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## **LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULES AND REGULATIONS**

The memorandum summarizes the history of legislative rule and regulation oversight in Kansas, the statutory procedures for the approval and adoption of administrative rules and regulations, current options for legislative actions to influence rules and regulations, and changes to the Rules and Regulations Filing Act since 2000.

### **History of Legislative Oversight**

Since 1939, Kansas statutes have provided for legislative oversight of rules and regulations filed by state officers, boards, departments, and commissions. The 1939 law declared all rules and regulations of a general or statewide character were to be filed with the Revisor of Statutes and would remain in force until and unless the Legislature disapproved or rejected the regulations. It was not until 1974 that the Legislature took steps to formalize an oversight process. In that year, all filed rules and regulations were submitted to each chamber. Within 60 days of submission, the Legislature could act to modify and approve or reject any of the regulations submitted. The 1975 interim Legislative Budget Committee, under Proposal No. 33, found it “important to maintain and even enhance legislative oversight of all regulations in order to make sure that they conform with legislative intent.” The 1976 Legislature enacted several amendments to the Rules and Regulations Filing Act. In that same year, the Legislative Coordinating Council created the Special Committee on Administrative Rules and Regulations to review proposed administrative rules and regulations filed with the Revisor of Statutes. The law was later changed to require proposed agency rules and regulations to be reviewed as outlined below.

In 1984, the Kansas Supreme Court, in *State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 687 P.2d 622 (1984), held a procedure adopted in 1979, which authorized the use of concurrent resolutions to modify or revoke administrative rules and regulations, violated the doctrine of separation of powers under the *Kansas Constitution*. The opinion notes, “Like the *Constitution of the United States*, the *Kansas Constitution* contains no express provision establishing the doctrine of separation of powers. However, it has been recognized that the very structure of the three-branch system of government gives rise to the doctrine. . . . Generally speaking, the legislative power is the power to make, amend, or repeal laws; the executive power is the power to enforce the laws; and the judicial power is the power to interpret and apply the laws in actual controversies. . . . This is not to say the legislature cannot modify the statute which grants an agency the authority to adopt regulations.”

A 1977 law created the Joint Committee on Administrative Rules and Regulations (Joint Committee). In 1988, responsibility for filing and publishing all rules and regulations was statutorily assigned to the Secretary of State. The *Policy and Procedure Manual for the Filing of*

*Kansas Administrative Regulations* of the Kansas Department of Administration<sup>1</sup> provides guidance to agencies on the development of and procedures for promulgating rules and regulations.

## **The Rule and Regulation Adoption Process**

Administrative rules and regulations may be temporary or permanent. The Rules and Regulations Filing Act (KSA 77-415 through 77-438, and amendments thereto) outlines the statutory requirements for the filing of regulations by most executive branch agencies and for the review of the agency regulations. Rules and regulations of the Kansas Lottery are exempt from the requirements of the Rules and Regulations Filing Act (KSA 74-8710). Other exclusions, such as hunting seasons and bag limits, are listed in the definition of “rule and regulation” in KSA 77-415.

### ***Temporary Rules and Regulations Adoption Process***

A temporary rule and regulation, as defined in KSA 77-422, may be adopted by an agency if the State Rules and Regulations Board (Board) finds preservation of the health, safety, welfare, or public peace makes it necessary or desirable to put the regulation into effect before a permanent regulation would take effect. Temporary rules and regulations take effect after approval by the Director of the Budget, the Secretary of Administration, the Attorney General, and the Board and may remain effective for no more than 120 days, beginning with the date of approval by the Board and filing with the Secretary of State. A state agency, for good cause, may request a temporary rule and regulation be renewed one time for an additional period not to exceed 120 days.

### ***Permanent Rules and Regulations Adoption Process***

KSA 77-420 and KSA 77-421 outline the process for the an agency’s adoption of permanent Kansas Administrative Regulations (KARs) in the following steps, which are to be followed in consecutive order:

- Obtain approval of the proposed rules and regulations from the Director of the Budget (Director). KSA 77-420 requires the Director to review the economic impact statement submitted with the rules and regulations and conduct an independent analysis to determine whether the implementation or compliance costs incurred by businesses, local government, or individuals would be \$3.0 million or less over a two-year period;
  - If the impact does not exceed that threshold, the statute directs the Director to approve the proposed rule and regulation for submission to the Secretary of Administration and the Attorney General;
  - If the impact of implementation and compliance costs exceeds \$3.0 million, the Director may either disapprove the proposed rule and regulation or approve it, provided the agency had conducted a public hearing prior to submitting the proposed rule and regulation, and the agency found the costs to be accurately determined and necessary for

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<sup>1</sup> This manual is available from the [Department of Administration Document Center](#).

achieving legislative intent, and the Director independently concurs with the agency's findings and analysis;

- Obtain approval of the organization, style, orthography, and grammar of the proposed rules and regulations from the Secretary of Administration;
- Obtain approval of the proposed rules and regulations from the Attorney General, who must promptly provide an opinion as to the legality of any proposed rule and regulation, including whether the making of the rule and regulation is within the authority conferred by law on the state agency;
- Submit the notice of hearing, copies of the proposed rules and regulations as approved, the economic impact statement, and the environmental benefit statement (if required by KSA 77-416) to the Secretary of State, and submit a copy of the notice of hearing to the chairperson, vice-chairperson, and ranking minority member of the Joint Committee and to the Kansas Legislative Research Department (KLRD); the notice also must be published in the *Kansas Register*;
- Review the proposed rules and regulations with the Joint Committee. KSA 77-436 requires the Joint Committee to review all proposed rules and regulations during the public comment period, which is at least 60 days for all rules and regulations, except for certain hunting and fishing activities and for permanent prior authorization on a prescription-only drug (KSA 2020 Supp. 39-7,120), for which the public comment period is at least 30 days;
  - The Joint Committee is required to issue a report to the Legislature following each meeting making comments and recommendations and indicating concerns about any proposed rule and regulation. The reports are posted on the [KLRD webpage](#) for the Joint Committee. Agencies are asked to respond to any and all comments and questions; those responses are included in Joint Committee records and summarized in its annual report;
  - The Joint Committee may introduce such legislation as it deems necessary in performing its functions of reviewing administrative rules and regulations;
- Hold the public hearing and cause minutes or other records of the meeting to be made;
- Prepare a statement of the principal reason for adopting the rules and regulations, including reasons for not accepting substantial arguments made in comments and reasons for any substantial change from the proposal;
- Initiate new rulemaking proceedings if the final rule and regulation would differ in subject matter or effect in any material respect from the rule and regulation as originally proposed or the rule and regulation is not the logical outgrowth of the rule and regulation as originally proposed;
- Adopt the rules and regulations. At the time it adopts or amends a rule and regulation, the state agency is required to prepare a concise statement of the

principal reasons for adopting the rule and regulation or amendment thereto, including:

- The agency's reasons for not accepting substantial arguments made in testimony and comments; and
  - The reasons for any substantial change between the text of the proposed adopted or amended rule and regulation contained in the published notice of the proposed adoption or amendment of the rule and regulation and the text of the rule and regulation as finally adopted; and
- File the rules and regulations and associated documents with the Secretary of State.

A permanent rule and regulation takes effect 15 days after publication in the *Kansas Register* (KSA 77-426). The Secretary of State, as directed by KSA 2021 Supp. 77-417, endorses on each rule and regulation its date of filing, maintains a file of rules and regulations for public inspection, keeps a complete record of all amendments and revocations, indexes the filed rules and regulations, and publishes the rules and regulations. The Office of the Secretary of State publishes new, amended, or revoked regulations in the *Kansas Register* and compiles the adopted regulations in the KAR Volumes and Supplements and on the Office's website. The Secretary of State is authorized to return to the state agency or otherwise dispose of any document that had been adopted previously by reference and filed with the Secretary of State.

## Legislative Review and Statutory Legislative Actions

The 12-member Joint Committee is required by KSA 77-436 to review proposed rules and regulations during the public comment period prior to the required public hearing on the proposed regulations, as noted above. Recent legislative changes to the Rules and Regulations Filing Act have not changed this review and comment process or opportunities for legislation.

**Committee comments and reports.** The Joint Committee provides comments reflecting its concerns or recommendations to the agency for consideration at the time of the agency's public hearing on the proposed rules and regulations. The Joint Committee requests the agency reply to it in writing to respond directly to each comment made. It also requests information on any amendments to the proposed rules and regulations made after the Joint Committee hearing and any delays in the adoption or the withdrawal of the rules and regulations.

Since 2018, KSA 77-436 has required the Joint Committee to issue a report to the Legislature of its comments to the agencies following each meeting; these reports are posted on the Joint Committee's [page](#) within the KLRD website and are distributed to the agencies. KLRD maintains a database of responses to Joint Committee comments, reports on those responses to the Joint Committee, and summarizes the comments and responses in the Committee's annual report. The annual report also includes a summary of provisions in legislation enacted in that year that authorize, require, clarify, or remove authority for rules and regulations.

**Committee-introduced legislation.** The Joint Committee may introduce legislation it deems necessary in the performance of its review functions (KSA 77-436(e)).

**Legislative concurrent resolution.** Provisions of KSA 77-426(c) authorize the Legislature to adopt a concurrent resolution expressing its concern with any temporary or permanent rule and regulation filed during the preceding year and requesting revocation or amendment of such rule and regulation.

## **Amendments to Rule and Regulation Procedures**

Few bills since 2000 have changed the basic procedures for agency adoption of rules and regulations and legislative review of them.

### **2008**

**SB 579** (L. 2008, ch. 25) required state agencies to consider the impact of proposed rules and regulations on small employers. (These provisions, in KSA 77-416, were expanded in 2018.) The bill defined “small employer” in KSA 77-415 as any person, firm, corporation, partnership, or association with 50 or fewer employees, the majority of whom are employed in Kansas.

### **2010**

**House Sub. for SB 213** (L. 2010, ch. 95) revised law on rules and regulations by removing obsolete language and authorized publication of the KAR in paper or electronic form by the Secretary of State (KSA 77-430). In addition, the bill amended definitions and the exclusion of certain rules and regulations from the Act (KSA 77-415). Certain procedures to be followed in the rulemaking process and procedures were also revised. One provision requires state agencies to begin new rulemaking procedures when the adopted rules and regulations differ in subject matter or effect in a material respect from those reviewed by the Joint Committee (KSA 77-421).

### **2011**

**HB 2027** (L. 2011, ch. 14) named the Rules and Regulations Filing Act (Act) and simplified the definitions of terms such as “rule and regulation” and removed certain obsolete exclusions. It also expanded the definition of “person” to include individuals and legal or commercial entities that previously had not been included (KSA 77-415).

The bill gave precedential value to orders (KSA 77-415) issued in an adjudication against a person who was not a party to the original adjudication when the order is:

- Designated by the agency as precedent;
- Not overruled by a court or other adjudication; and
- Disseminated to the public through the agency website or made available to the public in any other manner required by the Secretary of State.

The bill provided that agency-issued forms, the contents of which are governed by rule and regulation or statute, and guidance and information the agency provides to the public do not give rise to a legal right or duty and are not treated as authority for any standard, requirement, or policy reflected in the forms, guidance, or information.

The bill provided for the following to be exempt from the Act (KSA 77-415):

- Policies relating to the curriculum of a public educational institution or to the administration, conduct, discipline, or graduation of students from such institution;
- Parking and traffic regulations of any state educational institution under the control and supervision of the State Board of Regents; and
- Rules and regulations relating to the emergency or security procedures of a correctional institution and orders issued by the Secretary of Corrections or any warden of a correctional institution, to which other procedures apply.

The bill authorized state agencies to issue guidance documents without following the procedures set forth in the Act. Under the terms of this section (KSA 77-438), guidance documents may contain binding instructions to state agency staff members, except presiding officers, concerning their duties. The bill required each state agency to maintain an index of the guidance documents, publish the index on the agency's website, make all guidance documents available to the public, file the index in any other manner required by the Secretary of State, and provide a copy of each guidance document to the Joint Committee.

## **2012**

**SB 252** (L. 2012, ch. 61) changed notice requirements in KSA 77-421 from 30 days to 60 days for new rulemaking proceedings when an agency proposes to adopt a final rule and regulation that:

- Differs in subject matter or effect in any material respect from the rule and regulation as originally proposed; and
- Is not a logical outgrowth of the rule and regulation as originally proposed.

## **2018**

**HB 2280** (L. 2018, ch. 117) made several changes to the Act:

- Granted new authority to the Director of the Budget to review and approve proposed rules and regulations (KSA 77-420);
- Added certain economic analysis requirements (KSA 77-416);
- Added a member of the minority party and a representative of an appropriations committee to the State Rules and Regulations Board (KSA 77-423);

- Added a ranking minority member to the Joint Committee (KSA 77-436);
- Requires reports to the Legislature from the Joint Committee after each meeting (KSA 77-436); and
- Required the Legislative Post Audit Committee, in 2021, to direct the Legislative Division of Post Audit to evaluate the implementation of the new provisions contained in the bill (KSA 77-416).

## **2021**

**HB 2391** (L. 2021, ch. 61), a bill amending law regarding business filing and publication duties of the Secretary of State, removed a requirement that the price of KARs be set in rules and regulations (KSA 45-107). The price of the KARs is to recover costs of publishing and storing the KARs.