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State and Local Government

J-1 Administrative Rule and Regulation 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. In 1984, the Kansas Supreme Court, in *State Ex Rel. Stephan v. Kansas House of Representatives* (236 Kan. 45), 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 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 (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. 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.

Administrative rules and regulations are developed using the *Policy and Procedure Manual for the Filing of Kansas Administrative Regulations* developed by the Kansas Department of Administration.

Rule and Regulation Authority—Examples

Regulations serve to implement or interpret legislation administered by a state agency. The statutory authority for the agency to adopt

these rules and regulations is found in enabling legislation, as illustrated in the language found in the below legislation.

Kansas Amusement Ride Act (2017 Session)

The Secretary of Labor shall adopt rules and regulations necessary to implement provisions of the Kansas Amusement Ride Act (2017 House Sub. for SB 86, amending KSA 44-1613).

Acupuncture Practice Act (2016 Session)

The Board [of Healing Arts] shall promulgate all necessary rules and regulations which may be necessary to administer the provisions of this act and to supplement the provisions herein (2016 HB 2615, KSA 65-7615).

Powers of the Secretary (KSA 32-807)

The Secretary [of Wildlife, Parks and Tourism] shall have the power to: (a) Adopt, in accordance with KSA 32-805 and amendments thereto [approval, modification and approval, or rejection of proposed rules and regulations by the Wildlife, Parks and Tourism Commission], such rules and regulations as necessary to implement, administer and enforce the provisions of wildlife, parks and tourism laws of this state; . . .

Rules and regulations of the Kansas Lottery are exempt from the Act (KSA 74-8710).

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 Legislature's review of the agency regulations.

The Regulation Adoption Process

Administrative rules and regulations may be temporary or permanent. A temporary rule and

regulation, as defined in KSA 2018 Supp. 77-422, may be adopted by an agency if the State Rules and Regulations 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 State Rules and Regulations Board and may remain effective for no more than 120 days, beginning with the date of approval by the State Rules and Regulations 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.

KSA 2018 Supp. 77-420 and 77-421 outline the process for the adoption of permanent Kansas Administrative Regulations (KAR) 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 2018 Supp. 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 costs incurred by businesses, local government, or individuals would be \$3.0 million or less over a two-year period. The Director will approve the proposed rule and regulation for submission to the Secretary of Administration and Attorney General if it is determined the impact is less than or equal to \$3.0 million. If the impact 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, the agency found the costs have been accurately determined and are necessary for 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, including whether the rule and regulation is within the authority of 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 2018 Supp. 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 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 2018 Supp. 39-7,120), for which the public comment period is at least 30 days;
 - 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; 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 2018 Supp. 77-417, endorses on each rule and regulation filed at the time and 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 the adopted regulations in the KAR Volumes and Supplements and on the Office's website.
- In addition, new, amended, or revoked regulations are published in the *Kansas Register* as they are received. 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

The 12-member Joint Committee is required by KSA 2018 Supp. 77-436 to review proposed rules and regulations during the public comment period prior to the required public hearing on the proposed regulations. Recent legislative changes to the Act have not changed this review process. The Joint Committee may introduce legislation it deems necessary in the performance of its review functions. Provisions of KSA 77-426 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.

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. KSA 2018 Supp. 77-436 also

requires the Joint Committee to issue a report of those comments to the Legislature following each meeting. The Joint Committee requests the agency reply to it in writing to respond directly to each comment made, and to detail any amendments in 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. KLRD maintains a database of responses to Joint Committee comments and reports on those responses to the Joint Committee.

As part of its review process, the Joint Committee examines economic impact statements that are prepared by agencies, as required by law, and accompany the proposed rules and regulations.

Each year, KLRD prepares a report on the oversight activities of the Joint Committee; the 2019 electronic report is available on the KLRD website at <http://www.kslegresearch.org/KLRD-web/Publications/CommitteeReports/2019CommitteeReports/jcarr'18-'19-cr.pdf>. The report also includes a summary of provisions in legislation enacted in that year that authorize, require, or clarify authority for rules and regulations.

Recent 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 (2008 Session Law, Chapter 25) required state agencies to consider the impact of proposed rules and regulations on small employers. (These provisions were expanded in 2018.) The bill defined “small employer” 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 (2010, Chapter 95) revised the Act by removing obsolete language and authorized publication of the KAR in paper or electronic form by the Secretary of State. In addition, the bill amended definitions used in the Act and in the exclusion of certain rules and regulations from the Act. Certain procedures to be followed in the rule-making process and procedures were also revised. One provision requires state agencies to begin new rule-making procedures when the adopted rules and regulations differ in subject matter or effect in a material respect from those proposed and reviewed by the Joint Committee. Under these conditions, the public comment period could be shortened to not less than 30 days.

2011

HB 2027 (2011, Chapter 14) amended the Act by simplifying the definitions of terms such as “rule and regulation” and removing certain exclusions that had not been used, such as those relating to use of the highways and made known to the public through the use of signals. It also expanded the definition of “person” to include individuals and legal or commercial entities that previously had not been included.

The bill gave precedential value to orders 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 also allowed statements of policy to be treated as binding within the agency when directed to agency personnel concerning their duties or the internal management or organization of the agency.

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.

Further, the bill provided for the following to be exempt from the Act:

- 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.

In those instances, statutes that specify the procedures for issuing rules and regulations will apply rather than the procedures outlined in the Act.

The bill created a new section giving state agencies the authority to issue guidance documents without following the procedures set forth in the Act. Under the terms of this section (KSA 2018 Supp. 77-438), guidance documents may contain binding instructions to state agency staff members, except presiding officers. Presiding officers and agency heads may consider the guidance documents in an agency adjudication, but are not bound by them.

To act in variance with a guidance document, an agency must provide a reasonable explanation for the variance and, if a person claims to have reasonably relied on the agency's position, the explanation must include a reasonable justification for the agency's conclusion that the need for the variance outweighs the affected person's reliance interests. 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 (2012, Chapter 61) changed notice requirements from 30 days to 60 days for new rule-making 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.

2013

Enactment of HB 2006 (2013, Chapter 2) removed "Kansas" from the name of the Act.

2018

HB 2280 (2018, Chapter 117) made several changes to the Act:

- Granted new authority to the Director of the Budget to review and approve proposed rules and regulations;
- Added a member of the minority party and a representative of an appropriations committee to the State Rules and Regulations Board;
- Added a ranking minority member to the Joint Committee;
- Requires reports to the Legislature from the Joint Committee after each meeting; and
- Requires 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.

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