 67831

(620) 635-2802

(620) 635-2148 (Fax)

County Attorney

Gerald Woolwine

PO Box 871

Ashland, KS 67831

(620) 635-2131

(620) 635-2788 (Fax)

February 9, 2010

Dear Representative Neufeld:

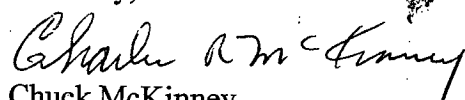
We, the under-signed representatives of the various government sub-units of the State of Kansas listed below and service providers for the Kansans living therein, respectfully request legislative resolution of a matter which has caused us great difficulty and, if left unresolved, will continue to cause significant harm to our ability to serve our constituents.


The matter that needs to be addressed by the Kansas Legislature is the matter of the decline rate in the first three year of production available to be used by oil and gas companies to protest their tax assessments on various properties. The first issue is whether or not the appraisers' guidelines are enforceable. It is our understanding that they do not carry the weight of law as they are not rules and regulations, rather they are simply guidelines, yet they are treated like law at the judicial branch. It is our belief that the guidelines need to be treated like guidelines without enforcement at the court-level or that they need to be codified so that taxing agencies are able to set their budgets accordingly.

A second, and more important, troubling aspect of this matter for the taxing entities listed below is that our budgets are all based on property valuations set months prior to the adoption of our budgets, but the decline rate county appraisers are required to use if requested by the operator which allow for a reduction in tax liability for the oil and gas companies in the middle of a budget year after budgets are finalized, contracts signed, personnel hired and/or retained and purchases made. Taking revenues away from government service providers negatively impacts those providers' ability to render services to their constituents. It is our belief that the state of Kansas should change the law to prevent the payment of taxes under protest. Protests should be made prior to the setting of the budgets that depend on those taxes.

Please refer this matter to the appropriate committee for consideration during this legislative session.

Sincerely,


Chuck McKinney
Chairman, Clark County Commissioners


Benjamin Anderson
Administrator, Ashland
Honorable District
Joint Committee on Administrative
Rules and Regulations
February 26, 2010
Attachment 5

Clark County Kansas

913 Highland Street
Ashland, KS 67831
Fax (620) 635-2051



David Clawson
BOE President, USD 220 – Ashland



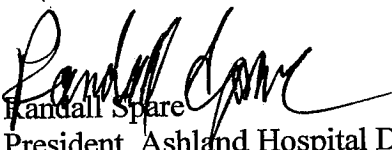
Bill Day
Superintendent, USD 220 – Ashland
Treasurer, Ashland Recreation Commission



Dwann Seacat
BOE President, USD 459 – Bucklin



W.S. Landis
Superintendent, USD 459 - Bucklin



Randall Spare
President, Ashland Hospital District Board of Directors