

November 19, 2010

**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

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). A redline version showing the specific amendments can be found at pages 7-10 of this report. 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(a)(1). New subsections K.S.A. 77-415(a)(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 subsections K.S.A. 77-415(a)(2)(E) and (F). Again, these provisions correspond to exclusions under current law.

New subsection K.S.A. 77-415(a)(2)(G) 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 (b). The definition of rules and regulations contained in new K.S.A. 77-415(b)(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(b)(3) has been amended

to include a person, 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.

Finally, the Committee recommends repealing K.S.A. 77-438 and placing its contents at the beginning of new K.S.A. 77-415(a). This change is technical and not substantive.

Guidance documents

The Committee also recommends that a new guidance document provision be added to the Rules and Regulations Filing Act. See proposed new section at page 11 of this report. 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.

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, 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.

K.S.A. 77-415. Citation of act; general provisions; definitions.

(a) K.S.A. 77-415 through 77-437, and amendments thereto, shall be known and may be cited as the Kansas rules and regulations filing act.

(1) Unless otherwise provided by statute or constitutional provision each rule and regulation issued or adopted by a state agency must comply with the requirements of the Kansas rules and regulations filing act. Except as provided in this section, any standard, requirement or other policy of general application may be given binding legal effect only if it has complied with the requirements of the Kansas rules and regulations filing act.

(2) Notwithstanding the provisions of this section:

(A) An agency may bind parties, establish policies, and interpret statutes or regulations by order in an adjudication pursuant to procedures provided by law; provided, however, that no non-party to an adjudication may be adversely affected by an order unless the order is readily available to the public.

(B) Statements of agency policy directed to agency personnel relating to the performance of their duties or the internal management or organization of the agency may be treated as binding within the agency, but such statements may not be relied on to bind the general public.

(C) Agencies may provide forms, the content or substantive requirements of which are prescribed by rule and regulation or statute; provided, however, that no form may give rise to any legal rights or duties or be treated as authority for any standard, requirement or policy reflected therein.

(D) Agencies may provide guidance or information to the public describing agency policies or statutory or regulatory requirements; provided, however, that no guidance or information may give rise to any legal rights or duties or be treated as authority for any standard, requirement or policy reflected therein.

(E) Policies relating to the curriculum of public educational institutions or to the administration, conduct, discipline, or graduation of students from such institutions, as well as parking and traffic regulations of state educational institutions under the control and supervision of the state board of regents shall not be subject to the Kansas rules and regulations filing act.

(F) Rules and regulations relating to the emergency or security procedures of a correctional institution, as defined in subsection (d) of K.S.A. 75-5202, and amendments thereto, and orders issued by the secretary of corrections or wardens of correctional institutions under K.S.A. 75-5256, and amendments thereto, shall not be subject to the Kansas rules and regulations filing act.

(G) When a statute authorizing an agency to issue rules and regulations or take other action specifies the procedures for doing so, those procedures shall apply instead of the procedures in the Kansas rules and regulations filing act.

(b) As used in K.S.A. 77-415 through 77-437, and amendments thereto the Kansas rules and regulations filing act, unless the context clearly requires otherwise:

~~(a)~~ (1) “Board” means the state rules and regulations board established under the provisions of K.S.A. 77-423, and amendments thereto.

~~(b)~~ (2) “Environmental rule and regulation” means:

(1) (A) A rule and regulation adopted by the secretary of agriculture, the secretary of health and environment or the state corporation commission, which has as a primary purpose the protection of the environment; or

(2) (B) a rule and regulation adopted by the secretary of wildlife and parks concerning threatened or endangered species of wildlife as defined in K.S.A. 32-958, and amendments thereto.

~~(c)~~ (3) “Person” means a person, individual, firm, association, organization, partnership, business trust, corporation, or any other legal or commercial entity.

~~(d)~~ (4) “Rule and regulation,” “rule,” and “regulation” mean a standard, requirement or other policy of general application, including amendments or revocations thereof, issued or adopted by a state agency to implement or interpret legislation, that has the force and effect of law. and words of like effect mean a standard, statement of policy or general order, including amendments or revocations thereof, 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. Every rule and regulation adopted by a state agency to govern its enforcement or administration of legislation shall be adopted by the state agency and filed as a rule and regulation as provided in this act. The fact that a statement of policy or an interpretation of a statute is made in the decision of a case or in a state agency decision upon or disposition of a particular matter as applied to a specific set of facts does not render the same a rule and regulation within the meaning of the foregoing definition, nor shall it constitute specific adoption thereof by the state agency so as to be required to be filed.

(2) A rule and regulation as herein defined shall not include any rule and regulation which:

(A) Relates to the internal management or organization of the agency and does not affect private rights or interest;

(B) is an order directed to specifically named persons or to a group which does not constitute a general class and the order is served on the person or persons to whom it is directed by appropriate means. The fact that the named person serves a group of unnamed persons who will be affected does not make such an order a rule and regulation;

(C) relates to the use of highways and is made known to the public by means of signs or signals;

(D) relates to the construction and maintenance of highways or bridges or the laying out or relocation of a highway other than bidding procedures or the management and regulation of rest areas;

(E) relates to the curriculum of public educational institutions or to the administration, conduct, discipline, or graduation of students from such institutions or relates to parking and traffic regulations of state educational institutions under the control and supervision of the state board of regents;

~~(F) relates to the emergency or security procedures of a correctional institution, as defined in subsection (d) of K.S.A. 75-5202, and amendments thereto;~~
~~(G) relates to the use of facilities by public libraries;~~
~~(H) relates to military or naval affairs other than the use of armories;~~
~~(I) relates to the form and content of reports, records or accounts of state, county or municipal officers, institutions, or agencies;~~
~~(J) relates to expenditures by state agencies for the purchase of materials, equipment, or supplies by or for state agencies, or for the printing or duplicating of materials for state agencies;~~
~~(K) establishes personnel standards, job classifications, or job ranges for state employees who are in the classified civil service;~~
~~(L) fixes or approves rates, prices, or charges, or rates, joint rates, fares, tolls, charges, rules, regulations, classifications or schedules of common carriers or public utilities subject to the jurisdiction of the state corporation commission, except when a statute specifically requires the same to be fixed by rule and regulation;~~
~~(M) determines the valuation of securities held by insurance companies;~~
~~(N) is a statistical plan relating to the administration of rate regulation laws applicable to casualty insurance or to fire and allied lines insurance;~~
~~(O) is a form, the content or substantive requirements of which are prescribed by rule and regulation or statute;~~
~~(P) is a pamphlet or other explanatory material not intended or designed as interpretation of legislation enforced or adopted by a state agency but is merely informational in nature;~~
~~(Q) establishes seasons and fixes bag, creel, possession, size or length limits for the taking or possession of wildlife, if such seasons and limits are made known to the public by other means;~~
~~or~~
~~(R) establishes records retention and disposition schedules for any or all state agencies.~~
~~(e) (5) “Rulemaking” shall have the meaning ascribed to it in K.S.A. 77-602, and amendments thereto.~~

~~(f) (6) “Small employer” means any person, firm, corporation, partnership or association that employs not more than 50 employees, the majority of whom are employed within this state.~~

~~(g) (7) “State agency” means any officer, department, bureau, division, board, authority, agency, commission or institution of this state, except the judicial and legislative branches, which is authorized by law to promulgate rules and regulations concerning the administration, enforcement or interpretation of any law of this state.~~

~~K.S.A. 77-421a. Procedure for adoption of rules and regulations not subject to 77-415 et seq.; exception.~~

~~Whenever any officer, department, bureau, division, board, authority, agency, commission or institution of this state, except the judicial and the legislative branches, is authorized by law to promulgate rules and regulations concerning the administration, enforcement or interpretation of any law of this state, and such rules and regulations are exempt from the requirements of K.S.A. 77-415 et seq., and amendments thereto, by virtue of the definition of “rule or regulation” in~~

~~subsection (e) of K.S.A. 77-415, and amendments thereto, such 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. This section shall not apply to orders issued by directors of correctional institutions under K.S.A. 75-5256, and amendments thereto.~~

~~77-438. Citation of act. K.S.A. 77-415 to 77-437, inclusive, and acts amendatory thereof or supplemental thereto shall be known and may be cited as the rules and regulations filing act.~~

Proposed Guidance Document Provision

New section to be included in the rules and regulations filing act:

(a) A state agency may issue a guidance document without following the procedures set forth in this act for the adoption of rules and regulations. “Guidance document” means a record of general applicability, designated by an agency as a guidance document, that lacks the force of law but states the agency’s current approach to, or interpretation of, law, or general statements of policy that describe how and when the agency will exercise discretionary functions.

(b) A guidance document may contain binding instructions to state agency staff members except officers who preside in adjudicatory proceedings.

(c) If a state agency proposes to act in an adjudication at variance with a position expressed in a guidance document, it shall provide a reasonable explanation for the variance. If an affected person in an adjudication may 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.

(d) Each state agency shall maintain an index of all of its currently effective guidance documents, publish the index on its website, make all guidance documents available to the public, and file the index in the manner prescribed by the secretary of state.

(e) A guidance document may be considered by a presiding officer or agency head in an agency adjudication but it does not bind any party, the presiding officer or the agency head.