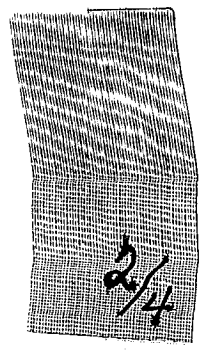
Approved: 3/10/2010

Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE



The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on February 4, 2010, in Room 346-S of the Capitol.

All members were present except:
Representative John Grange- excused

Committee staff present:
Jason Long, Office of the Revisor of Statutes
Matt Sterling, Office of the Revisor of Statutes
Jill Wolters, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the Committee:
Judge Steve Leben, Court of Appeals for Kansas Judicial Council
Luke Bell, Kansas Association of Realtors

Others attending:
See attached list.

The hearing on **HB 2530** - Rules and regulations filing act as opened.

Ken Wilke, Senior Assistant Revisor of Statutes, addressed the committee since he was very familiar with this bill and said the amendments were proposed by the Judicial Council. The amendments update the Rules and Regulations Filing Act by removing obsolete language and preparing the way for future publication of the Kansas Administrative Rules and Regulations in electronic form by the Secretary of State. He proceeded to walk the committee thru a summary of the changes in each section. (Attachment 1)

Judge Steve Leben, stated he was a member of the Administrative Procedure Advisory Committee and participated in this study. The Committee was particularly interested in finding ways to improve notice and public participation in rule-making and to take advantage of technology by utilizing internet and electronic transmission of information. He also advised Representative Jan Pauls (a member of the current House Judiciary Committee) also served on this committee during the study of the rule-making statutes. He also reviewed various changes and explanations by section. (Attachment 2)

Written testimony was submitted by Vickie Johnson, Chief Counsel for the Kansas Department of Transportation as a neutral position, however expressed concern of a provision that would likely cause contractual difficulties. (Attachment 3)

Written testimony was submitted by Dave Starkey, Chief Counsel for Kansas Department of Agriculture also as a neutral position, however he pointed out two issues that should be given consideration. (Attachment 4)

The hearing on **HB 2530** was closed.

The hearing on **HB 2529** - Continuation of certain exceptions to disclosure under the open records act was opened.

Chairman Kinzer reminded the committee that at the very beginning of the session we received an update from the work of the Special Committee on Judiciary which looked at the Open Records Act Exceptions.

Jill Wolters provided an overview of the bill and especially mentioned the following items:
(1) Two sections were stricken from the list and repealed in the bill: 74-7405a (corrections ombudsman records) and 79-1437f 9 (real estate sales validation questionnaire). Also section 2, as requested by the Special Committee, this section amends K.S.A. 2009 Supp. 38-1664 to add "guardian ad litem" to subsection (d) as a person who may view the confidential report of a foster parent under this subsection.

Minutes of the House Judiciary Committee at 3:30 p.m. on February 5, 2010, in Room 346-S of the Capitol.

Chairman Kinzer stated Chapter 17 and 56a is dealing with certain documents in the nature of annual reports corporations file. He asked the staff to provide a very specific answer to what is it in law if we strike the following statutes from the Open Records Act, that agencies could rely on that the State is not going to disclose the annual reports of businesses; 17-7503, 17-7505, 56-1a606, 56-1a607,56-1201, and 56a-1202. (Note: See minutes of February 16, 2009 for response/memo to this question.)

Chairman Kinzer told the committee as the Chairman of the Special Committee, he is actually the proponent of the bill and explained an overview of the process the committee used to arrive at the final product.

Representative Pauls pointed out a needed change on page 6, Line 35; it should say "and the juvenile offenders attorney if any." The revisors made note of such change.

Luke Bell, on behalf of Kansas Association of Realtors (KAR) spoke to the committee as an opponent. He stated under K.S.A. 79-1437c, no deed or instrument transferring the title to real property can be recorded by a county register of deeds unless it is accompanied by a real sales validation questionnaire. He stated this document contains confidential, private, and sensitive information on a real estate transaction and this document falls under all three categories listed in K.S.A. 45-229(a), which states the qualifications for the Kansas Legislature to consider when an exception to the Kansas Open Records Act is created or maintained. He urged the committee to restore the exception. (Amendment 5)

The hearing on **HB 2529** was closed.

HB 2226 - Allowing the attorney general or the county or district attorney to request of the district court the convening of a grand jury to investigate alleged violations of serious felonies.

Representative Whitham made the motion to report **HB 2226** favorably for passage.
Representative Patton seconded the motion.

Chairman Kinzer made a substitute motion to amend consistent with the balloon. (Attachment 6)
Representative Brookens seconded the motion.
Part A: Motion carried. Part B: Motion carried.

Note:
The four items on the balloon were split into Part A and Part B for voting purposes by the committee.
Part A: Includes three changes; (1) Line 18, add "the chief judge or the chief judge's designee;" (2) Line 22, add "chief judge or the chief judge's designee in;" (3) Line 23, add "as set forth in this subsection.
Part B: Line 21, striking "or 4" and adding, "4 or 5."

Representative Patton made the motion to pass **HB 2226** as amended.
Representative Jack seconded the motion. Motion carried.

The hearing on **HB 2226** was closed.

HB 2429 - Allowing the supreme court to eliminate and reassign district magistrate judge and district judge positions based on caseloads.

Jill Wolters presented the committee with a review of the bill that mainly repeals the one judge per county based on caseload.

After much discussion among the committee members, Chairman Kinzer stated we would be returning to further discussion on this bill at a later meeting.

The next meeting is scheduled for February 8, 2010.

The meeting was adjourned at 5:10 p.m.

JUDICIARY COMMITTEE GUEST LIST

DATE: 02-04-10

NAME	REPRESENTING
Vicky S. Johnson	KDOT
Dave Starkey	KDA
Richard Gannon	KPA
Laurel Klein Sparks	KCSDV
Beth Lange	SRS
Jeff Bottenberg	State Farm
Gail Bright	Office of the KS Securities Commissioner
Yoon Anderson	KOWE
Matt Casey	GBA
Mike Murray	Capitol Advantage
Ashley Sherard	Lenexa Chamber
Natalie Haag	Security Benefit
Jackson Lindsey	Hein Law
Sean Miller	Capitol Strategies

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MEMORANDUM

To: House Committee on Judiciary

From: Kenneth M. Wilke, Senior Assistant Revisor of Statutes

Date: February 4, 2010

Subject: House Bill 2530

House bill 2530 contains amendments the Rules and Regulations Filing Act, K.S.A. 77-415 et seq., and amendments thereto, proposed by the Judicial Council. Generally, these amendments update the act by removing obsolete language and preparing the way for future publication of the Kansas Administrative Rules and Regulations in electronic form by the Secretary of State. Below is a quick summary of the changes in each section.

Section 1. Allows an agency to issue a "guidance document" without going through the rule and regulation adoption process. The section describes the guidance document and its usage.

Section 2. Alphabetizes the existing definitions and includes a definition of "guidance document" in subsection (c).

Section 3. Grants rule and regulation authority to the Secretary of State.

Section 4. Deletes obsolete language.

Section 5. Subsection (a) deletes technical formats for rules and regulations and lets the Secretary of State prescribe the format.

Subsection (b) clarifies what is required from state agencies in economic and environmental impacts statements.

Section 6. Subsection (b) of this section has been moved from subsection (f) of section 5. It authorizes the Secretary of State to dispose of documents adopted by reference and previously filed with the Secretary of State.

House Judiciary
Date 2-4-10
Attachment # 1

Section 7. Deletes technical formats for rules and regulations and leaves such matters to the Secretary of State.

Section 8. Deletes obsolete language and clarifies the type of font to be used to show stricken language.

Section 9. Language regarding the Attorney General's opinion concerning whether or not the rules and regulation is within the agency's authority has been moved to subsection(b) (P. 10 lines 42-43 and p. 11, line 1).

Section 10. Subsection (a)(4) adds a new notice provision corresponding with the requirements of subsection(c).

Subsection (b)(1) updates and expands requirements on agency justification for adopting or amending a rule and regulation.

Subsection (c) is a **new provision** to provide criteria for when an agency change in a rule and regulation made after a public hearing requires starting the rule making process anew. This provision triggered the need for subsection (a) (4) above.

Section 11. Contains clean up language and a necessary change in cross reference.

Section 12. Aside from format changes, subsection (c)(3) extend the time a temporary rule and regulation is effective form 120 to 180 days and allows renewal for an additional 180 days.

Section 13. Allows for the designated executive branch officers to send designees to meeting of the state rules and regulations board.

Section 14. Removes an apparently unneeded restriction.

Section 15. Removes references to publishing by the Division of Printing and publishing in paper form.

Section 16. Allows for publication in electronic form.

Section 17. Redefines the distribution process for copies of the Kansas Administrative Regulations.

Section 18. Conforms the sale process for the Kansas Administrative Regulations to the process for the sale of the statute books.

Section 19. Concerns publication, distribution and sale of supplement for the Kansas Administrative Regulations.

Section 20. Concerns editorial authority of the Secretary of State regarding rules and regulations.

Section 21. Deletes references to review of agency forms by the Joint Committee on Administrative Rules and Regulations.

Section 22. Updates the named act section.

KANSAS JUDICIAL COUNCIL

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MEMORANDUM

TO: **House Judiciary Committee**

FROM: **Kansas Judicial Council - Judge Steve Leben**

DATE: **February 4, 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.

House Judiciary
Date 2-4-10
Attachment # 2

Approved by the Judicial Council
on December 4, 2009

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:

- 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.

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.

KANSAS
DEPARTMENT OF TRANSPORTATION

Mark Parkinson, Governor
Deb Miller, Secretary

http://www.ksdot.org

WRTTEN TESTIMONY SUBMITTED
HOUSE JUDICIARY COMMITTEE

REGARDING HOUSE BILL 2530
RELATED TO RULES AND REGULATIONS FILING ACT

February 4, 2010

Thank you for the opportunity to submit testimony on HB 2530. The Kansas Department of Transportation (KDOT) takes a neutral position on the majority of HB 2530. However, the provision which allows an administrative litigant to contest the wisdom of an agency guidance document, Section 1(b), would likely cause contractual difficulties , would allow a hearing officer to substitute their judgment on agency policy for that of the agency and would significantly widen the scope of some of the agency's administrative hearings.

HB 2530 would create new law addressing "guidance documents" created by state agencies which are used in administrative hearings. Guidance documents are defined as records of general applicability that lack the force of law but state the agency's current interpretation of law or a general statement of policy that describes how and when the agency will exercise discretionary functions. HB 2530 would require that during an administrative hearing a person be afforded a fair opportunity to contest the legality or wisdom of positions taken in the guidance document.

KDOT's concern with allowing challenges to the wisdom of the agency's policy statements as stated in guidance documents is best illustrated by an example. KDOT certifies project inspectors based upon their training and ability to perform the testing that is used by KDOT to verify conformity of materials and workmanship provided by the construction contractor.

These inspectors are trained and certified by KDOT and have contractually agreed to use KDOT guidance documents in performing their inspection work. When certified inspectors do not perform the testing according to the protocols spelled out in training and in KDOT guidance documents, their certification may be revoked and they have a right to an administrative hearing on the revocation.

While certainly KDOT agrees that a litigant should be entitled to contest the legality of an agency position, in this setting allowing them to contest the wisdom of using methods that they have either been hired as a KDOT employee to perform or hired as a consultant to perform, allows them to argue they should not have to perform in the way that their position description or contract requires.

If an inspector is allowed to contest the wisdom of the testing methods that KDOT guidance documents require be used, and is successful, the result could be a finding that the inspector should have been allowed to test by some other method that might have quite different criteria for acceptability of the contractor's work. The trickle down impact will be that the construction

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contractor is subjected to a moving target for conformity with the contract specifications and this will yield contract claims and lawsuits against the agency.

The possible claim from contractors would likely take the form of a claim that the product that the contractor supplied was acceptable under the inspector's test method. Therefore, KDOT may be liable for making the contractor redo work, increase pay for work that meets quality standards under the inspector's test method, or pay back liquidated damage awards for a product that was not timely. This example is just one of many that could arise from the provision of this bill that allows litigants to question the wisdom of state policy documents. The fiscal cost of allowing a hearing panel to question and possibly declare KDOT guidance documents as inappropriate cannot be determined, but could be quite large.

KANSAS
DEPARTMENT OF AGRICULTURE

Mark Parkinson, Governor
Joshua Svaty, Secretary

www.ksda.gov

Written Testimony on HB 2530
to
House Judiciary Committee

by Dave Starkey
Chief Counsel
Kansas Department of Agriculture

February 4, 2010

Good afternoon, Chairman Kinzer and members of the committee. I am Dave Starkey, chief counsel with the Kansas Department of Agriculture. I am here to provide neutral written testimony on House Bill 2530.

The main provisions of the bill are changes to the procedure for the adoption of rules and regulations. The proposed changes seem reasonable. They could provide more efficiencies and potential cost savings. However, the bill contains other provisions which could be problematic. New Section 1 in HB 2530 creates requirements for a new type of document called "guidance document." There are two issues which should be considered.

First, if enacted New Section 1 requires state agencies to determine what current documents are "guidance documents." All guidance documents must then be collected, indexed and published on the department's website. Those documents must then be continually updated and maintained to comply with the new law. Extensive staff time for review, development and implementation will be required. If this is not done, then an agency could be penalized in an administrative proceeding. During ordinary times, these tasks could be performed. These are not ordinary times. State agencies, in some cases, are struggling to perform other statutory duties and responsibilities. This may not be the time for this new mandate.

Second, New Section 1(b) says a person may contest the legality of positions taken by a department in the guidance document in an administrative proceeding. Under existing law, a person can always challenge the legality of agency action. This new statutory statement may be unnecessary. Moreover, New Section 1(b) says a person may challenge "the wisdom of positions taken in the document." In some cases, this may be counter to existing law. The Legislature requires state agencies to administer and enforce laws. For example, the chief engineer of the division of water resources has the statutory duty to administer the state's water resources. The appellate court has said deference is to be given to the chief engineer because of special training and expertise in administering applicable statutes. If enacted, the focus of the administrative hearing may become a debate over the guidance document rather than whether or not a statute, rule, or regulation has been violated.

I will stand for questions at the appropriate time.

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To: House Judiciary Committee

Date: February 4, 2010

Subject: **HB 2529** -- Restoring an Exception to the Kansas Open Records Act (KORA) Regarding Real Estate Sales Validation Questionnaires

Chairman Kinzer and members of the House Judiciary Committee, thank you for the opportunity to appear in front of you today on behalf of the Kansas Association of REALTORS® to provide comments in opposition to the current provisions of **HB 2529**. Through the comments expressed herein, it is our hope to provide additional legal and public policy context to the discussion on this issue.

KAR has faithfully represented the interests of the nearly 9,000 real estate professionals and over 700,000 homeowners in Kansas for the last 90 years. In conjunction with other organizations involved in the housing industry, the association seeks to increase housing opportunities in this state by increasing the availability of affordable and adequate housing for Kansas families.

Original Intent Behind the Real Estate Validation Questionnaire Requirement Was to Generate Information That Could Be Used to Accurately Assess Fair Market Value for Property Tax Purposes

Under **K.S.A. 79-1437c**, no deed or instrument transferring the title to real property can be recorded by a county register of deeds unless it is accompanied by a real sales validation questionnaire. The real estate sales validation questionnaire is an extremely comprehensive document that contains a whole litany of confidential and private information on a real estate transaction.

The original intent behind the enactment of this requirement by the Kansas Legislature in the early 1990s was to provide county appraisers and officials with access to these documents so they could adequately and accurately assess the fair market value of properties in their respective jurisdictions for property tax purposes. For the most part, we believe the real estate validation questionnaires are still being used to satisfy this extremely narrow public purpose.

During this debate, the Kansas Association of REALTORS® was a strong opponent of the creation of the real estate sales validation questionnaire since we were very concerned about the potential for abuse and misuse of the very confidential, personal and sensitive information of Kansas property owners contained on these forms. After considerable discussion, our organization eventually reached a good-faith compromise with the Kansas Department of Revenue that cleared the way for the passage of these statutes through the Kansas Legislature.

At that time, we objected to the extremely broad range of information that the Kansas Department of Revenue wanted an individual to provide on the real estate sales validation questionnaire. Since this information would only be used for a limited purpose by a very small g[illegible] and licensed professionals, we ultimately dropped our objections to the cor[illegible]

House Judiciary
Date 2-4-10
Attachment # 5

KAR Strongly Believes the Exception Should Be Maintained Because the Information Contained in Real Estate Sales Validation Questionnaires is Confidential, Personal and Sensitive for Individuals

Under **K.S.A. 45-229(a)**, it is the intent of the Kansas Legislature that an exception to the Kansas Open Records Act should only be created or maintained if the public record: (1) is of a sensitive or personal nature concerning individuals; (2) is necessary for the effective and efficient administration of a governmental program; or (3) affects confidential information.

KAR strongly believes that the exception for the real estate sales validation questionnaires should be maintained because the information contained in these documents falls under all three categories listed in **K.S.A. 45-229(a)**. As a result, we would urge the committee to adopt an amendment to restore the exception for **K.S.A. 79-1437f** in line 8 on page 4 of the legislation.

First, we strongly believe the information contained in the real estate sales validation questionnaire is of a confidential, personal and sensitive nature concerning individuals. The current real estate sales validation questionnaire contains information that would allow anyone to access, among other things, what a particular person paid for the property, how the purchase was financed, whether the property had been in foreclosure or had been repossessed, whether the property had been rented or leased and whether personal property had been transferred with the property.

While all of this information may be important to a county appraiser who is attempting to assess the fair market value of the property for property tax purposes, we believe it is absolutely unnecessary and a violation of a property owner's privacy to inform the general public on how a particular individual financed the purchase of their property or whether their property had been in foreclosure or had been repossessed by a financial institution.

Second, we strongly believe that the continued accuracy and availability of the information contained in the real estate sales validation questionnaire is necessary for the effective and efficient administration of a governmental program. If a property owner knew this personal and sensitive information would be released to the general public, he or she might have more incentive to complete the real estate sales validation questionnaire in a less than truthful manner.

If so, this removal of the confidentiality of the information contained in the real estate sales validation questionnaire could significantly degrade the value of the information contained on the form for county appraisers and officials in determining the fair market value of real property for property tax purposes. This could in turn result in very negative consequences for the collection of property taxes at the local and state level.

Conclusion

For all the foregoing reasons, we would urge the members of the House Judiciary Committee to restore the exception to the Kansas Open Records Act (KORA) for the real estate sales validation questionnaires contained in **K.S.A. 79-1437f**. Once again, thank you for the opportunity to provide comments on **HB 2529** and I would be happy to respond to any questions from the committee members at the appropriate time.

ONLY FOR USE IN COUNTIES APPROVED TO ACCEPT ONE-PART FORMS ***(See website address below for approved list)***

KANSAS REAL ESTATE SALES VALIDATION QUESTIONNAIRE

FOR COUNTY USE ONLY: DEED BOOK _____ PAGE _____	COV # _ _ _ _ _ _	CO. NO.	MAP	SEC	SHEET	QTR.	BLOCK	PARCEL	OWN
RECORDING DATE ____/____/____	TYPE OF INSTRUMENT _____ CR _____ RA _____ DE _____ SPLIT☐ MULTI☐	MO	YR	TY	AMOUNT	S	V		

SELLER (Grantor)
NAME _____

MAILING _____

CITY/ST/ZIP _____

PHONE NO. (____) _____

BUYER (Grantee)
NAME _____

MAILING _____

CITY/ST/ZIP _____

PHONE NO. (____) _____

IF AGENT SIGNS FORM, BOTH BUYER AND SELLER TELEPHONE NUMBERS MUST BE ENTERED.

BRIEF LEGAL DESCRIPTION

_____

Property / Situs Address: _____
Name and Mailing Address for Tax Statements

_____

CHECK ANY FACTORS THAT APPLY TO THIS SALE (See Instructions on back of form.)

1. SPECIAL FACTORS
   - ☐Sale between immediate family members: SPECIFY THE RELATIONSHIP _____
   - ☐Sale involved corporate affiliates belonging to the same parent company
   - ☐Auction Sale
   - ☐Deed transfer in lieu of foreclosure or repossession
   - ☐Sale by judicial order (by a guardian, executor, conservator, administrator, or trustee of an estate)
   - ☐Sale involved a government agency or public utility
   - ☐Buyer (new owner) is a religious, charitable, or benevolent organization, school or educational association
   - ☐Buyer (new owner) is a financial institution, insurance company, pension fund, or mortgage corporation
   - ☐Would this sale qualify for one of the exceptions listed on the reverse side of this form? (Please indicate # _____)
   - ☐Sale of only a partial interest in the real estate
   - ☐Sale involved a trade or exchange of properties
   - ☐**NONE OF THE ABOVE**
2. CHECK USE OF PROPERTY AT THE TIME OF SALE:
   - ☐Single Family Residence ☐Agricultural Land
   - ☐Farm/Ranch With Residence Mineral Rights Included? ☐Yes ☐No
   - ☐Condominium Unit
   - ☐Vacant Land ☐Apartment Building
   - ☐Other: (Specify) ☐Commercial/Industrial Bldg.
3. WAS THE PROPERTY RENTED OR LEASED AT THE TIME OF SALE? ☐YES ☐NO
4. DID THE SALE PRICE INCLUDE AN EXISTING BUSINESS? ☐YES ☐NO
5. WAS ANY PERSONAL PROPERTY (SUCH AS FURNITURE, EQUIPMENT, MACHINERY, LIVESTOCK, CROPS, BUSINESS FRANCHISE OR INVENTORY, ETC.) INCLUDED IN THE SALE PRICE? ☐YES ☐NO
   If yes, please describe _____
   Estimated value of all personal property items included in the sale price $_____
   If **Mobile Home** Year _____ Model _____
6. ARE YOU AWARE OF ANY CHANGES IN THE PROPERTY SINCE JAN. 1? ☐YES ☐NO
   ☐Demolition ☐New Construction ☐Remodeling ☐Additions
   Date Completed _____
7. WERE ANY **DELINQUENT** TAXES ASSUMED BY THE PURCHASER? ☐YES ☐NO AMOUNT $_____
8. METHOD OF FINANCING (check all that apply):
   ☐New loan(s) from a Financial Institution
   ☐Seller Financing ☐Assumption of Existing Loan(s)
   ☐All Cash ☐Trade of Property ☐Not Applicable
9. WAS THE PROPERTY MADE AVAILABLE TO OTHER POTENTIAL PURCHASERS? ☐YES ☐NO If not, explain _____
   (SEE #9 INSTRUCTION ON BACK)
10. DOES THE BUYER HOLD TITLE TO ANY ADJOINING PROPERTY? ☐YES ☐NO
11. ARE THERE ANY FACTS WHICH WOULD CAUSE THIS SALE TO BE A NON-ARMS LENGTH / NON-MARKET VALUE TRANSACTION? **(SEE #11 INSTRUCTION ON BACK)** ☐YES ☐NO
12. **TOTAL SALE PRICE $**_____
    DEED DATE ____/____/____
13. I CERTIFY THAT THE ADDRESS TO WHICH TAX STATEMENTS FOR THE PROPERTY ARE TO BE SENT IS CORRECT.
    I ALSO CERTIFY I HAVE READ ITEM NO. 13 ON THE REVERSE SIDE AND HEREBY CERTIFY THE ACCURACY OF THE INFORMATION AND THAT I AM AWARE OF THE PENALTY PROVISIONS OF K.S.A. 79-1437g.

PRINT NAME _____

SIGNATURE _____

☐GRANTOR (SELLER) ☐GRANTEE (BUYER)
☐AGENT DAYTIME PHONE NO. (____) _____

PV-RE-21-OP-CG **(REV. 06/04)**

KANSAS REAL ESTATE SALES VALIDATION ONE-PART QUESTIONNAIRE WEBSITE ADDRESS:
http://www.ksrevenue.org/pvdratiostats.htm

5-3

Session of 2009

HOUSE BILL No. 2226

By Representative Kinzer

2-3

AN ACT concerning criminal procedure; relating to grand juries; amending K.S.A. 22-3001 and repealing the existing section.

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

Section 1. K.S.A. 22-3001 is hereby amended to read as follows: 22-3001. ~~(1)~~ *(a)* A majority of the district judges in any judicial district may order a grand jury to be summoned in any county in the district when it is determined to be in the public interest.

(b) The attorney general in any judicial district or the district or county attorney in such attorney's judicial district may petition the chief judge or the chief judge's designee in *such district court to order a grand jury to be summoned in the designated county in the district to investigate alleged violations of an off-grid felony, a severity level 1, 2, 3* , 4 or 5 *felony or a drug severity level 1 or 2 felony. The* ~~judge or judges of~~ chief judge or the chief judge's designee in *the district court of the county shall then consider the petition and, if it is found that the petition is in proper form,* as set forth in this subsection, *shall order a grand jury to be summoned.*

~~(2)~~ *(c)* A grand jury shall be summoned in any county within 60 days after a petition praying therefor is presented to the district court, bearing the signatures of a number of electors equal to 100 plus 2% of the total number of votes cast for governor in the county in the last preceding election. The petition shall be in substantially the following form:

The undersigned qualified electors of the county of _____ and state of Kansas hereby request that the district court of _____ county, Kansas, within 60 days after the filing of this petition, cause a grand jury to be summoned in the county to investigate alleged violations of law and to perform such other duties as may be authorized by law.

The signatures to the petition need not all be affixed to one paper, but each paper to which signatures are affixed shall have substantially the foregoing form written or printed at the top thereof. Each signer shall add to such signer's signature such signer's place of residence, giving the street and number or rural route number, if any. One of the signers of each paper shall verify upon oath that each signature appearing on the paper is the genuine signature of the person whose name it purports to be and that such signer believes that the statements in the petition are true. The petition shall be filed in the office of the clerk of the district

Proposed amendment
Chairman Kinzer
February 4, 2010

(1)

(2)

(1)

(1)

Note: (1) Part A
(2) Part B
Balloon Split for Voting
By Committee

House Judiciary
Date 2-4-10
Attachment # 9

court who shall forthwith transmit it to the county election officer, who shall determine whether the persons whose signatures are affixed to the petition are qualified electors of the county. Thereupon, the county election officer shall return the petition to the clerk of the district court, together with such election officer's certificate stating the number of qualified electors of the county whose signatures appear on the petition and the aggregate number of votes cast for all candidates for governor in the county in the last preceding election. The judge or judges of the district court of the county shall then consider the petition and, if it is found that the petition is in proper form and bears the signatures of the required number of electors, a grand jury shall be ordered to be summoned.

~~(3)~~ *(d)* The grand jury shall consist of 15 members and shall be drawn and summoned in the same manner as petit jurors for the district court. Twelve members thereof shall constitute a quorum. The judge or judges ordering the grand jury shall direct that a sufficient number of legally qualified persons be summoned for service as grand jurors.

Sec. 2. K.S.A. 22-3001 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

6-2