

SESSION OF 2011

**SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2027**

As Amended by Senate Committee on Judiciary

**Brief\***

HB 2027 would amend KSA 77-415 concerning the Rules and Regulations Filing Act (the Act), by simplifying the definition of "rule and regulation," "rule," and "regulation." The existing definition would be deleted, including several provisions exempting specific rules and regulations from formal rulemaking under the Act. It also would expand the definition of "person" to include individuals and companies or other legal or commercial entities. Further, the bill would give precedential value to orders issued in an adjudication against a person who was not a party to the original adjudication when the order is:

- Designated by the agency as precedent;
- Not overruled by a court or other adjudication; and
- Disseminated to the public in one of the following ways:
  - Inclusion in a publicly available index of all orders designated as precedent, maintained by the agency and published on its website;
  - Publication in full on the agency website in a format allowing key terms searches; or
  - Being made available to the public in any other manner required by the Secretary of State.

The bill also would allow statements of policy to be treated as binding within the agency when directed to agency personnel concerning their duties or the internal management or organization of the agency.

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\*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

Additionally, the bill states that agency issued forms, whose contents are governed by rule and regulation or statute, and guidance and information the agency provides to the public would not give rise to a legal right or duty or be treated as authority for any standard, requirement, or policy reflected in the forms, guidance, or information.

The bill would provide that the following are not subject to the Act:

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

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

Finally, the bill would create a new section giving state agencies the authority to issue guidance documents without following the procedures set forth in the Act. Under the terms of this new section, guidance documents could contain binding instructions to state agency staff members, except presiding officers. Presiding officers and agency heads could consider the guidance documents in an agency adjudication, but would not be bound by them. To act in variance with a guidance document, the agency would have to provide a reasonable explanation for the variance and, if a person claims to have reasonably relied on the agency's position, the

explanation would have to include a reasonable justification for the agency's conclusion that the need for the variance outweighs the affected person's reliance interests. Each state agency would be required to maintain an index of the guidance documents, publish the index on the agency's website, make all guidance documents available to the public, and file the index in any other manner required by the Secretary of State.

## **Background**

HB 2027 was introduced by the Kansas Judicial Council, whose Administrative Procedure Advisory Committee studied the current provisions of the Kansas Rules and Regulations Filing Act. In particular, the Advisory Committee reviewed KSA 77-415(d)(2), which lists the current exemptions to formal rulemaking requirements found in the Act. The Advisory Committee's study found that the exemptions fall into two categories of rules, which the Act treats in the same manner: 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 only to limited rulemaking. Additionally, the Advisory Committee noted there is confusion about what process is required to adopt an exempt rule and regulation and, after soliciting input from state agencies on this issue, learned that agencies understand and apply the statutes in this area in various ways and few rely on the specific exceptions in KSA 77-415(d)(2). The Advisory Board's report indicates the Judicial Council's intent in drafting the bill was to resolve confusion surrounding those exemptions, clarify the terminology used in the Act, and encourage consistency in agency procedure and practice. Consequently, the bill would delete the existing exemptions, and would specify in new subsections KSA 77-415(b)(2)(A) through (D) the extent to which agencies may continue to articulate policy through actions that are not rules and regulations, including orders, personnel and other internal policies, use of forms, and publication of information and guidance to the public. It also would specify that internal

policies, forms, and information or guidance may not bind the public. The report explains that these provisions correspond to some exclusions from the current definition of rules and regulations.

In the House Committee on Judiciary, a representative of the Judicial Council appeared in support of HB 2027. No opponents appeared at the hearing. After the hearing, the Committee received supplemental information on the bill from the Judicial Council, the Kansas Corporation Commission, and Representative Carl Holmes. The House Committee on Judiciary amended the bill to clarify when orders issued in an adjudication can be binding against a person who was not a party to the original adjudication.

The House Committee of the Whole amended the bill by making technical amendments and adding a requirement that any agency issuing a guidance document provide a copy of that document to the Joint Committee on Administrative Rules and Regulations.

In the Senate Committee on Judiciary, a representative of the Judicial Council appeared in support of HB 2027. No opponents appeared at the hearing. The Senate Committee on Judiciary amended the bill by deleting the House Committee of the Whole amendment.

The Department of Administration stated that passage of HB 2027, as introduced, would have no fiscal effect on its budget. Further, the fiscal note indicates that, while agencies would be required to publish guidance documents on their respective websites, the cost of doing so would be negligible and could be absorbed within existing resources.