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TO: Senate Judiciary Committee

FROM: Kansas Judicial Council -- Judge Steve Leben

DATE: March 3, 2011

RE: Testimony on 2011 HB 2027 amending the Rules and Regulations Filing Act

The Judicial Council recommends 2011 HB 2027, a bill that was drafted by the Council's Administrative Procedure Advisory Committee. A copy of the Advisory Committee's formal report to the Judicial Council is attached to this testimony. It includes a list of the Advisory Committee members who participated in the study that led to the introduction of HB 2027.

There are two different subjects addressed by the proposed amendments to the Kansas Rules and Regulations Filing Act. First, the bill tries to clear up when an agency must follow the formal procedures for public notice and comment before adopting a regulation. Second, the bill establishes a new process for agencies to let the public know about the agency's present interpretation of the statutes it administers.

Let me start with one quick legal point – in general, what's an agency rule or regulation? In many statutes, you give agencies the authority to adopt rules and regulations that are consistent with the statute but provide additional detail. Those rules or regulations have the force of law, just as a statute does, so long as they are adopted under statutory authority and are not in conflict with the statute. So it's an important thing.

Presently, K.S.A. 77-421 requires that rules and regulations be adopted only after public notice and comment, and that certain other procedures be followed in rulemaking by administrative agencies. The rules they make through this process have the force of law if authorized by statute.

K.S.A. 77-415 defines what is a rule or regulation, and it has a laundry list of exemptions. The list includes things that wouldn't fit within the idea of a rule or regulation, anyway, like rules for the internal management of an agency that do not affect private rights or interests. But the list also defines out of the term "rule and regulation" some things that otherwise *would* be a rule or regulation, which means a rule of general applicability to all.

K.S.A. 77-421a talks about procedures for the adoption of *exempt* regulations, and it says that something that is exempt from the definition of rule and regulation "by virtue of the definition" in K.S.A. 77-415 "shall be adopted in the manner prescribed in K.S.A. 77-421," which is the statute we just talked about that sets out the procedures for public notice for all rules and regulations!

So, at least in one literal reading of these statutes, K.S.A. 77-415 defines what's a rule and regulation and has lots of exemptions. K.S.A. 77-421 tells agencies to follow a detailed set of procedures for the non-exempt rules and regulations. And K.S.A. 77-421a says to use the same procedures for the exempt regulations!

Not surprisingly, when we surveyed state agencies, we found considerable uncertainty about how to apply these statutes. Some felt that exempt regulations could be adopted without following the procedures of K.S.A. 77-421, but there would be a risk in a legal challenge that the regulation might be held to be invalid.

We have tried to simplify the Rule and Regulation Filing Act on these issues so that there will be a clear answer. We have also tried in every case in which a state agency indicated that it still relied upon a listed exemption to make sure that the exemption was preserved in our rewrite.

Under the bill, with only very limited exemptions, only agency rules that follow the public notice-and-comment procedures will have binding legal effect.

We retained exemptions for:

- Things that aren't really rules and regulations at all, like orders entered after an agency adjudication or statements of internal agency management.
- Guidance documents, which I will talk more about in a minute.
- Some specific exemptions from the current list that are needed, like rules adopted by the Secretary of Corrections relating to security procedures in correctional institutions, which need to be adopted quickly in many cases, and parking and traffic regulations on state university campuses. These were previously exempt regulations under the current K.S.A. 77-415.

- We have also provided that if an agency's own authorizing statutes provide for a different procedure for that agency, the more-specific statute for that agency will prevail.

As revised, unless specifically exempted, rules and regulations may be adopted only through the procedures set out in K.S.A. 77-421. K.S.A. 77-421a, which used to say to follow the same procedures for exempt regulations, is deleted. Thus, unless an agency's organic statute requires some specific procedure for adopting a regulation in the limited circumstances we have set out in the amended K.S.A. 77-415, no specific public notice and comment period would be required. That certainly makes sense for the Secretary of Corrections in making changes to security procedures. With respect to the other limited exemptions we have preserved, we believe this is consistent with the Legislature's intention of including them previously in an "exempt" list, which seems to have occurred over the years without regard to K.S.A. 77-421a's requirement that the same procedures be used to adopt exempt regulations as to adopt non-exempt ones.

We also eliminated the requirement that agencies submit their forms to the Joint Committee on Administrative Rules and Regulations for review. That change was considered appropriate by the committee and by the legislators we talked to who had been on that committee.

So that's the first of two areas we've addressed in this bill—clarifying which regulations are subject to notice-and-comment rulemaking and which are truly exempt.

The second area is a proposal for a new statutory provision specifically authorizing agencies to issue what are referred to as guidance documents. These are agency statements in essence about the agency's current approach or interpretation of the law that agency administers—but without having the force of law. Agencies often have interpretative rules or policy statements that are used by the agency's staff in administering the programs under that agency's jurisdiction throughout the state. This new provision would encourage giving broad public access to these documents so that the public will know what an agency's position is. Each agency would have to maintain an index of its guidance documents on its website, and the documents themselves would have to be publicly available.

Doing this will help Kansas citizens and businesses. It's easier for someone to avoid an unintentional violation of a law – or what the agency thinks the law is – if you know the agency's position.

Often, especially in technical areas, the Legislature will give the agency administering a law considerable leeway to determine various things. In the environmental area, KDHE might have to struggle with the specific definition, say, of what a "point source" is for pollution control purposes. If the agency's interpretation is known, and if that interpretation doesn't cause any problem for a private party, that party can simply proceed based on the guidance document rather than engaging in extensive legal consultations, regulatory proceedings, or even litigation.

We had included a longer version of this guidance document provision in the bill we submitted last year. The House Judiciary committee approved it, but it was later deleted in the House before last year's bill came to the Senate, based in part on concerns expressed by Rep. Neufeld. We have revised the provision into one that I believe still accomplishes the purpose we had intended to achieve of giving the public access to agency interpretations of its statutory authority, for the reasons I've noted. Although Rep. Neufeld is no longer in the House, he attended the meetings at which we discussed and adopted this revised guidance-document provision. He was not a voting member of the group but he did not express any objection to this revised proposal.

House Amendments

The bill was amended both in the House Judiciary Committee and on the House floor. The Judicial Council Administrative Procedure Advisory Committee has discussed the amendments via email and has no objection to any of them. The Advisory Committee did want to point out that, as to the amendment to Section 4 providing that all guidance documents be given to the Joint Committee on Administrative Rules and Regulations, we didn't include such a provision because we didn't think the Joint Committee would want to be burdened by having all of these documents come to them. But if that is the Legislature's preference, we certainly have no objection.

**REPORT OF THE JUDICIAL COUNCIL
ADMINISTRATIVE PROCEDURE ADVISORY COMMITTEE
ON "EXEMPT" RULES AND REGULATIONS AND GUIDANCE DOCUMENTS**

BACKGROUND

In 2009, the Judicial Council's Administrative Procedure Advisory Committee conducted a study of the Rules and Regulations Filing Act, K.S.A. 77-415 *et seq.* The Committee recommended a number of amendments to improve public access to and notice of the rulemaking process and to give the Secretary of State's office more flexibility in the filing and publication of rules and regulations. See 2010 H. Sub for SB 213. However, at the time the Committee finalized the proposed legislation, the issue of "exempt" rules and regulations remained on the Committee's agenda for further study. During the 2010 session, a provision relating to guidance documents was deleted from the Committee's proposed legislation, so that issue was also placed on the Committee's agenda.

COMMITTEE MEMBERSHIP

The members of the Administrative Procedure Advisory Committee are:

Carol L. Foreman, Chair, Topeka; former 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

Two additional persons with rulemaking expertise also served 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

The Administrative Procedure Advisory Committee held several meetings, solicited input from state agencies, and circulated drafts of proposed amendments to state agency legal counsel for comment. The Committee also invited Representative Melvin Neufeld to participate during the study because of his interest in 2010 H. Sub for SB 213 and experience with legislative oversight of the rulemaking process.

COMMITTEE RECOMMENDATION

Exempt rules and regulations: the problem

Current Kansas law defines “rule and regulation” to mean “a standard, statement of policy or general order . . . of general application and having the effect of law, issued or adopted by a state agency to implement or interpret legislation enforced or administered by such state agency or to govern the organization or procedure of such state agency.” See K.S.A. 77-415(d)(1) (as amended by L. 2010, Ch. 95, Sec. 1). The statute then provides a laundry list of rules and regulations which are not rules and regulations for purposes of the act – in other words, “exempt” rules and regulations. See K.S.A. 77-415(d)(2). The Committee found that the

laundry list of “exempt” rules and regulations in K.S.A. 77-415(d)(2) actually contains two different categories of rules: 1) agency actions, such as policy statements and orders, that are not rules and regulations at all, and 2) specific types of rules and regulations that are subject to only a limited rulemaking process. However, the Act treats both of these categories in the same manner.

The Committee also found the Rules and Regulations Filing Act to be unclear as to what process is required to adopt an “exempt” rule and regulation. K.S.A. 77-421a provides that “exempt” rules and regulations “shall be adopted in the manner prescribed by K.S.A. 77-421 and amendments thereto after notice has been given and a hearing held in the manner prescribed by K.S.A. 77-421 and amendments thereto.” The Committee believes this provision can be interpreted in two different ways. One possible interpretation of the statute is that any exempt rule and regulation listed in K.S.A. 77-415(d)(2) must be adopted using the process set out by K.S.A. 77-421. Another possible interpretation is that K.S.A. 77-421 must be followed only if an agency wants the exempt rule and regulation to be an actual rule and regulation, in other words, to have the force and effect of law. The committee was concerned that, under either interpretation, agency actions that are not rules and regulations (such as adjudicatory orders) might be required to go through procedures that were unnecessary and inappropriate.

The Committee solicited input from state agencies about how they interpret and apply K.S.A. 77-415 and 77-421a, and whether they currently adopt “exempt” rules and regulations. The responses the Committee received indicated that the current statutes have created considerable uncertainty and that agencies understand and apply the statutes in various ways. The responses also indicated that few agencies promulgate “exempt” rules and regulations in reliance on a specific exception in K.S.A. 77-415.

The Solution: Recommended Amendments

In Section 1 of the bill, the Committee recommends amending K.S.A. 77-415 to clarify and simplify the definition of rule and regulation and eliminate the long list of kinds of agency action excluded from the definition of rules and regulations contained in K.S.A. 77-415(d)(2).

The Committee also recommends repealing K.S.A. 77-421a relating to an abbreviated process for the "exempt" rules and regulations listed in K.S.A. 77-415(d)(2). In drafting the proposed amendments, the Committee's primary goals were to resolve the confusion surrounding exempt rules and regulations, to clarify the terminology used in the statutes, and to encourage consistency in agency procedure and practice.

The central premise of the Committee's recommendation is that, except for a few specific exemptions, only agency rules and regulations that comply with the procedures of the Rules and Regulations Filing Act can have binding legal effect. This premise is expressly stated in new subsection K.S.A. 77-415(b)(1). New subsections K.S.A. 77-415(b)(2)(A) through (D) specify the extent to which agencies may continue to articulate policy through actions that are not rules and regulations, including orders following adjudications, personnel and other internal policies, use of forms, and publication of information and guidance to the public, while specifying that internal policies, forms, and information or guidance may not bind the public. These provisions correspond to some exclusions from the definition of rules and regulations under current law.

After receiving comments from the State Board of Regents, State Board of Education, and Department of Corrections, the Committee also included exemptions for certain policies relating to public educational institutions and certain rules and orders relating to correctional institutions. See new subsection K.S.A. 77-415(b)(2)(E). Again, these provisions correspond to exclusions under current law.

New subsection K.S.A. 77-415(b)(2)(F) provides that, if an agency's organic statutes provide some other procedure for adopting rules and regulations or other policies, those provisions apply instead of the Rules and Regulations Filing Act.

The definitions (which used to be subsections) have been consolidated as numbered paragraphs in subsection (c). The definition of rules and regulations contained in new K.S.A. 77-415(c)(4) has been amended so that it is relatively short and includes any policy with binding legal effects. The definition of person contained in new K.S.A. 77-415(c)(3) has been amended to include an individual or any other legal or commercial entity.

The Committee's recommended amendments would eliminate most of the specific exclusions for particular kinds of "exempt" rules and regulations. Along with eliminating the concept of "exempt" rules and regulations, the Committee recommends repealing K.S.A. 77-421a. The Committee found that statute has proven confusing in its application, as agency comments revealed that different agencies interpret the statute differently. In addition, the provision appeared to have little, if any, actual impact on agency practice.

Sections 2 and 3 of the bill contain some technical clean-up amendments as a result of 2010 H. Sub for SB 213. Section 3 also eliminates references to "exempt" rules and regulations since those will no longer exist under the bill.

Finally, the Committee recommends moving the current language of K.S.A. 77-438 (Section 4) to the beginning of new K.S.A. 77-415(a). This change is technical and not substantive.

Guidance documents

In Section 4 of the bill, the Committee recommends amending K.S.A. 77-438 to add a new guidance document provision to the Rules and Regulations Filing Act. The guidance document provision is designed to encourage agencies to advise the public of their 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 and is not binding. The section recognizes the agencies' need to use such documents to guide both agency employees and the public. The statutes and regulations an agency implements often require interpretation or entail discretion in their application, and the public has an interest in knowing the agency's position. 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.

Section 4 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.

Section 4 is based, in part, upon section 311 of the Revised Model State Administrative Procedure Act (2010). The above comments are based, in part, upon the Model Act comments to section 311.

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