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# Kansas Legislator Briefing Book

Prepared for the  
2019 Kansas Legislature

# KLRD

*Providing objective research and fiscal  
analysis for the Kansas Legislature*

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# **Kansas Legislator Briefing Book**

## **Prepared for the 2019 Kansas Legislature**

Kansas Legislators are called upon to make decisions on many issues that come before the Legislature. In addition, members of the Legislature are frequently asked by constituent groups to discuss public policy issues in a community forum in their districts. The purpose of the Kansas Legislator Briefing Book is to assist members in making informed policy decisions and to provide information in a condensed form that is usable for discussions with constituents—whether in their offices in Topeka or in their districts.

This publication contains several reports on new topics plus reports from the prior version. Most of the reports from the prior version have been updated with new information.

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# LEGISLATOR BRIEFING BOOK

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## [Kansas Prison Population, Capacity, and Related Facility Issues](#)

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### [Election Security](#)

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This article examines the election vulnerabilities and summarizes election security activities being undertaken at the federal and state levels.

### [Government Transparency](#)

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[Joint Committee on Special Claims Against the State](#) I-6

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This article reviews the provisions and definitions found in the Kansas Open Meetings Act, the public bodies that are covered, and penalties for violating the law.

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[State Employee Issues](#) I-12

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An explanation of classified and unclassified state employees, benefits provided to state employees, recent salary and wage adjustments authorized by the Kansas Legislature, general information on the number of state employees, and the characteristics of the classified workforce is provided.

This article briefly summarizes the current status of law concerning voter registration requirements, including both national requirements and state requirements. The state practices of same day voter registration, online registration, preregistration, and voter identification requirements are discussed.

## **State Budget**

This article includes a short background about docket fees and explains how docket fees are distributed to various state funds. Additionally, a table shows the amount of each docket fee, how the fee is authorized, and how it is distributed.

This article promotes understanding of the state budget, the State General Fund, expenditures and revenues, and terminology used when discussing budgetary issues.

This article contains information on various state laws and statutory sections that provide safeguards to prevent deficit financing. Included are constitutional provisions, ending balance requirements, the Governor’s options to eliminate a negative ending balance or create a \$100 million ending balance, and a mechanism to eliminate cash flow issues during the year.

This article provides an explanation of State General Fund transfers, including the statutory authorization for transfers; the specific revenue sources for transfers, where applicable; recent treatment of the transfers as revenue transfers; and funding provided for the transfers in recent years.

## **Taxation**

This article outlines the history and structure of the Homestead Property Tax Refund Act, which is a “circuit-breaker” style property tax relief program Kansas has utilized since 1970. More than \$43.0 million in refunds were paid out in FY 2012, but changes in the program enacted in 2013, including the exclusion of renters, reduced the size of the program to about \$24.9 million in FY 2018.

Beginning in 2012, the Kansas Legislature passed legislation enacting major changes to the Kansas individual income tax. Major legislation was passed in

2012, 2013, 2015, and 2017, with additional legislation being passed related to individual income tax reform in 2014.

## [Liquor Taxes](#)

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This article discusses the three tiers, or levels, of liquor taxation in Kansas (the liquor gallonage tax, the liquor enforcement tax, and the liquor drink tax). Some history on the rates of the various taxes imposed is provided, as well as information on the disposition of revenues. For FY 2018, total identifiable liquor tax receipts were about \$142.0 million.

## [Selected Tax Rate Comparisons](#)

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This article compares information used to calculate the tax base and tax rates between Kansas and selected states for various taxes. States compared include Kansas, Arkansas, Colorado, Iowa, Missouri, Nebraska, Oklahoma, and Texas. Taxes compared include individual income tax, corporate income tax, sales tax, motor fuel tax, and cigarette tax.

## ***Transportation***

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Distracted driving was recorded as a factor in 2,351 crashes in Kansas in 2016 that led to injuries or property damage; 15 people died and 974 were injured in those crashes. State responses to distracted driving include bans on using electronic devices while driving. Researchers have found links between distraction and driving errors and between device-use bans and reductions in the numbers of crashes.

### [Kansas Turnpike: The Relationship Between KTA and KDOT](#)

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### [Safety Belt Requirements and Fines](#)

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Kansas law allows law enforcement officers to ticket a vehicle occupant for not wearing a seat belt or the driver if a child is unrestrained. This article summarizes safety belt law in Kansas and fines associated with violations. It also provides information on similar laws in neighboring states.

### [State Highway Fund Receipts and Transfers](#)

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Projected revenues to the State Highway Fund (SHF) for use by the Kansas Department of Transportation can be described in five categories: state sales tax, state motor fuels tax, federal funding, vehicle registration fees, and "other." This article briefly discusses the components of those categories, and it summarizes anticipated revenues the SHF has not realized and transfers from the SHF in recent years.

## [State Motor Fuels Taxes and Fuel Use](#)

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Kansas' motor fuels taxes are 24¢ a gallon on gasoline and 26¢ a gallon on diesel fuel, unchanged since 2003. This article reviews the history of those taxes and illustrates Kansas fuels tax revenues and gasoline usage fluctuate over time. The article also includes information on the state gasoline tax portion of an individual's overall fuel costs in Kansas and in surrounding states.

## [Toll or Tax?](#)

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This article includes information on the Kansas Turnpike Authority, statutes governing its operation, and court decisions related to turnpike tolls.

## ***Utilities and Energy***

### [Affordable Clean Energy Rule](#)

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This article summarizes the Affordable Clean Energy (ACE) rule, proposed by the Environmental Protection Agency (EPA) in August 2018. If adopted, ACE would replace the Clean Power Plan (CPP), which was proposed by the EPA in 2015. The article also provides a brief history of the CPP.

### [Broadband Expansion](#)

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This article provides information about the efforts made by the federal government and state governments to deploy broadband across the country. These efforts include enacting legislation and forming various committees to study the issue and make recommendations to their respective governing authority.

### [Electric Utility Regulation and Ratemaking](#)

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This article discusses various regulations relating to electric utilities in Kansas and outlines the electric ratemaking process.

### [Small Wireless Facility Siting](#)

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This article reviews paragraphs of the FCC's Declaratory Ruling and Third Report and Order, which address 5G wireless siting in the United States, and certain sections of Kansas Law it may affect.

## ***Veterans, Military, and Security***

### [Cybersecurity](#)

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This article outlines recent cybersecurity legislation enacted and considered in Kansas and other states.

This article summarizes recently enacted Kansas legislation affecting veterans, in addition to providing an overview of resources for benefits' assistance available to Kansas veterans, servicemembers, and military families. This article also contains links to websites that provide more detailed information in regard to Kansas and federal benefits for veterans and military families.



### Agriculture and Natural Resources

#### A-1 Industrial Hemp

##### Background

Industrial hemp is a variety of the *Cannabis sativa* plant. Industrial hemp is of the same plant species as marijuana, but is genetically different. As defined by Kansas 2018 SB 263 and the federal Agricultural Act of 2014 (Section 7606, known as the Federal Farm Bill), industrial hemp contains less than 0.3 percent delta-9 tetrahydrocannabinol (THC) on a dry weight basis.

There are three general categories of industrial hemp products: seeds and grains, fiber, and floral plant extracts. These products are produced from the fiber, roots, stalks, leaves, seeds, or floral materials of the industrial hemp plant.

##### ***Federal Industrial Hemp Policy***

Section 7606 of the Agricultural Act of 2014 legalized the growth and cultivation of industrial hemp in accordance with state law. The legislation authorized states to create agricultural pilot programs to research the growth, cultivation, or marketing of industrial hemp.

Section 7606 did not remove “industrial hemp” from the federal list of controlled substances, thus restricting industrial hemp activities to the extent authorized in Section 7606. In 2016, the U.S. Department of Agriculture, in consultation with the U.S. Food and Drug Administration and the U.S. Drug Enforcement Administration, released the *Statement of Principles on Industrial Hemp* to provide guidance on how federal law applies to state activities authorized in Section 7606. (The *Statement of Principles* can be accessed at <https://www.federalregister.gov/documents/2016/08/12/2016-19146/statement-of-principles-on-industrial-hemp>.) Specifically, Section 7606 limited industrial hemp growth or cultivation to state agricultural pilot programs established by a state department of agriculture or state agricultural agency. Only state departments of agriculture and institutions of higher education (or persons licensed with them to conduct research) may grow or cultivate industrial hemp as part of the agricultural pilot program. Additionally, for purposes of marketing research, industrial hemp products may be sold in or among states with an agricultural pilot program, but may not be sold in states where such a sale is prohibited by state law. Federal law prohibits the transportation of industrial hemp plants and seeds across state lines.

## Industrial Hemp in Kansas

In 2018, the Legislature passed SB 263, which created the Alternative Crop Research Act (Act); the Act became effective May 3, 2018. The Act allows the Kansas Department of Agriculture (KDA) to develop a pilot research program to grow and cultivate industrial hemp and promote the research and development of industrial hemp, in accordance with federal law. KDA may act alone or coordinate with a state institution of higher learning. The Act allows KDA to license individuals to participate in the pilot program under its authority. Additionally, the Act removes industrial hemp, when cultivated, possessed, or used for activities authorized by the Act, from the definition of “marijuana” for criminal law and controlled substances purposes.

### ***KDA Rules and Regulations***

KDA is charged with developing rules and regulations by December 31, 2018, to implement the pilot program. KDA released draft rules and regulations in July 2018. (The draft rules can be accessed at <http://agriculture.ks.gov/docs/default-source/pp-industrial-hemp/hemp-regs-revised-7-5-18.pdf?sfvrsn=0>.) The draft rules and regulations for the industrial hemp pilot program include the following:

- An approval process for all individuals desiring to participate in the pilot program. Any individual who desires to cultivate, grow, handle, harvest, store, distribute, transport, or process industrial hemp plants, plant parts, grain, or seeds must submit a research license application and applicable fees. All persons to be involved in the pilot program must be included on the application, including farm hands and harvesters;
- The requirement that all pilot program applications include a research proposal. Such a research proposal must include the type of research to be conducted, the purpose of the research, the data to be collected, the location of research (including the number of acres or square

feet), the methods to be used to conduct the research, the intended duration of the research, the anticipated results of the research, and any other necessary information;

- The requirement that any individual applying to participate in the pilot program and any individual included on a research license application be fingerprinted and submit to state and national criminal history record checks. Individuals with felony violations involving controlled substances are disqualified from participating in the program;
- The establishment of a State Advisory Board to review pilot program applications and research proposals and recommend to the Secretary of Agriculture (Secretary) which applications to approve. Board members are to be appointed by the Secretary and each member must be recognized for knowledge and leadership in crop research, industrial hemp production or processing, law enforcement, seed certification, membership in the Kansas Legislature, or other qualifications identified by the Secretary;
- The requirement that pilot program licensees submit a pre-harvest report to KDA at least 30 days before the anticipated harvest of industrial hemp plants, plant parts, grain, or seeds. KDA will then conduct sampling and testing of the industrial hemp to determine THC levels before the licensee may harvest. Once KDA approves the licensee for harvest, the licensee has ten days to harvest;
- The process for which individuals employed by or affiliated with a state educational institution may conduct industrial hemp research; and
- The potential risks and expenses to the licensee for the movement of industrial hemp plants, plant parts, grain, or seed into, out of, or within the state of Kansas.

## **Fee Fund and Licenses**

SB 263 also created the Alternative Crop Research Act Licensing Fee Fund (Fund) in the State Treasury. KDA is authorized to establish fees for licenses, license renewals, and other necessary expenses to offset the costs associated with implementing the pilot program. Moneys received from fees collected by KDA will be deposited in the Fund. In its draft rules and regulations, KDA created three separate licenses and the following fee structure, which are described below.

### ***Research Grower License***

Individuals who have been issued a research grower license are authorized by KDA to cultivate, grow, handle, harvest, store, and transport industrial hemp plants, plant parts, grains, or seeds in Kansas. Licensed growers are authorized to conduct these activities only in specific research sections (defined as land or buildings licensed by KDA under the pilot program where the licensee may conduct industrial hemp research). The research grower license fee is \$1,000 for the initial licensed research section, plus \$1,000 per additional licensed research section.

### ***Research Processor License***

Individuals who have been issued a research processor license are authorized by KDA to store and handle industrial hemp plants, plant parts, grains, or seeds and take part in any aspect of turning raw, harvested industrial hemp into a separate industrial hemp product in Kansas. The research processor license fee is \$3,000 per processing facility or mobile processing facility for fiber or grain, and \$6,000 per processing facility or mobile processing facility for floral material.

### ***Research Distributor License***

Individuals who have been issued a research distributor license are authorized by KDA to distribute, transport, handle, and store raw, harvested industrial hemp plants, plant parts, grain, seed, and certified seed in Kansas. The

research distributor license fee is \$2,000 per licensed research section.

## **Other States**

As of 2018, at least 38 states have considered legislation related to industrial hemp. Most states that have created or authorized the creation of industrial hemp research pilot programs use the federal definition of “industrial hemp” and require a concentration of less than 0.3 percent THC on a dry weight basis. West Virginia deviates from the federal definition and defines “industrial hemp” as containing less than 1.0 percent THC on a dry weight basis.

States with industrial hemp research programs created in accordance with Section 7606 of the Agricultural Act of 2014 and that authorize individuals to participate in the program are required to license, register, or permit these individuals with the state agricultural agency overseeing the program. Such licensing or registration generally includes criminal background checks and registration of growing sites.

Protection from criminal prosecution or civil liability for the possession of industrial hemp varies by state. Some states (like Kansas) remove industrial hemp from the definition of “marijuana” or from the list of controlled substances for criminal law purposes. Other states specifically carve out an exception for individuals participating in an industrial hemp research program under the state department of agriculture.

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### Agriculture and Natural Resources

#### A-2 State Water Plan Fund, Kansas Water Authority, and State Water Plan

##### State Water Plan Fund

The State Water Plan Fund is a statutory fund (KSA 82a-951) that was created by the 1989 Legislature for the purpose of implementing the State Water Plan (KSA 82a-903). The State Water Plan Fund is subject to appropriation acts by the Legislature and may be used for the establishment and implementation of water-related projects or programs and related technical assistance. Funding from the State Water Plan Fund may not be used to replace full-time equivalent positions or for recreational projects that do not meet the goals or objectives of the State Water Plan.

##### *Revenue*

Revenue for the State Water Plan Fund is generated from the following sources:

**Water protection fees.** A water protection fee of \$0.03 per 1,000 gallons of water is assessed on the following:

- Water sold at retail by public water supply systems;
- Water appropriated for industrial use; and
- Water appropriated for watering livestock.

**Fees imposed on fertilizer and pesticides.** A tonnage fee on fertilizer and a fee for the registration of pesticides is assessed and transferred to the State Water Plan Fund in the following amounts:

- Inspection fees are imposed on each ton of fertilizer sold, offered or exposed for sale, or distributed in Kansas. Of that fee, \$1.40 per ton is credited to the State Water Plan Fund; and
- Every agricultural chemical that is distributed, sold, or offered for sale within the state must be registered, with an annual fee assessed for each registration. The law requires that \$100 from each registration fee be credited to the State Water Plan Fund.

**Sand royalty receipts.** A fee of \$0.15 per ton of sand sold is deposited in the State Water Plan Fund.

**Pollution fines.** Certain fines and penalties are levied by the Kansas Department of Health and Environment (KDHE) for water-related pollution, including:

- Violation of terms or conditions relating to public water supply systems;
- Commission of prohibited acts in relation to the operation of a public water supply system; and
- Violations of law governing the disposal of solid and hazardous waste.

**Clean water drinking fee.** A clean water drinking fee of \$0.03 per 1,000 gallons of water is assessed on retail water sold by a public water supply system and delivered through mains, lines, or pipes. Since July 1, 2007, revenue from the clean water drinking fee has been distributed as follows:

- 5/106 to the State Highway Fund;
- Of the remaining, not less than 15.0 percent for on-site technical assistance for public water supply systems; and
- The remainder to renovate and protect lakes used for public water supply.

**State General Fund transfer.** By statute, \$6.0 million annually is to be transferred from the State General Fund to the State Water Plan Fund. In recent fiscal years, this amount has been reduced in appropriations bills. The 2018 Legislature approved a transfer of \$2.75 million from the State General Fund to the State Water Plan Fund for FY 2019.

**Economic Development Initiatives Fund transfer.** By statute, \$2.0 million is to be transferred from the Economic Development Initiatives Fund to the State Water Plan Fund. The 2018 Legislature approved a transfer of \$500,000 from the Economic Development Initiatives Fund to the State Water Plan Fund for FY 2019.

<b>STATE WATER PLAN FUND REVENUE AND TRANSFERS*</b>			
<b>Receipts and Transfers In</b>	<b>FY 2017 Actual</b>	<b>FY 2018 Actual</b>	<b>FY 2019 Estimated</b>
State General Fund	\$ 0	\$1,400,000	\$ 2,750,000
Economic Development Initiatives Fund	0	0	500,000
Municipal Water Fees	3,028,509	2,993,852	3,267,271
Industrial Water Fees	973,133	904,987	1,120,701
Stock Water Fees	387,655	368,617	464,256
Pesticide Registration Fees	1,359,410	1,431,093	1,334,523
Fertilizer Registration Fees	3,491,049	3,354,186	3,568,921
Pollution Fines and Penalties	152,205	158,620	165,000
Sand Royalty Receipts	21,975	6,580	45,000
Clean Drinking Water Fees	2,724,051	2,701,067	2,820,674
<b>Total Receipts/ Transfers In</b>	<b>\$ 12,137,987</b>	<b>\$ 3,319,002</b>	<b>\$ 16,036,346</b>
* Does not include cash forward, released encumbrances, or other service charges.			

**Expenditures**

Expenditures from the State Water Plan Fund are based on priorities of the State Water Plan. The State Water Plan is developed and approved by the Kansas Water Authority. The following table summarizes recent actual and approved expenditures from the State Water Plan Fund.

<b>STATE WATER PLAN FUND EXPENDITURES*</b>			
<b>Agency/Project</b>	<b>FY 2017 Actual</b>	<b>FY 2018 Actual</b>	<b>FY 2019 Approved</b>
<b>Department of Agriculture</b>			
Interstate Water Issues	\$ 451,841	\$ 403,402	\$ 497,386
Water Use Study	107,488	75,000	72,600
Basin Management	781,007	539,802	619,692
Water Resources Cost Share	2,041,642	1,601,175	1,948,289
Nonpoint Source Pollution Assistance	1,866,556	1,331,554	1,860,023
Aid to Conservation Districts	2,092,637	2,000,000	2,092,637
Water Transition Assistance/CREP	178,572	222,280	201,963
Watershed Dam Construction	559,353	528,157	550,000
Water Quality Buffer Initiative	179,893	140,648	200,000
Riparian and Wetland Program	158,892	44,363	154,024
Streambank Stabilization	0	0	500,000
Irrigation Technology	0	0	100,000
Crop Research - Sorghum	0	0	150,000
Crop Research - Hemp	0	0	100,000
<i>Subtotal - Department of Agriculture</i>	<u>\$ 8,417,881</u>	<u>\$ 6,886,381</u>	<u>\$ 9,046,614</u>
<b>Kansas Water Office</b>			
Assessment and Evaluation	\$ 545,732	\$ 446,046	\$ 450,000
GIS Database Development	112,306	50,000	0
MOU-Storage Operation and Maintenance	302,071	363,699	350,000
Technical Assistance to Water Users	377,645	382,256	325,000
Streamgaging	431,282	350,000	431,282
Kansas River Alluvial	0	100,000	50,000
Bathymetric Surveys	0	0	100,000
Streambank Stabilization	400,000	1,000,000	0
Best Management Practices Implementation	0	0	900,000
Milford Lake RCPP	0	0	200,000
Water Vision Education	0	0	100,000
Streambank Stab. Effectiveness Research	0	0	100,000
Harmful Algae Bloom Research	0	0	100,000
Water Technology Farms	0	0	75,000
Equus Beds Chloride Plume	0	0	50,000
Water Resource Planner	0	0	101,848
<i>Subtotal - Kansas Water Office</i>	<u>\$ 2,169,036</u>	<u>\$ 2,692,001</u>	<u>\$ 3,333,130</u>
<b>Kansas Department of Health and Environment - Division of the Environment</b>			
Contamination Remediation	\$ 654,095	\$ 627,449	\$ 691,394
Total Maximum Daily Load	244,057	244,112	278,029
Nonpoint Source Program	297,768	235,045	303,208
Harmful Algae Bloom Pilot	0	0	450,000
Watershed Restor. and Protect. (WRAPS)	555,884	549,996	730,884
<i>Subtotal - KDHE-Environment</i>	<u>\$ 1,751,804</u>	<u>\$ 1,656,602</u>	<u>\$ 2,453,515</u>
<b>University of Kansas</b>			
Geological Survey	\$ 26,841	\$ 26,841	\$ 26,841
<b>Total Agency/Project Expenditures</b>	<u><b>\$ 12,365,562</b></u>	<u><b>\$ 11,261,825</b></u>	<u><b>\$ 14,860,140</b></u>

## Kansas Water Authority

The Kansas Water Authority (Authority) is a 24-member board that provides water policy advice to the Governor, Legislature, and the Director of the Kansas Water Office. The Authority is responsible for approving water storage sales, the State Water Plan, federal water contracts, and regulations and legislation proposed by the Kansas Water Office. The Authority meets quarterly. The Authority consists of 13 voting members and 11 ex officio members.

Voting membership includes:

- One member appointed by the Governor (also serving as chairperson);
- One member appointed by the President of the Senate;
- One member appointed by the Speaker of the House;
- A representative of large municipal water users;
- A representative of small municipal water users;
- A board member of a western Kansas Groundwater Management District (including districts 1, 3, and 4);
- A board member of a central Kansas Groundwater Management District (including districts 2 and 5);
- A member of the Kansas Association of Conservation Districts;
- A representative of industrial water users;
- A member of the State Association of Watershed Districts;
- A member with a demonstrated background and interest in water use, conservation, and environmental issues; and
- Two representatives of the general public.

Ex officio membership includes:

- The State Geologist;
- The Chief Engineer of the Division of Water Resources of the Kansas Department of Agriculture;

- The Secretary of Health and Environment;
- The Director of the Kansas Water Office (also serving as secretary);
- The Director of the Agricultural Experiment Station of Kansas State University;
- The Chairperson of the Kansas Corporation Commission;
- The Secretary of Wildlife, Parks and Tourism;
- The Secretary of Commerce;
- The Executive Director of the Division of Conservation of the Kansas Department of Agriculture;
- The Secretary of Agriculture; and
- The Director of the Kansas Biological Survey.

One primary responsibility of the Authority is to consider and approve policy for inclusion in the State Water Plan. The State Water Plan includes policy recommendations that have specific statewide or local impact and priority issues and recommendations for each of the 12 river basins in Kansas.

### ***Budgetary Process***

Historically, the Division of the Budget has assigned allocations to each agency for the expenditure of State Water Plan Fund moneys. Beginning with the FY 2008 budget cycle, the Authority and the Division of the Budget agreed to allow the Authority to develop a budget recommendation in lieu of the Division's allocation process.

A budget subcommittee of the Authority meets in the summer to develop a State Water Plan Fund budget proposal. The budget is presented to the full Authority in August. The Authority-approved budget is used by the state agencies to develop their budgets.

The Governor's budget includes recommended expenditures for the State Water Plan Fund when it is presented to the Legislature each January.



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**B-1**  
Department of  
Commerce

**B-2**  
Statewide STAR Bond  
Authority

**B-3**  
Unemployment  
Insurance Trust Fund

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### Commerce, Labor, and Economic Development

#### B-1 Department of Commerce

The Kansas Department of Commerce is the cabinet agency concerned with economic development. Under the Office of the Secretary of Commerce, there are two divisions and two commissions: the Division of Business and Community Development, the Division of Workforce Services, the Athletic Commission, and the Creative Arts Industries Commission.

#### Business and Community Development Division

In 2012, the Department of Commerce combined the Business, Rural, and Trade Development divisions into the Business and Community Development Division (Division). The Division works to improve the Kansas economy through the creation and retention of jobs and capital investment, as well as to improve the quality of life in communities, particularly in rural areas. The Division is composed of seven program sections: Business and Community Development Assistance, Business and Community Finance and Incentives, Business Recruitment and Relocation, Rural Opportunity Zones, Minority and Women Business Development, the Innovation Growth Program, and Trade Development.

#### ***Business and Community Development Assistance, Business and Community Finance and Incentives***

Business and Community Development Assistance determines the eligibility of various tax credits and loan funds for business clients. Commerce staff may act as a liaison with other state agencies, such as the Departments of Revenue, Labor, or Health and Environment, to ensure licensing requirements are met. Rural communities are assisted in developing community-driven strategic plans to attract businesses, workers, and investment. Financial and planning assistance may come from the following programs.

**The Kansas Downtown Redevelopment Act.** This act encourages entrepreneurs to locate and invest their businesses in central business districts or distressed neighborhoods. Property tax relief is offered in available areas designated by local governments and, subsequently, are reviewed and approved by the Department of Commerce.

**Kansas PRIDE.** This is a community-initiated effort that helps local leaders prepare for and manage change, addressing such issues as planning, community services, and enrichment; the Department of Commerce determines the eligibility for several financial incentives and tax credits. The Department then monitors the compliance of businesses and individuals for the duration of the incentive or tax credit agreement. (The Department also administers the Sales Tax and Revenue (STAR) Bond Program, which is discussed briefly in this article.) The purposes and criteria for several financial incentives are outlined below.

**Kansas Certified Development Companies (CDCs).** These companies are not-for-profit corporations that contribute to the economic development of their communities or regions. CDCs work with the U.S. Small Business Administration and private lenders to provide financing to small businesses. The 12 CDCs in Kansas can be found at [www.kacdc.com](http://www.kacdc.com). CDCs' loan packages often contain multiple sources of project funding, providing the small business customer with an optimal combination of rates and terms.

**Community Development Block Grant (CDBG) Program.** This program distributes federal funds to Kansas cities and counties looking to improve their communities. To receive funds, a project must meet at least one of the following federally mandated criteria:

- Benefits low- and moderate-income individuals;
- Removes or prevents slum or blight conditions; or
- Eliminates an urgent need created by a disaster when local funds are unavailable.

**Kansas Community Service Program (CSP).** This program gives not-for-profit organizations a way to improve capital fundraising drives for community service, crime prevention, or health care projects. Tax credit awards are distributed through a competitive application process. Based on the scope and cost of the proposed project, applicants may request up to \$250,000 in tax

credits. Applicant organizations in rural areas, defined as having less than 15,000 in population, are eligible for a 70 percent credit. Applicant organizations in non-rural areas are eligible for a 50 percent credit.

**Energy incentives.** Various incentives are offered to Kansas businesses and producers engaged in conventional and renewable energy production.

**High Performance Incentive Program (HPIP).** This program provides tax incentives to employers that commit to pay above-average wages and enhance their workers' skill development. HPIP offers employers four potential benefits:

- A 10 percent income tax credit for eligible capital investment at a company's facility that exceeds \$50,000—or \$1.0 million in the 5 metro counties of Douglas, Johnson, Sedgwick, Shawnee, and Wyandotte. The tax credit may be carried forward and used in any of the next 16 years in which the facility re-qualifies for HPIP;
- A sales tax exemption to use in conjunction with the company's capital investment at its facility;
- A training tax credit, worth up to \$50,000; and
- Priority consideration for access to other business assistance programs.

**Individual Development Account (IDA).** The IDA promotes self-sufficiency for low-income Kansans in a matched savings program. The tax credits, approximately \$500,000 awarded to selected community-based organizations, are used to leverage donations, which will serve as a match for savings in an IDA. Savings accrued in IDAs may be used for home ownership, residence repairs, business capitalization, and post-secondary education.

**Kansas Industrial Training and Retraining Programs (KIT/KIR).** These programs assist employers with training workers, whether on-site or in a classroom. The KIT Program may be used to assist firms involved in both pre-

employment and on-the-job training, giving firms and prospective employees an opportunity to evaluate one another before making employment commitments. The KIR Program helps companies that are likely to terminate employees because of obsolete or inadequate job skills and knowledge. Eligible industries include basic enterprises that are incorporating new technology into their operations or diversifying production. At least one current employee must be trained to qualify for assistance.

**Kansas Partnership Fund (Fund).** Initially funded by legislative appropriation, the Fund provides low-interest loans to cities and counties for infrastructure improvements that support Kansas basic enterprises, including manufacturing, mining, agriculture, and interstate transportation. Wholesale trade, financial services, business services, and tourism activities, if primarily undertaken for out-of-state markets, also are considered to be Kansas basic industries, as well as research and development of new products or technologies. All city and county units of government, regardless of size, are eligible to apply for loans.

Other sources of income for this revolving loan fund are the sale of revenue bonds through the Kansas Development Finance Authority (KDFA) and contributions by public or private entities. Loan interest rates are adjustable, indexed annually to either the federal discount rate or the average interest rate earned by the Economic Development Initiatives Fund during the previous year, whichever is greater.

**Private Activity Bonds (PABs).** These bonds are federally tax-exempt bonds. The types of bonds that qualify for tax-exempt status include:

- Exempt facility bonds;
- Qualified mortgage bonds;
- Qualified veterans' mortgage bonds;
- Qualified small issue bonds;
- Qualified student loan bonds;
- Qualified redevelopment bonds; and
- Qualified 501(c)(3) bonds.

Under the federal volume cap for 2018, Kansas has a bond allocation of \$311.4 million. The primary demand for bond allocation in Kansas has been for the issuance of exempt facility bonds, mortgage revenue bonds, and qualified small issue bonds, sometimes called industrial revenue bonds (IRBs). Exempt facility bonds are used to finance public infrastructure facilities pertaining to mass commuting, water, sewage, solid, or hazardous waste; heating or cooling utilities; and qualified residential rental projects. Mortgage revenue bonds (MRBs) and mortgage credit certificates (MCCs) are issued to provide first-time home buyers an enhanced opportunity to finance the purchase of a new home. Persons meeting certain financial and demographic guidelines are able to achieve substantial savings over the life of a home mortgage through the use of these programs. Kansas legislation allows cities, counties, or the KDFA to issue IRBs for industrial or other authorized purposes, such as to purchase land; pay the cost of constructing and equipping new facilities; or to purchase, remodel, or expand existing facilities.

**Promoting Employment Across Kansas Act (PEAK).** This act gives qualified companies an incentive to locate or expand business operations and jobs in Kansas by allowing them to retain Kansas payroll withholding. A company must commit to creating five new jobs in non-metropolitan counties—or ten new jobs in the metropolitan counties of Douglas, Johnson, Leavenworth, Sedgwick, Shawnee, and Wyandotte—over a two-year period. The company must also pay wages for the PEAK jobs that meet or exceed the county median or average wage or North American Industry Classification System (NAICS) average wage for that industry. Qualified applicants may include for-profit companies in eligible NAICS codes, as well as headquarters for not-for-profit organizations. Applicants must offer adequate health insurance coverage, as defined by KAR 110-21-1, to their full-time employees and pay at least 50 percent of the premium.

Depending on the number of PEAK jobs to be filled in Kansas and their wage levels, the Secretary of Commerce may approve benefit periods for a maximum of ten years. Companies that had

entered into the program prior to January 1, 2013, may request an extension of the benefit period for up to two years from the Secretary of Commerce. During the benefit period, participating PEAK companies may retain up to 95 percent of the payroll withholding tax of PEAK-eligible jobs.

Caps are applied on the aggregate amounts of benefits received by companies that are expanding or relocating in Kansas. In FY 2019 and subsequent fiscal years, the cap on benefits is \$42.0 million. As of July 1, 2018, PEAK benefits may not be used for retaining existing jobs.

**Small Communities Improvement Program (SCIP).** This program sets aside \$500,000 annually for small communities that are undertaking improvement projects through self-help and volunteerism. The competitive program is designed to assist communities with populations of 5,000 or less that are ineligible for other assistance and may not have the capacity to provide matching funds. The maximum award for a single project is \$125,000. Self-help and volunteerism must result in savings of at least 40 percent of the project's marketplace price. Communities must validate the impact the project will have on the quality of life for their residents.

**Sales Tax and Revenue (STAR) Bonds.** STAR Bonds allow city or county governments, subject to approval from the Department of Commerce, to issue special revenue bonds for the financing of the infrastructure necessary for a major economic development project. A form of tax increment financing (TIF), the proceeds from the incremental increase of sales tax revenue within the STAR Bond district, including state sales tax and transient guest tax revenues, may be used to pay off the bonds. (See Briefing Book article [B-2 Statewide STAR Bond Authority](#) for more details.)

**State Small Business Credit Initiative (SSBCI).** This initiative provides federal matching funds to eligible businesses through a network of partners. The Kansas Capital Multiplier Loan Fund provides businesses with matching loans, up to 9.0 percent of the private capital invested. Loans may range from \$25,000 to \$500,000. The Fund provides businesses with matching equity, up to 9.0 percent of the private equity invested. Eligible

businesses include technology and bioscience companies working with a state entrepreneurial center or a university center of excellence. Rural businesses, businesses in distressed urban areas, or businesses with local angel investment may qualify. Equity investment may range from \$25,000 to \$250,000. Additional information may be found at [www.NetWorkKansas.com](http://www.NetWorkKansas.com).

**Work Opportunity Tax Credit (WOTC).** This tax credit encourages private employers to hire within one of several targeted groups of job candidates who traditionally face barriers to employment, such as public assistance recipients, unemployed or disabled veterans, or ex-felons. The tax credit reduces an employer's federal income tax liability by as much as \$2,400 per qualified new worker in the first year of employment, with employers hiring disabled veterans saving up to \$9,600 in the first year of employment.

**Job Creation Program Fund (JCPF).** This fund, administered by the Secretary of Commerce in consultation with the Secretary of Revenue and the Governor, aims to promote job creation and economic development by funding projects related to the major expansion of an existing commercial enterprise, the relocation to Kansas of a major employer, the award of a significant grant that has a financial matching requirement, the potential departure from the state or the substantial reduction of an existing employer's operations, training activities, the potential closure or substantial reduction of a major state or federal institution, projects in counties with at least a 10 percent decline in population over the last decade, or other unique economic development opportunities.

The 2.0 percent of withholding tax receipts, which previously was dedicated to the Investments in Major Projects and Comprehensive Training (IMPACT) Program, is deposited in the JCPF, provided the current debt services, including administrative expenses, of the IMPACT Program have been met. The Secretary of Revenue annually estimates the amount of net tax savings realized under the provisions of 2011 House Sub. for SB 196, and that amount is deposited in the JCPF. The Secretary of Commerce is required to annually report to legislative leadership

and the tax and commerce committees on the expenditures from the Fund.

### ***Business Recruitment and Relocation***

The Business Recruitment and Relocation Section, working with site consultants and out-of-state businesses, promotes Kansas as a locale for businesses to move a portion or all of their operations. In each of five regions of the country (the East Coast, the Great Lakes, the Mid-Central, Missouri, and the West Coast), a regional office engages in recruitment activities, including identifying client needs, possible site locations, and available state and local resources. Emphasis is placed upon attracting businesses, both domestic and foreign, involved in the industries of alternative energy, distribution, bioscience, and advanced manufacturing.

### ***Rural Opportunity Zones***

Started in 2011, Rural Opportunity Zones (ROZs) are designed to reverse population declines in rural areas of Kansas. Statute designates 77 counties as ROZs, including Allen, Anderson, Barber, Bourbon, Brown, Chase, Chautauqua, Cherokee, Cheyenne, Clark, Clay, Cloud, Coffey, Comanche, Decatur, Doniphan, Edwards, Elk, Ellsworth, Gove, Graham, Grant, Gray, Greeley, Greenwood, Hamilton, Harper, Haskell, Hodgeman, Jackson, Jewell, Kearny, Kingman, Kiowa, Labette, Lane, Lincoln, Linn, Logan, Marion, Marshall, Meade, Mitchell, Montgomery, Morris, Morton, Nemaha, Neosho, Ness, Norton, Osborne, Ottawa, Pawnee, Phillips, Pratt, Rawlins, Republic, Rice, Rooks, Rush, Russell, Scott, Sheridan, Sherman, Smith, Stafford, Stanton, Stevens, Sumner, Trego, Thomas, Wabaunsee, Wallace, Washington, Wichita, Wilson, and Woodson.

The program has two incentives:

- A state income tax exemption for up to five years to individuals who move to a ROZ county from outside the state. Individuals must not have lived in Kansas for the past five years nor have an income of more than \$10,000

per year over the past five years from a Kansas source; and

- Student loan forgiveness, up to \$3,000 per year with a \$15,000 maximum benefit, for individuals who graduate from an accredited post-secondary institution and move to a ROZ county. The incentive is a county-state partnership, and counties must choose to participate.

As of 2018, 75 county governments or employers in the ROZ counties have joined the student loan forgiveness program. The income tax waiver is solely available in Chase and Wabaunsee counties.

### ***Minority and Women Business Development***

The Office of Minority and Women Business Development encourages the development of minority- and women-owned businesses. Information and referrals are provided in the areas of procurement, contracting and subcontracting, financing, and business management. The Office partners with other business advocates to sponsor business education workshops and seminars.

**Kansas Statewide Certification Program.** The Office also administers the Kansas Statewide Certification Program in which women and minority businesses can be certified as a Disadvantaged Business Enterprise, Minority Business Enterprise, or Women Business Enterprise. Certification may increase opportunities for those businesses to gain contracts and subcontracts from governmental and private entities committed to the inclusion of less advantaged persons. Program services are free.

### ***Innovation Growth Program***

The Innovation Growth Program provides Kansas entrepreneurs and technology companies with technical expertise, research, and other services designed to help those businesses grow and succeed. The Program, comprised of elements of the former Kansas Technology Enterprise

Corporation (KTEC), offers expertise in four basic areas.

**Research to Support Industry.** University-based centers of excellence provide access to research and technical expertise for companies and entrepreneurs seeking to develop new products or solve problems with new technologies.

**Entrepreneurial Centers.** These business incubators provide services to technology companies in their early-stage development phase. Services range from preparing entrepreneurs to approach capital partners, to forming joint ventures and new companies around technologies, to accessing expertise housed at state universities.

**Mid-America Manufacturing Technology Center (MAMTEC).** MAMTEC works to increase the competitive position of small- and mid-sized Kansas manufacturers by helping to improve their productivity and expand their capacity.

**Angel Investment Resources.** Regional networks of angel investors and angel tax credits help to meet the financing needs of Kansas entrepreneurs by serving as a catalyst to stimulate the flow of private investment capital in promising early stage ventures. Angel networks identify and fund promising start-up business opportunities. Kansas income tax credits are available to individuals who provide seed-capital financing for emerging Kansas businesses engaged in the development, implementation, and commercialization of innovative technologies, products, and services.

### ***Trade Development***

The Trade Development Section works to increase the international sales of goods and services produced in Kansas. Private companies can receive counseling regarding exports, marketing, international regulations, and searches for agents or distributors. International trade representatives are utilized on a contractual basis to provide contacts in Brazil, China, India, Japan, Mexico, South Korea, and Taiwan, and other countries in Asia, Europe, and Latin America. Kansas vendors are recruited to attend international trade shows.

The Section organizes trade missions and hosts foreign delegations when they visit Kansas.

## **Division of Workforce Services**

### **KANSASWORKS**

The Department of Commerce is responsible for the State's workforce system called KANSASWORKS. Established through the federal Workforce Investment Act (WIA) of 1998 and Gubernatorial Executive Order No. 01-06, KANSASWORKS links businesses and employers with job seekers and educational institutions that provide training. KANSASWORKS' goal is to provide persons looking for work a "one-stop shop" to find employment, training, and information about Unemployment Insurance benefits. Workforce Services determines employers' eligibility for several of the employee-related incentives and training programs previously mentioned in this article. If a business faces mass layoffs, a rapid response team can be sent out to the employer's facility to provide job counseling for soon-to-be displaced workers. The Division also administers the following programs.

**Business Executive and Industry Liaisons (BEILs).** Liaisons work closely with the Business Development Division to identify the workforce demands of companies either planning to expand or locate to Kansas.

### ***Federal Bonding Program***

This program provides individual fidelity bonds to employers for applicants who are denied coverage because of a criminal record, history of chemical abuse, lack of employment history, or dishonorable discharge. Each bond's coverage is for \$5,000 for six months. The program is free to employers and job applicants.

### ***Older Kansans Employment Program (OKEP)***

This program assists Kansans over 55 years of age with employment placement services.



### ***Kansas Registered Apprenticeship***

This program combines classroom instruction with on-the-job training. Apprenticeships may last one to six years, depending upon the occupation and the industry's standards. A specialized form of Apprenticeship Program is the Early Childhood Association Apprenticeship Program, which, in partnership with community colleges, certifies people working in childcare and early education.

### ***Incumbent Worker Training Program***

Financed by WIA, this program provides grants to employers for training expenses associated with avoidance of mass layoff, the development of a best practice model, industries endorsed by a local workforce board, or a significant occupational demand.

### ***Foreign Labor Certification***

This certification qualifies an employer to hire foreign or alien workers if an employer cannot find qualified U.S. workers available to fill vacancies.

Workforce Services works with an advisory State Board, which is appointed by the Governor and composed of 19 members, including employers, human resources specialists, higher education administrators, and state officials. At the local level, the state is divided into five areas. Each area has a local board of directors with headquarters in Great Bend (Area I), Topeka (Area II), Kansas City (Area III), Wichita (Area IV), and Pittsburg (Area V). The five areas provide workforce services at 28 workforce centers across the state.

### ***Agency Funding from the Economic Development Initiatives Fund (EDIF)***

The statutes governing the EDIF provide that it shall be used to finance programs "supporting and enhancing the existing economic foundation of the state and fostering growth . . . to the state's economic foundation." With the exception of a statutory \$2.0 million transfer to the State Water Plan Fund, the Legislature annually appropriates the EDIF for individual projects and programs

deemed to support and enhance the State's economic foundation.

The EDIF is funded through the State Gaming Revenue Fund (SGRF). A portion of state revenue from both the Kansas Lottery and parimutuel wagering is transferred to the SGRF. That fund is used essentially as a holding fund from which further transfers are made on a monthly basis. No more than \$50.0 million may be credited to the SGRF in any fiscal year. Amounts in excess of \$50.0 million are credited to the State General Fund.

The Kansas Athletic Commission and the Kansas Creative Arts Industries Commission, both statutorily created, are organized within the Department of Commerce.

### ***Kansas Athletic Commission***

This commission, composed of five members appointed by the Governor and serving four-year terms, administers the laws governing wrestling and regulated sports, including professional boxing, kickboxing, and mixed martial arts. The Commission, in cooperation with the Boxing Commissioner, works to ensure the health and safety of contestants, fair and competitive bouts, and the protection of the general public. Regulatory responsibilities include the licensing and supervision of referees, judges, physicians, managers, contestants, timekeepers, seconds, promoters, and matchmakers for contests as well as event oversight.

### ***Kansas Creative Arts Industries Commission***

This commission, composed of 11 members appointed by the Governor and legislative leadership, promotes the growth of creative industries in Kansas. This is pursued through two grant programs: the Strategic Investment Program, which supports the development and operation of art organizations, and the Arts Integration Program, which facilitates

the involvement of the arts in education and community development goals.

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### Commerce, Labor, and Economic Development

#### B-2 Statewide STAR Bond Authority

##### STAR Bond Q&A

###### *What is a STAR Bond?*

A STAR Bond is a tax increment financing (TIF) program that allows city governments to issue special revenue bonds, which are repaid by all of the revenues received by the city or county from incremental increases in transient guest taxes, local sales taxes, and use taxes collected from taxpayers doing business within the designated portion of the city's "sales tax and revenue" (STAR) bond district. All or a portion of the increased state sales and use tax revenues also may be used to repay the bonds, which typically have a 20-year repayment period.

###### *What type of project can use STAR Bond financing?*

- A project with at least a \$50.0 million capital investment and \$50.0 million in projected gross annual sales revenues;
- A project located outside of a metropolitan statistical area that has been found by the Secretary of Commerce (Secretary) to be in an eligible area under Tax Increment Financing law and of regional or statewide importance;
- A major commercial entertainment and tourism area as determined by the Secretary;
- Auto racetrack facilities, multi-sport athletic complexes, river walk canal facilities, historic theaters, the Manhattan Discovery Center, the Wyandotte County Schlitterbahn Project, museum facilities, or a major motorsports complex in Shawnee County; or
- A project involving buildings 65 years old or older and include contiguous lots that are vacant or condemned.

###### *Is any project specifically excluded from use of STAR Bonds?*

Projects including a gaming casino are specifically excluded from use of STAR Bonds.

### **How does the STAR Bond project work?**

The law allows the governing body of a city to establish one or more special bond projects in any area in the city or outside a city's boundaries with the written approval of the county commission. However, each special bond project must be approved by the Secretary based on the required feasibility study prior to utilizing STAR Bonds.

The city also is required to propose a project plan, hold a hearing on the plan, and adopt the project plan. One mandated component of the project plan is a marketing study conducted to examine the impact of the special bond project on similar businesses in the projected market area.

Finally, the city must complete a feasibility study, which includes:

- Whether a project's revenue and tax increment revenue and other available revenues are expected to exceed or be sufficient to pay for the project costs;
- The effect, if any, the project will have on any outstanding special obligation bonds payable from the revenues used to fund the project;
- A statement of how the jobs and taxes obtained from the project will contribute significantly to the economic development of the state and region;
- Visitation expectations, the unique quality of the project, an economic impact study, and integration and collaboration with other resources or businesses;
- The quality of service and experience provided as measured against national consumer standards for the specific target market;
- Project accountability, measured according to best industry practices;
- The expected return on state and local investment that the project is anticipated to produce;
- A statement concerning whether a portion of the local sales and use taxes are pledged to other uses and are unavailable as revenue for the project

and, if the revenues are so committed, a detailed explanation of the commitment and the effect; and

- An anticipated principal and interest payment schedule on the bond issue.

The Secretary places a limit on the total amount of STAR Bonds that may be issued for any project.

A city also is required to have a certified public accountant conduct an annual audit of each project. STAR Bond districts are prohibited from including real property that was part of another project or district unless that project or district has been approved by the Secretary prior to March 1, 2016. A district is limited to those areas being developed and any areas reasonably anticipated to directly benefit the project. However, STAR Bond districts created and approved in 2017 or later must exclude tax increment revenues derived from retail automobile dealers. If a STAR Bond district adds area, the base tax year for the newly annexed area will be the 12-month period immediately prior to the month in which the new area is added to the district.

### **What are the constraints placed on the developer?**

The developer of a special bond project is required to commence work on the project within two years from the date of adoption of the project plan. If the developer does not commence work on the project within the two-year period, funding for the project ceases and the developer has one year to appeal to the Secretary for re-approval of the project. If the project is re-approved, the two-year period for commencement applies.

Also, the law requires that Kansas residents be given priority consideration for employment in construction projects located in a special bond project area.

### **What are eligible uses for STAR Bond proceeds?**

- Purchase of real property, which may be acquired by means of eminent domain;

- Relocation assistance for property owners moving out of the project district;
- Site preparation work, including relocations of utilities;
- Drainage conduits, channels, levees, and river walk canal facilities;
- Parking facilities, including multi-level parking structures devoted to parking only;
- Street improvements;
- Street light fixtures, connection, and facilities;
- Utilities located within the public right-of-way;
- Landscaping, fountains, and decorations;
- Sidewalks and pedestrian underpasses or overpasses;
- Drives and driveway approaches located within the public right-of-way of an auto racetrack facility, major multi-sport athletic complex, museum facility, and major motorsports complex; and
- Up to 1.0 percent of the bond proceeds, but not exceeding \$200,000, plus any actual administrative costs incurred by the Department of Commerce (Department) that exceed the fee.

### ***What are ineligible uses for the STAR Bond proceeds?***

Costs incurred in connection with the construction of buildings or other structures are not eligible. In addition, proceeds are not available for fees and commissions paid to real estate agents, financial advisors, or any other consultants who represent the developer or any other businesses considering locating or located in a redevelopment district; salaries for local government employees; moving expenses for employees of the businesses locating within the redevelopment district; property taxes for businesses that locate in the redevelopment district; lobbying costs; bond origination fees paid to the city; any personal property as defined in KSA 79-102; or travel, entertainment, and hospitality.

### **Other Important Information**

All cities that have projects financed with STAR Bonds are to prepare and submit an annual report to the Secretary by October 1 of each year. The Department compiles an annual report on all STAR Bond projects and submits them to the Governor; the Senate Committee on Commerce; and the House Committee on Commerce, Labor and Economic Development by January 31 of each year. For the past three calendar years and year to date, each STAR Bond district must report the following information:

- The amount of sales and use tax collected;
- The amount of bond payments and other expenses incurred;
- The amount of bonds issued and the balance of bonds, by district and by project;
- The remaining cash balance in the project to pay for future debt service and other permissible expenses;
- Any new income-producing properties brought into the district, identifying the base amount of revenue the State would retain and the incremental amount that goes to the district;
- The amount of bonds issued to repay private investors, identifying the share of the indebtedness financed by private and public financing;
- The percentages of state and local effort committed to the district; and
- The number of visitors to the district, identifying the number of in-state and out-of-state visitors.

Reauthorized in 2017, the authority to issue debt pursuant to the STAR Bond Financing Act will sunset on July 1, 2020, unless continued by an act of the Legislature.

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## Commerce, Labor, and Economic Development

### B-3 Unemployment Insurance Trust Fund

#### Overview

The Kansas Unemployment Insurance (UI) Trust Fund was created in 1937 as the state counterpart to the Federal Unemployment Insurance Trust Fund. The UI Trust Fund provides income stability for Kansas citizens during times of economic difficulty while stimulating economic activity. UI is a federal program managed by the State. Changes to Employment Security Law cannot take effect until approved by the U.S. Department of Labor. The Legislature has modified the provisions of the Kansas Employment Security Law several times over the past two decades.

#### State Fund Contributions

Contributions to the UI Trust Fund are made by Kansas employers and are governed by KSA 2018 Supp. 44-710a. The UI Trust Fund is designed to be self-correcting during economic cycles. Moneys in the UI Trust Fund accumulate during periods of economic expansion; benefits are distributed during economic recessions.

Unemployment rates increase when contribution rates increase, while contribution rates decline during better economic times. The State charges employers a fee on the first \$14,000 of wages paid to each employee. This is called the taxable wage base. (In rate year 2016, the taxable wage base increased from \$12,000 to \$14,000.) The amount collected from employers varies depending upon the presence or absence of several factors or conditions, such as employer classifications. Employers in Kansas can be classified as a new employer, an entering and expanding employer, a positive balance employer, or a negative balance employer.

New employers in the construction industry with less than three years of employment history are charged a fee amount equal to 6.0 percent of their taxable wage base. For new employers who are not in the construction industry and have fewer than 24 months of payroll experience, the contribution rate is 2.7 percent.

After receiving notice from the Kansas Department of Labor regarding contributions owed for the upcoming rate year, a new employer has 30 days to request an alternative rate be applied

if the employer can provide information that the employer's operation has been in existence in another state for a minimum of three years prior to moving to Kansas.

If that condition is met, the employer's contribution rate will be equal to the rate previously charged by another state provided that rate was not less than 1.0 percent. In order to retain the reduced contribution rate, the employer must maintain a positive account balance throughout the four-year period the reduced rate is in effect.

Employers with an employment history of at least three years qualify for experience-based ratings.

Employers are classified as positive balance when their total contributions to the UI Trust Fund exceed the amount of unemployment benefits charged to their accounts. Positive balance employers are grouped into 27 rate groups, depending upon their unemployment experience, and a specific contribution rate is determined for each employer.

The standard rates for the positive groups range from 0.2 percent for rate group 1 and increase by 20 basis points in each subsequent rate group until 5.4 percent is established for rate group 27.

Employers not classified as negative balance employers are eligible to receive a fee discount of 25.0 percent if all reports are filed and contributions are made by January 31. This discount does not apply if other discounts provided by law are in effect or if the UI Trust Fund's balance is insufficient.

Employers are classified as negative balance when their total contributions to the UI Trust Fund do not exceed the amount of unemployment benefits charged to their accounts. They are grouped into 11 rate groups. The standard rates for the negative groups range from 5.6 percent for rate group N1 and increase by 20 basis points in each subsequent rate group until 7.6 percent is established for rate group N11.

The solvency adjustment, which is based upon the UI Trust Fund's reserve ratio (the UI Trust Fund's balance as of July 31, divided by total payroll for

contributing employers) and the average high benefit cost rate (an average of the three highest ratios of benefits paid to total wages in the most recent 20 years) is applied to all experience-rated employers, which range from a maximum of 1.6 percent to a minimum of -0.5 percent. Employers have the choice to make additional contributions to the UI Trust Fund in order to become positive balance employers and qualify for an experience-based rating with lower contribution rates.

### **Federal Unemployment Trust Fund**

In addition to the contributions to the UI Trust Fund, employers are taxed by the Federal Unemployment Tax Act (FUTA).

Employers pay a rate of 6.0 percent on the first \$7,000 of income; however, the federal government provides a tax credit of 5.4 percent against this rate for states with an unemployment insurance program in compliance with federal requirements.

This yields an effective contribution rate of 0.6 percent for Kansas employers. FUTA funds are used for administrative purposes and to fund loans for state unemployment insurance programs when they become insolvent.

### **Solvency of UI Trust Fund**

Kansas uses the Average High Cost Multiple (AHCM), as recommended by the U.S. Department of Labor, to ensure the UI Trust Fund is adequately funded. The AHCM is the number of years a state can pay benefits out of its current UI Trust Fund balance if it were required to pay benefits at a rate equivalent to an average of the three highest 12-month periods in the past 20 years.

The primary determinants of the UI Trust Fund depletion rate are the benefits paid out, the number of persons to whom unemployment is paid, and the amount of time for which benefits are paid.



### Current Status of the Fund

If a future recession were severe enough to deplete the UI Trust Fund, which happened during the Great Recession, the Kansas Department of Labor is authorized to borrow from the federal Labor Department, Pooled Money Investment Board, or both to make weekly benefit payments. The State General Fund is not obligated to ensure the solvency of the UI Trust Fund. Likewise, the UI Trust Fund may not be used for non-employment security purposes. Federal UI loans must be repaid in a single lump sum plus interest, which is waived if a state’s UI trust fund was sufficiently solvent prior to the loan. Failure to repay the loan results in the FUTA tax credit for employers being reduced by an additional 0.3 percent annually until the debt is repaid.

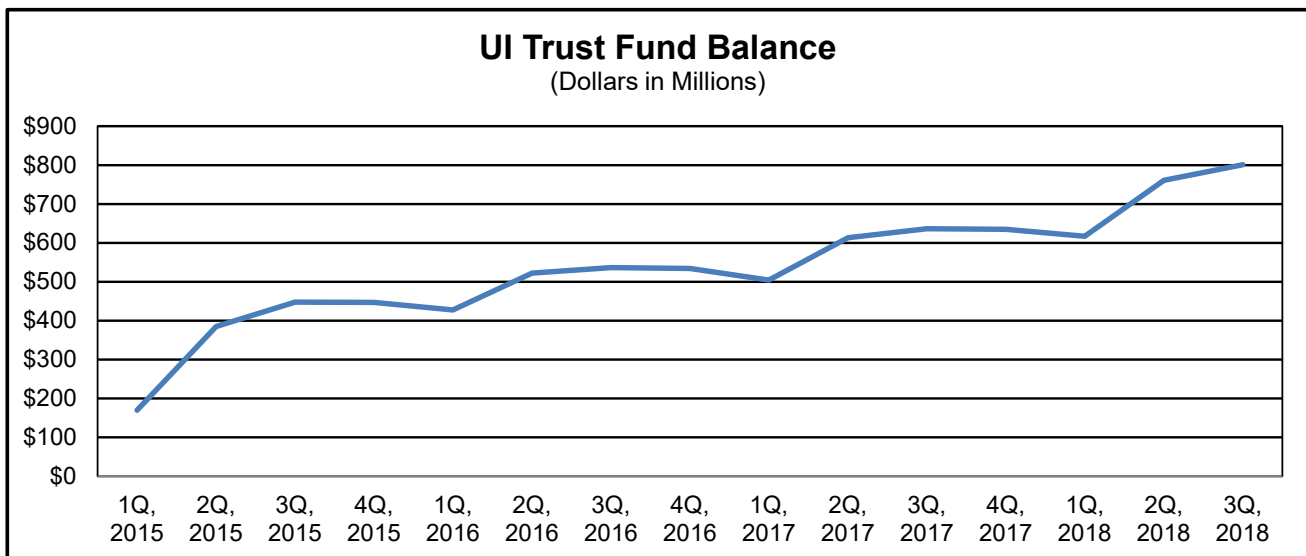
### Employee Benefits

An individual is eligible for unemployment compensation when that person has lost employment through no fault of his or her own. Termination or resignation generally disqualifies a person from receiving UI benefits; however, Kansas Employment Security Law allows for several exceptions to this prohibition.

The amount of money an employee can receive in benefits will vary depending on the level of compensation the employee received during employment and the length of time the employee can receive benefits. However, there are strict upper and lower limits on benefit payments to prevent over- and under-compensation. If the Kansas Department of Labor determines a person made a false statement or representation when applying for benefits, that person is disqualified from receiving benefits for five years.

### Calculating the Weekly Benefit

The weekly benefit amount is what the claimant will receive each week in unemployment compensation. The weekly benefit amount is determined by multiplying 4.25 percent times the highest earning quarter in the first four of the last five completed calendar quarters. KSA 2018 Supp. 44-704(c) limits the weekly benefit amount to either \$474 or 55.0 percent of the average weekly wages paid to employees in insured work in the previous calendar year, whichever is greater. Subsection (d) of the same statute guarantees that employees will receive at least 25.0 percent of the average weekly wages paid to employees in insured work in the previous calendar year.



Source: Weekly UI Reports, Kansas Department of Labor

## Calculating the Length of Compensation

During a standard or non-recessionary period, an employee's duration of benefit is calculated in one of two ways, whichever is less. First, an employee can receive weekly compensation for a specified number of weeks, or second, the duration of benefits is determined by multiplying one-third times the total benefits received in the first four of the last five completed calendar quarters. The weekly benefits amount is divided into the total benefits received in order to determine the number of weeks an employee can receive compensation. If the unemployment rate for Kansas is equal to or greater than 6.0 percent, a person is eligible for a maximum of 26 weeks of benefits. If the unemployment rate is less than 6.0 percent but greater than 4.5 percent, a person is eligible for 20 weeks of benefits. A person is eligible for 16 weeks of benefits if the unemployment rate is equal to or less than 4.5 percent. For purposes of this provision, the law calculates the unemployment rate using a three-month, seasonally adjusted rolling average.

The federal Emergency Unemployment Compensation Act of 2008 (Act) extends an

employee's duration of benefits by 20 weeks and has an additional Tier 2 trigger to provide 13 weeks of compensation when unemployment exceeds 6.0 percent, for a total of 33 weeks above the 26 weeks of unemployment compensation in non-recessionary periods. All benefits paid under the Act are paid from federal funds and do not impact the UI Trust Fund balance. Under KSA 2018 Supp. 44-704(a), Kansas will provide an additional 13 weeks of unemployment compensation when the Kansas economy hits one of several indicators, including an unemployment rate of at least 6.5 percent for the previous three months. An applicant can receive less than 13 weeks of extended state benefits in the event his or her original eligible benefit period was less than 26 weeks based on the one-third calculation. Under state law, extended Kansas benefits are paid 50.0 percent from the UI Trust Fund and 50.0 percent from the Federal Unemployment Account.

## Enforcement of the UI System

In 2013, the Legislature authorized the Secretary of Labor to hire special investigators with law enforcement capabilities to investigate UI fraud, tax evasion, and identity theft.

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**C-1  
Career Technical  
Education (CTE) in  
Kansas**

**C-2  
Mental Health  
Intervention Team  
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**C-3  
School Finance—  
Recent Legislative  
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**C-4  
School Safety and  
Security**

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## Education

### C-1 Career Technical Education (CTE) in Kansas

In 2012, legislation (SB 155) launched a new plan to enhance career technical education (CTE) in Kansas with the purpose of better preparing high school students for college and careers. Beginning with the 2012-2013 school year, Kansas high school students could qualify for free college tuition in approved technical courses offered at Kansas technical and community colleges. The program also initially provided school districts with a \$1,000 incentive for each high school student who graduated from that district with an industry-recognized credential in a high-need occupation.

The 2015 Legislature changed the incentive to a prorated amount not to exceed \$750,000 in total. During the 2016 Session, the appropriated amount decreased from \$750,000 to \$50,000 for FY 2016 and FY 2017, which was estimated to cover the cost of the certification examinations only.

The 2017 Legislature moved the \$50,000 incentive funds from the Kansas Board of Regents (KBOR) to the Kansas State Department of Education (KSDE) for FY 2018 and FY 2019.

The appropriated amount for tuition was prorated in FY 2016 and FY 2017, as there was no increase in appropriations and the amount did not cover all participants in the program. The program was fully funded in FY 2018 and FY 2019.

Occupations on the qualifying credential incentive list can be found on the KBOR website. The list currently includes, but is not limited to, the following occupations:

- Heavy and tractor-trailer truck drivers;
- Computer support specialists;
- Nursing assistants;
- Automotive service technicians and mechanics;
- Machinists;
- Farm equipment mechanics;
- Firefighters;
- Carpenters;
- Welders;
- Electricians;

- Plumbers and pipe-fitters;
- Sheet metal workers; and
- Heating, air-conditioning, and refrigeration mechanics and installers.

technical education has grown significantly, resulting in a growth of college credit hours generated and credentials earned by high school students. The table published on the KBOR website summarizes the increase in participation over time.

### Student Participation

Since the program’s inception, the number of students participating in postsecondary career

	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018*
Participating Head Count	3,475	3,870	6,101	8,440	10,275	10,023	10,600	11,690
College Credit Hours Generated	28,000	28,161	44,087	62,195	76,756	79,488	85,150	92,093
Credentials Earned		548	711	1,419	1,682	1,224	1,459	1,503
* preliminary numbers								

### National Recognition

In 2013, the Career Technical Education Initiative received national recognition as one of the “Top Ten Innovations to Watch” from The Brookings Institution. The same year, Martin Kollman of KSDE and Lisa Beck of KBOR published the article “Free CTE College Tuition and Certification

Funding: KS SB 155 at Work” in the September issue of *Techniques*, a national monthly magazine published by the Association for Career and Technical Education.

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### Education

#### C-2 Mental Health Intervention Team Pilot Program

##### 2018 Legislation

In Sub. for SB 423 and House Sub. for SB 61, the 2018 Legislature created the Mental Health Intervention Team Pilot Program (Program) for FY 2019 “to improve social-emotional wellness and outcomes for students by increasing schools’ access to counselors, social workers and psychologists statewide” (2018 Sub. for SB 423, Sec. 1(a)). The legislation requires school districts and community mental health centers (CMHCs) to enter into partnerships through memorandums of understanding (MOUs) to implement the Program. Additionally, the legislation requires mental health intervention teams to consist of school liaisons employed by the participating school districts, and clinical therapists and case managers employed by the participating CMHCs. The legislation specifies the minimum number of schools from the following school districts that would participate in the Program:

- 23 schools in the Wichita school district (USD 259);
- 28 schools in the Topeka school district (USD 501);
- 10 schools in the Kansas City school district (USD 500);
- 5 schools in the Parsons school district (USD 503);
- 4 schools in the Garden City school district (USD 457); and
- 9 schools served by the Abilene school district (USD 435) as the fiscal agent.

The Legislature appropriated \$10.0 million, all from the State General Fund, to the Kansas State Department of Education (KSDE) to fund the Program for FY 2019. The appropriations include \$4.2 million to cover treatment costs for participating students. This includes \$2.6 million for Medicaid costs and \$1.5 million for CMHCs. In addition, the appropriations include \$3.3 million to cover the costs associated with the school liaisons hired by participating school districts. Finally, \$2.5 million is included to create an online database to be used for the Program.

## Program Overview

### Scope of Program

As implemented by KSDE, the Program will focus on providing care to two groups of students. The “alpha group” consists of youth who are Children in Need of Care (CINC) and are in state custody. These students have experienced multiple placements and move school districts multiple times throughout the school year. The “beta group” consists of youth who may move from time to time, but are also likely to reside in one school district throughout their education.

### Duties of Intervention Team Members

The duties of school liaisons employed by participating school districts include, but are not limited to:

- Identifying appropriate referrals;
- Acting as a liaison between the school district and the CMHC;
- Helping the CMHC prioritize interventions for identified students;
- Facilitating connections between identified students’ families and the CMHC staff;
- Communicating with child welfare contacts to get educational history of a student who has moved schools; and
- Gathering outcomes to monitor the effectiveness of the program.

The duties of clinical therapists employed by participating CMHCs include, but are not limited to:

- Helping the school liaison identify and prioritize students for treatment interventions;
- Conducting a clinical assessment of the identified student and making appropriate treatment recommendations;
- Providing individual and family therapy;
- Communicating with school personnel to help them understand a student’s

diagnosis, family circumstance, and suggested interventions; and

- Gathering outcome data to monitor the effectiveness of the Program.

The duties of case managers employed by participating CMHCs include, but are not limited to:

- Working with the school liaison and clinical therapist to identify and prioritize students for treatment interventions;
- Providing outreach to students, families, and child welfare contacts to help engage in treatment;
- Helping maintain communication between all entities involved, including family, student, school, clinician, child welfare, and community;
- Making referrals to appropriate community resources; and
- Helping to reconnect students and families when they are not following through with the treatment process.

### Memorandums of Understanding

Participating school districts are required to enter into three MOUs for the Program. The first MOU is with KSDE, which outlines the basic requirements of the Program and specifies how funding received for the Program is to be spent. The second MOU is between the school district and its partner CMHC. This MOU outlines how the school district and CMHC will cooperate in the implementation of the Program. KSDE produced and distributed a standard memorandum for this agreement, but did not require school districts to use it. The final MOU is between the participating school districts and the Kansas Department of Health and Environment (KDHE), which covers payments made by the school district to KDHE for Medicaid-related costs.

### Breakdown of Funding

All funding for the Program flows through the participating school districts. Following is a description of the three different grant payments.

**School Liaison Grant.** This grant is distributed to school districts on a monthly basis. School districts submit requests each month to cover anticipated expenditures. Allowable expenditures for this grant include salary, fringe benefits, travel expenses, and a computer that must be used exclusively by the school liaison. The anticipated distribution of funds for school liaisons can be seen in Table 1.

Abilene (USD 435)	\$ 150,000
Garden City (USD 457)	112,500
Kansas City (USD 500)	839,410
Parsons (USD 503)	75,000
Topeka (USD 501)	560,000
Wichita (USD 259)	1,526,200
<b>TOTAL</b>	<b>\$3,263,110</b>

**CMHC.** This grant will be distributed quarterly to school districts. School districts must forward all payments to the participating CMHC to cover the cost for treatment and services for students who are uninsured or underinsured. The distribution of funding for the CMHC grants can be seen in Table 2.

Abilene (USD 435)	\$ 125,750
Garden City (USD 457)	55,500
Kansas City (USD 500)	74,800
Parsons (USD 503)	48,000
Topeka (USD 501)	208,000
Wichita (USD 259)	1,029,000
<b>TOTAL</b>	<b>\$1,541,050</b>

**KDHE Grant.** This grant will be distributed quarterly to school districts. School districts must forward all payments to KDHE to cover Medicaid costs related to the Program. The distribution of funding for the KDHE grants can be seen in Table 3.

Abilene (USD 435)	\$ 216,290
Garden City (USD 457)	95,460
Kansas City (USD 500)	128,656
Parsons (USD 503)	82,560
Topeka (USD 501)	357,760
Wichita (USD 259)	1,769,000
<b>TOTAL</b>	<b>\$2,649,726</b>

**Reporting Requirements**

KSDE requires participating school districts to submit, in conjunction with their partner CMHC, three reports during the fiscal year. A report covering the period July 1, 2018, through October 31, 2018, is due November 15, 2018. The second report covering November 1, 2018, through February 28, 2019, is due March 15, 2019. Finally, the year-end report is due July 1, 2019.

These reports track the number of students served and various academic performance measures, including attendance, behavior, and graduation. Additionally, the year-end report will include a financial report on program expenditures for the fiscal year.

**Participating Schools**

There are 22 schools participating in the Wichita school district (USD 259), 28 schools participating in the Topeka school district (USD 501), 10 schools participating in the Kansas City school district (USD 500), 5 schools participating in the Parsons school district (USD 503), and 5 schools participating in the Garden City school district (USD 457). The Abilene school district (USD 435), in addition to having 3 participating schools, is serving as the fiscal agent for the following school districts, which have a total of 6 schools participating in the Program:

- Solomon (USD 393);
- Chapman (USD 473); and
- Herington (USD 487).

(Note: The original list of Wichita schools submitted to the legislative committee named 23 schools; however, it was determined a school was listed twice. Therefore, Wichita has 22 schools participating in the Program.)

Table 4 includes a list of all schools participating in the Program during FY 2019.

<b>Table 4 – Participating Schools</b>		
<b>Wichita (USD 259)</b>		
Allen Elementary School	Hamilton Middle School	Sowers Alternative High School
Bryant Opportunity Academy (ES)	Jardine STEM and Career Explorations Magnet Middle Academy	Wichita Heights High School
Cessna Elementary School	Marshall Middle School	Wichita North High School
Dodge Literacy Magnet Elementary School	Mead Middle School	Wichita South High School
Gardiner Elementary School	Stucky Middle School	Wichita Southeast High School
Greiffenstein Alternative Elementary School	Truesdell Middle School	Wichita West High School
Isely Traditional Magnet Elementary School	Wells Alternative Middle School	Gateway Alternative Program (MS/HS)
OK Elementary School		
<b>Topeka (USD 501)</b>		
Highland Park Central Elementary School	Ross Elementary School	Marjorie French Middle School
Jaguar Academy (ES)	Scott Dual Language Magnet School (ES)	Robinson Middle School
Jardine Elementary School	State Street Elementary School	Avondale Academy (MS/HS)
Lowman Hill Elementary School	Stout Elementary School	Capital City High School
McCarter Elementary School	Whitson Elementary School	Highland Park High School
McClure Elementary School	Williams Science and Fine Arts Magnet School (ES)	Hope Street Charter Academy (HS)
McEachron Elementary School	Chase Middle School	Topeka High School
Meadows Elementary School	Eisenhower Middle School	Topeka West High School
Quincy Elementary School	Jardine Middle School	
Randolph Elementary School	Landon Middle School	
<b>Kansas City (USD 500)</b>		
Bertram Caruthers Elementary School	Parker Elementary School	Argentine Middle School
Eugene Ware Elementary School	Quindaro Elementary School	D.D. Eisenhower Middle School
Hazel Grove Elementary School	Welborn Elementary School	F.L. Schlagle High School
New Chelsea Elementary School		
<b>Parsons (USD 503)</b>		
Garfield Elementary School	Lincoln Elementary School	Parsons High School
Guthridge Elementary School	Parsons Middle School	



<b>Garden City (USD 457)</b>		
Alta Brown Elementary School	Georgia Matthews Elementary School	Garden City Alternative Education Center
Florence Wilson Elementary School	Horace Good Middle School	
<b>Abilene (USD 435)</b>		
Eisenhower Elementary School	Abilene Middle School	Abilene High School
<b>Chapman (USD 473)</b>		
Chapman Elementary School	Chapman Middle School	
<b>Herington (USD 487)</b>		
Herington Elementary School	Herington Middle School	Herington High School
<b>Solomon (USD 393)</b>		
Solomon Jr./Sr. High School		

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### Education

#### C-3 School Finance—Recent Legislative Changes

The 2015, 2016, 2017, and 2018 Legislatures enacted major changes to school finance.

##### 2015

Legislation in 2015 repealed the School District Finance and Quality Performance Act (SDFQPA) that was passed in 1992 and, in its place, created the Classroom Learning Assuring Student Success (CLASS) Act. The CLASS Act provided a block grant of funding for each school district for school years 2015-2016 and 2016-2017.

##### 2016

The 2016 Legislature, in both its regular session and its special session, altered the formula for providing Supplemental General State Aid for FY 2017 and amended laws related to virtual school state aid, the Extraordinary Need Fund (ENF), and federal funding for certain pre-kindergarten programs.

Legislation passed in the 2016 Special Session reinstated the Supplemental General State Aid and Capital Outlay State Aid formulas in effect prior to the enactment of the CLASS Act, which the 2016 Legislature fully funded. In addition, the 2016 Special Session legislation reduced from \$5,600 to \$5,000 the amount of funding school districts were entitled to receive under the block grant for full-time virtual school students for FY 2017.

Legislation directed the State Board of Education (State Board) to review applications for funds from the ENF. In determining a district's need, the State Board must consider:

- Any extraordinary increase in enrollment for the current school year;
- Any extraordinary decrease in assessed valuation for the current year;
- Any other unforeseen acts or circumstances substantially impacting a district's general fund budget for the current year; and
- In lieu of any of the above, whether the district has reasonably equal access to substantially similar

educational opportunities through similar tax effort.

Special Session legislation set expenditure limits on the ENF at \$13.0 million and provided no moneys could be expended from the ENF in FY 2017 until the sale or merger of the Kansas Bioscience Authority was complete. The legislation directed the first \$25.0 million in proceeds from the sale or merger to be deposited in the State General Fund. If the remaining proceeds were less than \$13.0 million, the amount of money appropriated to the ENF was to be reduced by the amount of the shortfall.

## 2017

The 2017 Legislature passed the Kansas School Equity and Enhancement Act, which reinstated a weighted enrollment formula similar to the SDFQPA. Weightings include at-risk students, declining enrollment, high-density at-risk students, bilingual students, low enrollment, high enrollment, new school facilities, ancillary

school facilities, cost of living, career technical education, and transportation.

The weighted enrollment of a school district is once again multiplied by a coefficient to determine the aid the district receives in its general fund. This multiplier—formerly known as base state aid per pupil—is now referred to as base aid for student excellence (BASE).

## 2018

The 2018 Legislature increased the BASE over a five-year period to arrive at an amount of \$4,713 by school year 2022-2023. The legislation also made changes to weightings associated with transportation, at-risk students, career and technical education, and bilingual students. Finally, the legislation added aid for special education, early childhood education, student mental health, and college and career entry exams.

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### Education

#### C-4 School Safety and Security

House Sub. for SB 109 (2018) included provisions regarding school safety and security. These provisions included school safety grants, statewide standards for securing schools, school safety plans, and emergency preparedness drills.

#### School Safety and Security Grants

SB 109 created the School Safety and Security Grant Fund (Fund) in the Kansas State Department of Education and transferred \$5.0 million from the State General Fund (SGF) to the Fund for FY 2019. The Fund is controlled by the State Board of Education (State Board) and is designed to provide grant moneys to school districts for school safety and security improvements. School districts are required to match the amount of the grant on a dollar-for-dollar basis.

For FY 2019, the State Board awarded grants to 156 of the state's 286 school districts. The average grant was \$32,268. The smallest grant was awarded to Healy (USD 468) for \$1,043, and the largest was awarded to Wichita (USD 259) for \$922,613.

#### Statewide Standards for Securing Schools

The State Board is required to develop and adopt statewide standards for making all public schools safe and secure. SB 109 requires those standards to include, but not be limited to, the infrastructure of school buildings, security technology utilized in schools, and communication systems. When developing these standards, the State Board must consult with the Adjutant General's Department, Kansas Bureau of Investigation (KBI), Kansas Department of Health and Environment (KDHE), and the State Fire Marshal. The State Board may also consult with other state or local agencies or school districts if deemed necessary. The standards must be developed by January 1, 2019.

#### School Safety Plans

The State Board is also required to adopt statewide standards for school safety and security plans by January 1, 2019. These standards must include, but are not limited to:

- Evaluation of school building infrastructure;
- Training of school district employees on safety policies;
- Procedures for notification, securing a building during an emergency, emergency evacuation, and recovery after an emergency;

- Incorporation of school safety plans into existing emergency response plans;
- Distribution of school safety plans to pertinent local agencies; and
- Procedures to ensure school safety plans are implemented.

When developing these standards, the State Board is required to consult with the Adjutant General's Department, KBI, KDHE, and the State Fire Marshal. The State Board may also consult with other state or local agencies or school districts if deemed necessary.

Local boards of education are required to adopt a comprehensive school safety plan based on the standards adopted by the State Board. School districts must consult with local law enforcement and emergency management agencies to review school infrastructure and existing emergency response plans. Adopted school safety plans must be sent to the State Board and each local agency the school district consulted with during the creation of the plan.

## Emergency Preparedness Drills

SB 109 requires the State Fire Marshal to expend moneys to require administrators of public and private schools to conduct at least 16 emergency preparedness drills during the school year and to prescribe the manner in which such drills are to be conducted. The drills must include:

- Four fire drills;
- Three tornado drills; and
- Nine crisis drills, such as intruder response drills and lock-down drills.

## Expiration of Provisions

Since these school safety provisions were included in the budget bill in the 2018 Session, they only apply to the current school year (2018-2019) and will expire after June 30, 2019.

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### Federal and State Affairs

#### D-1 Amusement Parks

##### History of Amusement Parks

The modern amusement park can trace its roots back to early county fairs and carnivals. In Kansas, the first state fair was held in 1913 in Hutchinson. However, county fairs had been held at that location since 1873. The origin of traveling carnivals can be traced back to the 1893 Columbian Exposition in Chicago. The Columbian Exposition, also known as the World's Fair, introduced many new inventions, including the Ferris wheel.

Although the Ferris wheel was introduced in 1893, the first amusement rides are thought to have been built in the 1870s. As for roller coasters, the world's first coaster opened in 1884 at Coney Island, New York. It was there in 1895 where the first permanent amusement park was constructed. Previously, rides were operated individually. Ten years later, in 1905, the first amusement park in Kansas was constructed in Wichita when Wonderland Amusement Park was built on a sandbar in the Arkansas River. The park was in operation until 1918.

Other amusement parks were eventually developed in the state, including Joyland Amusement Park in Wichita, which operated from 1949 until 2004. Today, traveling carnivals continue to operate in the state, in addition to the Kansas State Fair, which is held each September. In addition, water parks and municipal pools are regulated by state law, provided their attractions fall within established definitions.

##### Regulation in Kansas

Since 1977, 21 bills, outlined in the following table, have been introduced to either establish new regulations or amend current laws concerning amusement parks. Four of those bills have been enacted.

<b>Bill Number</b>	<b>General Subject</b>	<b>Outcome</b>
1976 SB 842	Amusement Park Insurance	Died on Senate Calendar
1976 HB 2933	Amusement Safety Act	Died in Committee
1983 SB 198	Automatic Amusement Devices	Died in Committee
1983 HB 2547	Automatic Amusement Devices	Died in Committee
1986 SB 597	Amusement Park Regulation	Died in Committee
1993 HB 2401	Amusement Park Insurance	Be Not Passed Committee
1997 HB 2024	Amusement Park Permits, Inspections	Died in Committee
1998 HB 2722	Amusement Park Licensing	Died in Committee
1999 HB 2040	Amusement Park Regulation	Died in Conference Committee
1999 HB 2005	Amusement Park Insurance	Enacted
2001 HB 2120	Amusement Park Regulation	Died in Committee
2005 HB 2510	Coin Operated Machines	Died in Committee
2005 HB 2524	Coin Operated Machines	Died in Committee
2007 SB 193	Amusement Park Regulation	Added to HB 2504
2008 Senate Sub. for HB 2504	Amusement Park Regulation	Enacted
2008 HB 2616	Amusement Park Regulation	Added to HB 2504
2017 HB 2389	Amusement Park Regulation	Died in Committee (Contents inserted into 2017 House Sub. for SB 70)
2017 House Sub. for SB 70	Amusement Park Regulation	Enacted
2017 House Sub. for SB 86	Amusement Park Regulation	Enacted (Repealed House Sub. for SB 70)
2018 House Sub. for SB 307	Amusement Park Regulation	Enacted
2018 SB 310	Amusement Park Regulation	Enacted (Repealed SB 307)



Many of the bills in the table concerned establishing baseline regulations and insurance requirements. However, no insurance requirements were created in statute until 2000. Furthermore, no statutes regarding regulation of amusement rides were enacted until 2008 with the passage of the Kansas Amusement Ride Act (Act). During the 2017 Session, the Act was further amended and expanded.

### **2000 HB 2005—Kansas Amusement Ride Insurance Act**

This bill established that amusement rides shall not be operated in the state unless the owner has a liability insurance policy that provides for coverage of up to \$1.0 million in the aggregate. If the owner of the ride was a subdivision of the State, or a nonprofit organization, that individual would not be required to carry such insurance. In addition, city or county governments could establish and enforce safety standards for amusement rides and could establish higher amounts of required insurance.

During the 1999 Legislative Session, HB 2040 was introduced, which would have established statutory regulations over amusement rides and established permit and inspection provisions. However, the bill died in Conference Committee.

### **2008 Senate Sub. for HB 2504—Kansas Amusement Ride Act**

The contents of 2008 Senate Sub. for HB 2504 (previously 2008 HB 2616) were drafted after a 2007 Interim study by the Special Committee on Federal and State Affairs. After enactment, the provisions became the first oversight of amusement rides in Kansas law. Under the new law, amusement ride owners would be required to inspect rides set up at a permanent location yearly and to conduct nondestructive testing. Inspections could be conducted by park employees, provided they held a National Association of Amusement Ride Safety Officials (NAARSO) Level I certification. Additionally, rides at a temporary location would be required to be inspected every 30 days.

The bill also provided that injuries of patrons must be reported to the park. If a serious injury occurred, operation of the ride would cease until the ride was re-inspected. Further, criminal penalties were established for knowing operation in violation of the statute. The bill also provided rule and regulation authority to the Secretary of Labor (Secretary) and also directed the Secretary to develop an inspection checklist and to conduct random inspections of rides.

### **2017 House Sub. for SB 70**

The bill, prior to repeal and replacement by passage of 2017 House Sub. for SB 86, addressed regulation of amusement rides through many different categories, including the following:

- Permits;
- Registration;
- Amusement Ride Safety Fund;
- Injury reporting;
- Liability insurance;
- Definitions;
- Qualified inspectors;
- Inspections;
- Records;
- Standards for ride construction;
- Nondestructive testing;
- Criminal penalties; and
- Rule and regulation authority.

### **2017 House Sub. for SB 86**

The bill, as enacted, repealed the provisions of 2017 House Sub. for SB 70. The bill included the same provisions of House Sub. for SB 70, as described above, and made further amendments. The amendments included:

- Directing the Secretary to promulgate rules and regulations before January 1, 2018;
- Requiring the Secretary to give owners a reasonable amount of time to comply with the Act;

- Removing language regarding liability insurance requirements for home-owned amusement rides;
- Requiring a certificate of inspection for permit issuance;
- Adding commercial zip lines to the definition of “amusement ride”;
- Amending the definition of “serious injury” to include other injuries that require immediate medical treatment; and
- Requiring the Secretary to conduct compliance audits in place of random inspections.

### **2018 House Sub. for SB 307**

The bill, prior to repeal and replacement by passage of 2018 SB 310, addressed regulation

of amusement rides through many different categories, including the following:

- Permits;
- Permit applications;
- Registration;
- Insurance requirements;
- Inflatables; and
- Slide attendants.

### **2018 SB 310**

The bill, as enacted, repealed the provisions of 2018 House Sub. for SB 307. The bill included the same provisions of House Sub. for SB 307, as described prior, and made further amendments. The amendments included a change of effective date and an additional reference to “antique amusement rides.”

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### Federal and State Affairs

#### D-2 Carrying of Firearms

##### Background

Kansas generally has not restricted gun laws at the state level since statehood. Prior to 2006, open carry of firearms was legal in the state except where prohibited by local ordinance. The state also had no provisions for concealed carry of firearms until 2006 when the Personal and Family Protection Act was enacted.

##### Personal and Family Protection Act (2006 SB 418)

Enactment made Kansas the 47th state to allow concealed carry and made it the 36th state that “shall issue” concealed carry permits. In other words, under the new law, Kansas would be required to issue a concealed carry permit to any person who met the education requirements, could lawfully possess a firearm, and who paid the licensing fee. Permits were issued beginning on January 1, 2007.

##### 2013 Legislative Changes (2013 Senate Sub. for HB 2052 and 2013 SB 21)

The 2013 Legislature passed Senate Sub. for HB 2052, which added new sections to the Personal and Family Protection Act (PFPA), primarily authorizing concealed carry of handguns by licensees into certain public buildings enumerated in the legislation. Also passed was SB 21, which enacted firearms-related amendments.

##### 2015 Legislative Changes (2015 SB 45)

SB 45 (2015) allowed the concealed carry of a firearm without a concealed carry license issued by the State as long as the individual carrying the firearm is not prohibited from possessing a firearm under either federal or state law.

##### 2017 Legislative Changes (2017 Senate Sub. for HB 2278)

Senate Sub. for HB 2278 (2017) exempted the following institutions from a general requirement in law that public buildings have

adequate security measures in place before the concealed carry of handguns can be prohibited:

- State- or municipal-owned medical care facilities and adult care homes;
- Community mental health centers;
- Indigent health care clinics; and
- Any buildings located in the health care district associated with the University of Kansas Medical Center.

### **2018 Legislative Changes (2018 HB 2145)**

HB 2145 (2018) amended the definition of “criminal use of weapons” by adding possession of a firearm by any of the following: fugitives from justice; aliens illegally or unlawfully in the United States; persons convicted of a misdemeanor for a domestic violence offense within the past five years; and persons subject to court orders restraining them from harassing, stalking, or threatening an intimate partner, child, or child of an intimate partner.

The bill also specified possession of a device or attachment designed, used, or intended for use in suppressing the report of any firearm shall be exempt from the definition of “criminal use of weapons” if the device or attachment satisfies the description of a Kansas-made firearm accessory in current law. The exemption applies to any “criminal use of weapons” violation that occurred on or after April 25, 2013.

### **Carrying of Concealed Weapons**

Prior to the enactment of 2015 SB 45, Kansas citizens who wished to carry a concealed firearm in the state were required to possess a permit issued by the Kansas Attorney General. However, after January 1, 2014, any person who could lawfully possess a handgun in the state could carry it concealed without a permit. This makes Kansas a “constitutional carry” state. If a Kansas resident desires to carry a concealed handgun in a different state, they would need a Kansas concealed carry permit, provided the state recognizes Kansas-issued permits.

### **Permit Qualifications**

The applicant must:

- Be 21 years of age or older;
- Live in the county in which the license is applied for;
- Be able to lawfully possess a firearm;
- Successfully complete the required training course; and
- Pay application and background check fees (\$112).

### **Unlicensed Concealed Carry**

Since the enactment of 2015 SB 45, citizens have been able to carry concealed firearms in the state without a permit. However, the law provides some exceptions. Private property owners can exclude weapons from their premises. Additionally, state or municipal buildings must allow citizens to carry concealed firearms, unless adequate security is present. “Adequate security,” as defined by law, includes armed guards and metal detectors at every public access entrance to a building. Furthermore, state or municipal employers may not restrict the carry of concealed firearms by their employees, unless adequate security is present at each public access entrance to the building. Correctional facilities, jails, and law enforcement agencies may exclude concealed weapons in all secured areas, and courtrooms may be excluded, provided that adequate security is present at each public access entrance.

### **Public Buildings Exceptions**

Under the PFPA, several types of public buildings are excluded and are allowed to ban concealed firearms for a period of four years.

### ***State- or Municipal-Owned Hospitals, Mental Health Centers, and Community Mental Health Centers***

Senate Sub. for HB 2278 (2017) exempted the following institutions from a general requirement in law that public buildings have adequate

security measures in place before the concealed carry of handguns can be prohibited: state- or municipal-owned medical care facilities and adult care homes; community mental health centers; indigent health care clinics; and any buildings located in the health care district associated with the University of Kansas Medical Center.

### **Public College Campuses**

Under the PFPA, Board of Regents institutions were able to exclude concealed firearms from their campuses until July 1, 2017. Now, Board of Regents institutions must allow concealed firearms in buildings in which adequate security is not provided. The Board of Regents adopted a policy that stated those who carry on campus must be 21 years of age. Further, they must

completely conceal their weapon, and the safety must be engaged. Each university has adopted its own concealed weapons policy in accordance with the law. Kansas is 1 of 21 states whose laws state that public universities must allow concealed weapons on their campuses.

### **State Capitol Building**

Under the PFPA, the State Capitol building is excluded from the definition of state and municipal building. Furthermore, the law states that citizens may carry a concealed firearm within the State Capitol, provided they are lawfully able to possess a firearm.

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### Federal and State Affairs

#### D-3 Legalization of Medical and Recreational Marijuana

Although the use of medical or recreational marijuana is not legal in Kansas, several bills have been introduced to change the law. Medical marijuana use is legal in 33 states and the District of Columbia, and recreational use of marijuana is legal in 10 states and the District of Columbia. This article summarizes the bills that have been introduced in Kansas and provides an overview on the legalization and decriminalization that has occurred in other states.

#### Medical Use of Marijuana

##### *History of Legislation in Kansas*

In the last 14 years, 15 bills were introduced in the Kansas Legislature addressing the topic of medical marijuana or cannabidiol. The only bill to be enacted was 2018 SB 282, which amended the definition of marijuana to exempt cannabidiol.

Sub. for SB 155 (2017) would have amended law concerning nonintoxicating cannabinoid medicine (NICM). Under the bill, no person could have been arrested, prosecuted, or penalized in any manner for possessing, utilizing, dispensing, or distributing any NICM or any apparatus or paraphernalia used to administer the medicine. The bill would have specified the physicians issuing recommendation orders for NICM and pharmacists dispensing or distributing NICM could not have been subject to arrest, prosecution, or any penalty, including professional discipline. The bill was recommended for passage by the Senate Committee on Federal and State Affairs. At the beginning of the 2018 Session, the bill was rereferred to the Senate Committee and died in Committee.

During the 2015 Legislative Session, HB 2282 advanced out of its original committee and its contents passed the House Committee of the Whole as an amendment to HB 2049. HB 2282, as amended, would have allowed use of medical hemp preparations to treat or alleviate a patient's condition causing seizures, including those characteristic of epilepsy. The bill was withdrawn from General Orders in the House of Representatives and referred to the House Committee on Appropriations, where it died. (*Note: See additional information about HB 2049 under the heading "Penalties and Decriminalization" on the following page.*)

In 2010, HB 2610 would have allowed for the creation of not-for-profit Compassionate Care Centers and for these facilities to issue registration certificates, registry identification cards, and marijuana to patients. The bill would have allowed patients and caregivers to possess certain amounts of marijuana plants, usable marijuana, and seedlings of unusable marijuana. Also, the bill would have provided patients and caregivers with certain levels of immunity from arrest, prosecution, or other civil penalties. Finally, the bill would have prohibited discrimination against patients from schools, landlords, employers, and other entities.

Slight variations of 2010 HB 2610 were introduced in 2011 (HB 2330), 2012 (SB 354), 2013 (HB 2198 and SB 9), 2015 (HB 2011 and SB 9), and 2017 (SB 155, SB 187, and HB 2348).

### **Other States**

The District of Columbia and 33 states have laws legalizing medical marijuana and cannabis programs. The laws in these states meet the following criteria: protection from criminal penalties for using marijuana for a medical purpose; access to marijuana through home cultivation, dispensaries, or some other system that is likely to be implemented; allowance for a variety of strains; and allowance of either smoking or vaporization of marijuana products, plant material, or extract.

Another 19 states allow use of low THC, high cannabidiol products for specific medical conditions or as a legal defense. Both Missouri and Iowa enacted laws in 2014 to allow cannabidiol oil to be prescribed to individuals who suffer from intractable epilepsy, a seizure disorder in which a patient's seizures fail to come under control with treatment.

## **Recreational Use of Marijuana**

### **Other States**

The District of Columbia and ten states (Alaska, California, Colorado, Maine, Massachusetts,

Michigan, Nevada, Oregon, Vermont, and Washington) have legalized the recreational use of marijuana as of November 2018.

In 2018, Vermont became the first state to legalize recreational marijuana through the legislative process. The other nine states used a ballot initiative. Twenty-one states had bills before legislatures in 2017 to advance or allow the use of recreational marijuana for adults.

## **Penalties and Decriminalization**

### **Kansas**

SB 112 (2017) reduced the severity level for unlawful possession of drug paraphernalia from a class A to a class B nonperson misdemeanor when the drug paraphernalia was used to cultivate fewer than five marijuana plants or used to store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance into the human body. This provision became effective July 1, 2017.

HB 2049 was introduced during the 2015 Legislative Session. As introduced, the bill would have decreased the penalty for possession of marijuana in certain circumstances. The bill, as amended by the House Committee of the Whole, would have allowed use of medical hemp preparations to treat or alleviate a patient's condition causing seizures and would have created the Alternative Crop Research Act that would have allowed the Kansas Department of Agriculture (KDA) to cultivate and promote the research and development of industrial hemp. In 2016, the contents of the bill decreasing the criminal penalty in certain circumstances were inserted into HB 2462, which was approved by the Governor on May 13, 2016. The remainder of the contents from HB 2049, as amended by the House Committee of the Whole, were not included and did not become law.

In 2018, SB 263 enacted the Alternative Crop Research Act (Act), which allows the KDA, either alone or in coordination with a state institution of higher education, to grow and cultivate industrial hemp and promote the research and



development of industrial hemp, in accordance with federal law. The bill allows individuals to participate in the research program under the authority of the KDA. The bill amends KSA 2018 Supp. 21-5701, dealing with criminal law, and KSA 65-4101, dealing with controlled substances, excluding “industrial hemp” from the definition of “marijuana,” when cultivated, possessed, or used for activities authorized by the Act.

### **Wichita City Ordinance**

In April 2015, Wichita passed an ordinance during the general election that lessened the penalty for first-time marijuana possession. The new ordinance would impose up to a \$50 fine for first-time possession of a small amount of marijuana. After the election, the Kansas Attorney General filed a lawsuit against the City of Wichita seeking to have the ordinance declared null and void.

On May 13, 2015, the Kansas Supreme Court ordered the City of Wichita not to enforce the marijuana ordinance until the Court could issue a ruling on its validity. The ordinance conflicts with state law, where marijuana possession is a misdemeanor punishable by up to a year in jail and a \$2,500 fine.

The Kansas Supreme Court heard oral arguments on September 17, 2015. In its January 2016 ruling, the Court struck down the ordinance, citing the proponents’ failure to comply with statutory procedures in filing its proposal with the city clerk. Therefore, the Court declined to rule on the merits of the case.

On June 6, 2017, the Wichita City Council voted to preliminarily approve the reduction of the penalty for first-time marijuana offenses. The Council will take another vote at a later date to finalize the reduction.

### **Other States**

The District of Columbia and 22 states have decriminalized the use of small amounts of marijuana. Additional decriminalization efforts were introduced in 16 states in 2018.

In addition to legalization and decriminalization, efforts to reduce penalties related to marijuana were before 14 state legislatures in 2018.

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### Federal and State Affairs

#### D-4 Liquor Laws

Kansas laws concerning intoxicating liquor are included in the Liquor Control Act, the Cereal Malt Beverage Act, the Club and Drinking Establishment Act, the Nonalcoholic Malt Beverages Act, the Flavored Malt Beverages Act, the Beer and Cereal Malt Beverages Keg Registration Act, farm winery statutes, microbrewery statutes, and microdistillery statutes.

#### State and Local Regulatory Authority

The Division of Alcoholic Beverage Control (ABC) and the Director of ABC within the Kansas Department of Revenue (KDOR) have the primary responsibility for overseeing and enforcing Kansas intoxicating liquor laws. As part of its regulatory authority under the different liquor acts, ABC issues 17 different licenses and 5 different permits for the manufacture, distribution, and sale of alcoholic liquor.

County and city governments also have considerable regulatory authority over the sale of intoxicating and alcoholic liquors and cereal malt beverages in the State of Kansas. Article 15 §10 of the *Kansas Constitution* allows the Legislature to regulate intoxicating liquor. Cities and counties have the option to remain “dry” and exempt themselves from liquor laws passed by the state, or local units of government can submit a referendum to voters proposing the legalization of liquor in the local jurisdiction. If such a referendum is passed by a majority of the locality’s voters, alcoholic liquor becomes legal in the city or county and will be subject to state, county, and city laws, ordinances, and regulations.

#### Liquor Control Act

The Liquor Control Act grants the State its regulatory power to control the manufacture, distribution, sale, possession, and transportation of alcoholic liquor and the manufacturing of beer. Cities and counties are able to regulate certain aspects, such as the time and days for the sale of alcoholic liquor, but local governments cannot adopt laws that conflict with the provisions of the Liquor Control Act.

Farm wineries, farm winery outlets, microbreweries, microbrewery packaging and warehousing facilities, and microdistilleries also are regulated by the Liquor Control Act.

## **Cereal Malt Beverage Act**

Local governments have additional authority under the Cereal Malt Beverage Act. According to statute, applications for cereal malt beverage licenses are made either to the city or county government, depending on where the business is located.

As long as any local regulations and ordinances adopted are consistent with the Cereal Malt Beverage Act, the board of county commissioners or the governing body of a city may set hours and days of operation, closing time, standards of conduct, and adopt rules and regulations concerning the moral, sanitary, and health conditions of licensed premises. If the local government does not set hours and days of operation, the default hours and days provided in the Cereal Malt Beverage Act govern the sale of cereal malt beverages. Counties and cities also may establish zoning requirements that regulate establishments selling cereal malt beverages and that may limit them to certain locations.

The Cereal Malt Beverage Act also allows local governments some discretion in revoking licenses and requires such action by local governments in specific situations.

## **Club and Drinking Establishment Act**

In Kansas, the sale of alcoholic liquor by the drink is controlled by the Club and Drinking Establishment Act.

The board of county commissioners may submit a proposition to voters to (1) prohibit the sale of individual alcoholic drinks in the county, (2) permit the sale of individual alcoholic drinks only if an establishment receives 30.0 percent of its gross receipts from food sales, or (3) permit the sale of individual alcoholic drinks only if an establishment receives some portion of gross receipts from food sales. If a majority of voters in the county vote in favor of the proposition, the ABC Director must respect the local results when issuing or denying licenses in that county.

Additionally, the county commissioners are required to submit a proposition to the voters upon receiving a petition if the petition is signed by at least 10.0 percent of voters who voted in the election for the Secretary of State the last time that office was on the ballot in a general election. The petition must contain the language required in KSA 41-2646(3)(b), and the petition must be filed with the county election officer.

## **Nonalcoholic Malt Beverages Act**

Retail sales of nonalcoholic malt beverages are controlled by the Liquor Control Act, the Club and Drinking Establishment Act, or the Cereal Malt Beverage Act, depending on which act the retailer is licensed under for selling or providing the nonalcoholic malt beverage.

## **Flavored Malt Beverage Act**

Kansas adopted the federal definitions of flavored malt beverages (FMB). However, the federal government does not offer FMB licenses or impose penalties in Kansas. The ABC is responsible for FMB regulation and penalties associated with FMBs in the state. Because FMBs are cereal malt beverages, they are regulated under the Cereal Malt Beverage Act.

## **Beer and Cereal Malt Beverage Keg Registration Act**

Retailers selling kegs are regulated under the Liquor Control Act or the Cereal Malt Beverage Act, depending on the type of alcoholic beverage(s) the retailer is selling.

Although local governments have delegated authority under the Cereal Malt Beverage Act, city and county ordinances that conflict with the Beer and Cereal Malt Beverage Keg Registration Act are void.

## Liquor Taxes

Currently, Kansas imposes three levels of liquor taxes. For more information, see article [K-3 Liquor Taxes](#).

### 2018 Changes to Liquor Laws—HB 2362

#### Microbreweries production and packaging.

The bill allows microbreweries in Kansas to contract with other microbreweries for production and packaging of beer and hard cider. The contracting Kansas microbrewery will be held to all applicable state and federal laws concerning manufacturing, packaging, and labeling and will be responsible for payment of all state and federal taxes on the beer or hard cider. Production of beer or hard cider will count toward production limits in current law for both the microbreweries involved in such a contract. The bill allows the beer or hard cider to be transferred to the microbrewery on whose behalf the beer or hard cider was produced, after production and packaging.

**Sale of alcoholic candy.** The bill defines “alcoholic candy” and includes the term in the existing definition of “alcoholic liquor.” Alcoholic candy is subject to regulation by the ABC and a retailer is required to have a liquor license to sell such products.

#### Sale of domestic beer in refillable containers.

The bill allows a microbrewery licensee to sell beer manufactured by the licensee in refillable and sealable containers to consumers for off-premises consumption. Such containers may not contain less than 32 fluid ounces or more than 64 fluid ounces of beer. Licensees are required to affix labels to all containers sold, which includes the licensee’s name and the name and type of beer in the container.

**Hours of sale and service for alcohol.** The bill increases the length of time that certain businesses may serve or sell alcohol:

- Establishments licensed to serve alcohol may begin serving alcohol at 6:00 a.m.; and

- Farm wineries, microbreweries, and microdistilleries are allowed to sell their respective alcoholic products in their original containers between 6:00 a.m. and 12:00 a.m. on any day.

#### Self-service beer from automated devices.

The bill allows licensed public venues, clubs, and drinking establishments to provide self-service beer to customers from automated devices in the same manner as is permitted for wine under continuing law, so long as the licensee monitors the dispensing of beer and can control such dispensing. The bill requires any licensee offering self-service beer or wine from any automated device to provide constant video monitoring of the automated devices at all times the licensee is open to the public and maintain the footage for at least 60 days. The bill also sets out requirements for prepaid access cards that contain a fixed monetary amount that can be directly exchanged for beer or wine from an automated device.

### 2017 Changes to Liquor Laws—House Sub. for SB 13; Sub. for HB 2277

#### House Sub. for SB 13

**Expanded sale of strong beer.** The bill allows convenience, grocery, and drug stores licensed to sell cereal malt beverages (CMB), defined as any fermented but undistilled beverage with an alcohol weight of 3.2 percent or less, to sell beer containing not more than 6.0 percent alcohol by volume on and after April 1, 2019. Also effective April 1, 2019, any person with a retailer’s license to sell alcoholic liquor (beer, wine, and distilled spirits) may sell CMB. Liquor retailers may sell other goods or services, provided the amount of nonalcoholic sales—excluding the sales of lottery tickets, cigarettes, and other tobacco products—does not exceed 20.0 percent of the retailer’s total gross sales. Liquor retailers may continue to provide product for resale by bars, restaurants, clubs, and caterers. Distributors may establish minimum quantities and dollar amounts for orders of CMB and alcoholic liquor. Ten years after the bill’s effective date, the Director of ABC must conduct a market impact study on the sale

of beer by persons holding CMB licenses, which must be reported in the 2029 Legislative Session.

### **Sub. for HB 2277**

**Common consumption areas.** The bill allows a city or county to establish one or more common consumption areas by ordinance or resolution and designate the boundaries of these areas. Common consumption area permits can be issued to cities, counties, Kansas residents, or organizations with a principal place of business in Kansas and approved by the respective city or county. Common consumption area permit holders are liable for liquor violations occurring within the common consumption area the permit identifies. Licensees are liable for violations on their individual premises.

**Class B clubs.** The bill also removes from current law a ten-day waiting period for an applicant to become a member of a class B club.

### **2016 Changes to Liquor Laws—SB 326**

**Microbrewery production limits.** The legislation increased the allowable amount of beer manufactured with a microbrewery license to 60,000 barrels of domestic beer in a calendar year for each microbrewery license issued in the state. If a licensee has a 10.0 percent or greater ownership interest in one or more entities that also hold a microbrewery license, the aggregate amount of beer manufactured by all licenses under such common ownership cannot exceed 60,000 barrels.

The legislation allowed microbrewery licensees also licensed as a club or drinking establishment to sell and transfer domestic beer to that club or drinking establishment. Microbrewery licensees also are able to remove hard cider produced by the licensee from the licensed premises for delivery to licensed wine distributors.

**Hard cider.** The legislation allowed a microbrewery to manufacture and distribute not more than 100,000 gallons of hard cider, as defined by the bill. Under prior law, microbreweries could manufacture only beer.

**Residency requirements.** The legislation amends the Liquor Control Act to remove the one-year residency requirement for microbrewery, microdistillery, and farm winery licensees. Microbrewery, microdistillery, and farm winery licensees still are required to be Kansas residents.

### **2015 Changes to Liquor Laws—HB 2223**

**Infusion.** The legislation allowed drinking establishments to sell and serve alcoholic liquor infused with spices, herbs, fruits, vegetables, candy, or other substances intended for human consumption if no additional fermentation occurs during the process.

**Citations.** In addition to making changes to the required contents of citations, the legislation specified when issuing a citation for a violation of the liquor laws, agents of the ABC must deliver the citation issued to a person in charge of the licensed premises at the time of the alleged violation.

Previously, the law required delivery of the citation to the person allegedly committing the violation.

**Powdered alcohol.** The legislation banned clubs, drinking establishments, caterers, holders of temporary permits, and public venues from selling, offering to sell, or serving free of charge any form of powdered alcohol.

**Automated wine devices.** The legislation allowed public venues, clubs, and drinking establishments to offer customer self-service of wine from automated devices on licensed premises. Licensees are required to monitor and have the ability to control the dispensing of wine from the automated devices.

**Eligibility for licensure.** The legislation added to the list of persons who cannot receive liquor licenses any person who, after a hearing before the Director of ABC, is found to have held an undisclosed beneficial interest in a liquor license obtained through fraud or a false statement on the application for the license. The legislation also established requirements for limited liability companies applying for a liquor license.

**Alcohol consumption on Capitol premises.**

The legislation allowed consumption of alcoholic liquor on the premises of the Capitol for official state functions that are nonpartisan in nature. Any such function must be approved by the Legislative Coordinating Council before the consumption of alcoholic liquor may begin.

**Alcohol consumption on unlicensed premises.**

The legislation provided that patrons and guests of unlicensed businesses will be allowed to consume alcoholic liquor and CMB on the premises of unlicensed business property if the following conditions are met:

- The business, or any owner of the business, has not had a license issued under the Kansas Liquor Control Act or the Club and Drinking Establishment Act revoked for any reason;
- No charge is made by the business for the privilege of possession or consumption of alcohol on the premises or for mere entry onto the premises; and
- Any alcoholic liquor remains in the personal possession of the patron, it is not sold, offered for sale, or given away by the owner or employees of such business, and no possession or consumption takes place between 12 a.m. and 9 a.m.

**Alcohol consumption for catered events.** The legislation allowed the consumption of alcoholic liquor at catered events held on public property where the caterer has provided 48-hour notice to ABC.

**Notification requirements.** The legislation changed the required notification caterers must give to ABC by requiring electronic notice 48 hours before an event. Previously, the law required a caterer to provide notice to ABC 10 days before any event and provide notice to the Chief of Police or Sheriff where the event was to occur.

**Distributor sampling.** The legislation allowed alcoholic beverage distributors to provide samples of spirits, wine, and beer or cereal malt beverages to alcoholic beverage retailers and

their employees and other alcoholic beverage distributors and their employees in the course of business or at industry seminars.

**Vineyard permits.** The legislation allowed any person engaged in business as a Kansas vineyard with more than 100 vines to apply for an annual permit. The permit authorizes the following on the premises specified in the permit:

- The sale of wine in the original, unopened container;
- The serving of wine by the drink; and
- Conducting wine tastings in accordance with current law.

**Location of certain licensees.** The legislation allowed cities to pass ordinances allowing liquor retailers, microbreweries, microdistilleries, and farm wineries to locate within 200 feet of any public or parochial school, college, or church in a core commercial district.

**Temporary permits: State Fair.** The legislation allowed the Director of ABC, on or after July 1, 2016, to issue a sufficient number of temporary permits for the sale of wine in unopened containers and the sale of beer, wine, or both by the glass on the State Fairgrounds. The number of permits issued must be consistent with the requirements of the State Fair Board.

**Farmers' market permits.** The legislation allowed farm wineries to sell wine at farmers' markets. Applications for these permits must include the location(s) of the farmers' markets at which wine will be sold.

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### Federal and State Affairs

#### D-5 Lottery, State-owned Casinos, Parimutuel Wagering, and Tribal Casinos

Article 15, Section 3 of the *Kansas Constitution* prohibits lotteries and the sale of lottery tickets forever. The prohibition was adopted by convention, approved by voters in 1859, and approved by the Legislature in 1861. Exceptions to the prohibitions were added in 1974 to allow for bingo and bingo games and in 1986 to allow for the Kansas Lottery (including State-owned casinos, since 2007) and parimutuel wagering on dog and horse races.

**Revenue.** Kansas laws provide for the allocation of Lottery revenues to the State Gaming Revenues Fund (SGRF), State General Fund (SGF), Expanded Lottery Act Revenues Fund (ELARF), and Problem Gambling and Addictions Grant Fund. In FY 2018, these funds received a total of \$163.7 million.

#### Kansas Regular Lottery

In 1986, Kansas voters approved a constitutional amendment to provide for:

- A State-owned lottery; and
- A sunset provision prohibiting the operation of the State Lottery unless a concurrent resolution authorizing such operation was adopted by the Kansas Legislature. The 2007 Legislature extended the Lottery until 2022 and required a security audit of the Kansas Lottery be completed at least once every three years.

The 1987 Kansas Legislature approved implementing legislation that:

- Created the Kansas Lottery to operate the State Lottery;
- Established a five-member Lottery Commission to oversee operations;
- Required at least 45.0 percent of the money collected from ticket sales to be awarded as prizes and at least 30.0 percent of the money collected to be transferred to the SGRF;
- Exempted lottery tickets from sales tax; and

- Allowed liquor stores, along with other licensed entities, to sell lottery tickets.

Lottery games receipts from the sale of tickets and online games are deposited by the Executive Director of the Kansas Lottery into the Lottery Operating Fund in the State Treasury. Moneys in that fund are used to:

- Support the operation of the Lottery;
- Pay prizes to lottery winners by transfers to the Lottery Prize Payment Fund;
- Provide funding for veterans and individuals suffering from problem gambling, alcoholism, drug abuse, and other addictive behaviors *via* transfers to the SGRF; and
- Provide funding for correctional facilities, juvenile facilities, economic development, and the SGF *via* transfers to the SGRF.

**Vending machines.** The 2018 Legislature passed Sub. for HB 2194, which authorizes the Kansas Lottery to use lottery ticket vending machines to sell lottery tickets and instant bingo vending machines to sell instant bingo tickets.

**Veterans Benefit Lottery Game.** The 2003 Legislature passed HB 2400 authorizing the Kansas Lottery to sell an instant ticket game, year-round, benefiting veterans’ programs. Pursuant to KSA 74-8724, net profits are distributed accordingly:

- 40.0 percent for Kansas National Guard educational scholarships and for other purposes directly benefiting members of the Kansas Army and Air National Guard and their families;
- 30.0 percent for the use and benefit of the Kansas Veterans’ Home, Kansas Soldiers’ Home, and Veterans Cemetery System; and
- 30.0 percent for the Veterans Enhanced Service Delivery Program.

**State-owned Casinos**

The 2007 Legislature passed SB 66, commonly referred to as the Kansas Expanded Lottery Act (KELA), authorizing a State-owned and operated lottery involving electronic gaming and racetrack gaming facilities. A proviso in KELA stated that any action challenging the constitutionality of KELA shall be brought in Shawnee County District Court.

In *State ex rel. Morrison v. Kansas Lottery* 07C-001312, the Shawnee County District Court ruled KELA was constitutional because of the State’s selection of casino managers and electronic games, monitoring of managers’ daily activities, ownership of gaming software, and control over revenue distribution demonstrate ownership and operation of a lottery involving electronic gaming. In *State ex rel. Six v. Kansas Lottery*, 186 P.3d 183 (Kan. 2008), the Kansas Supreme Court upheld the district court’s ruling on the constitutionality of KELA.

<b>Revenue.</b> In FY 2018, revenue from the Kansas Regular Lottery was transferred from the SGRF in the following manner:	
Veterans’ Programs	\$ 1,028,373
Economic Development Initiatives Fund	42,364,000
Juvenile Detention Fund	2,496,000
Correctional Institutions Building Fund	4,932,000
Problem Gambling Grant Fund	80,000
State General Fund	23,826,170 <sup>1</sup>
<b>Total</b>	<b>\$ 74,726,543</b>
<p><small>1 Pursuant to statute, no more than \$50.0 million from online games, ticket sales, and parimutuel wagering revenues can be transferred to the SGRF in any fiscal year. Amounts in excess of \$50.0 million are credited to the SGF, except when otherwise provided by law.</small></p>	

**Where Can State Casinos Be Located in Kansas?**

KELA created gaming zones for expanded gaming.

One casino may be built in each zone:

- Wyandotte County (Northeast Kansas Gaming Zone);
- Crawford and Cherokee counties (Southeast Kansas Gaming Zone);
- Sedgwick and Sumner counties (South Central Kansas Gaming Zone); and
- Ford County (Southwest Kansas Gaming Zone).

**Who Owns and Operates the Casinos?**

The Kansas Lottery Commission has ownership and operational control. In addition, the Lottery is authorized to enter into contracts with the gaming managers for gaming at the exclusive and nonexclusive (parimutuel locations) gaming zones.

**Who Is Responsible for Regulation?**

The Kansas Racing and Gaming Commission (KRGCC) is responsible for oversight and regulation of lottery gaming facility operations.

**What Are the Required Provisions of Any Lottery Gaming Facilities Contract?**

KSA 74-8734 details the requirements of gaming facility contracts. Among other things, the contracts must include an endorsement from local governments in the area of the proposed facility and provisos that place ownership and operational control of the gaming facility with the Kansas Lottery, allow the KRGCC complete oversight of operations, and distribute revenues pursuant to statute. The contracts also must include provisions for the payment of a privilege fee and investment in infrastructure. The 2014 Legislature passed HB 2272, which lowered the privilege fee in the Southeast Gaming Zone from \$25.0 million to \$5.5 million and lowered

the investment in infrastructure in the Southeast Gaming Zone from \$225.0 million to \$50.0 million.

The Lottery solicits proposals, approves gaming zone contracts, and submits the contracts to the Lottery Gaming Facility Review Board for consideration and determination of the contract for each zone. The Board is responsible for determining which lottery gaming facility management contract best maximizes revenue, encourages tourism, and serves the best interests of Kansas. The KRGCC provides administrative support to the Board.

<b>Revenue.</b> Pursuant to KSA 74-8768, expanded gaming revenues deposited into the ELARF may only be used for state infrastructure improvements, the University Engineering Initiative Act, and reductions of state debt, the local <i>ad valorem</i> tax, and the unfunded actuarial liability of the Kansas Public Employees Retirement System (KPERS). In FY 2018, expenditures and transfers from the ELARF included:		
KPERS Bonds Debt Service	\$	35,698,913
Public Broadcasting Council Bonds		440,057
Kan-Grow Engineering Funds		10,500,000
KPERS Actuarial Liability		39,883,000
State General Fund		2,469,790
<b>Total</b>	<b>\$</b>	<b>88,991,760</b>

**Parimutuel Wagering**

In 1986, voters approved a constitutional amendment authorizing the Legislature to permit, regulate, license, and tax the operation of horse and dog racing by *bona fide* non-profit organizations and to conduct parimutuel wagering. The following year, the Kansas Parimutuel Racing Act was passed:

- Creating the Kansas Racing Commission, later renamed the KRGCC, which is authorized to license and

regulate all aspects of racing and parimutuel wagering;

- Permitting only non-profit organizations to be licensed and allowing the licenses to be for an exclusive geographic area;
- Creating a formula for taxing the wagering;
- Providing for simulcasting of both interstate and intrastate horse and greyhound races in Kansas and allowing parimutuel wagering on simulcast races in 1992; and
- Providing for the transfer from the State Racing Fund to the SGRF of any moneys in excess of amounts required for operating expenditures.

There are currently no year-round parimutuel racetracks operating in Kansas; therefore, there was no revenue transfer to the SGRF from parimutuel racing.

## Racetrack Gaming Facilities

### ***Who Decides Who Receives the Racetrack Gaming Facility Management Contract?***

The Kansas Lottery is responsible for considering and approving proposed racetrack gaming facility management contracts with one or more prospective racetrack gaming facility managers.

The prospective managers must have sufficient financial resources and be current in filing taxes to the state and local governments. The Lottery is required to submit proposed contracts to KRGC for approval or disapproval.

### ***What Are the Required Provisions of Any Racetrack Gaming Facilities Contract?***

A person who is the manager of a lottery gaming facility is ineligible to be a manager of a racetrack facility in the same gaming zone. KSA 74-8741 details the requirements of racetrack gaming facility contracts. Among other things, the contract must include language that allows the

KRGC complete oversight of operations and the distribution of revenue pursuant to statute.

### ***What Racetrack Facilities Are Permitted to Have Slot Machines?***

The passage of 2007 SB 66 created gaming zones for casinos and parimutuel racetracks housing electronic gaming machines. Currently, there are no racetrack facilities operating in Kansas. In the future, the Kansas Lottery can negotiate a racetrack gaming facility management contract to place electronic gaming machines at one parimutuel license location in each of the gaming zones, except for the Southwest Gaming Zone and Sedgwick County in the South Central Gaming Zone (voters in these gaming zones did not approve the placement of electronic gaming machines at parimutuel locations).

## Tribal-State Gaming

In 1995, the State of Kansas and each of the four resident tribes in Kansas entered into tribal state gaming compacts to allow Class III (casino) gaming at tribal casinos.

In accordance with the federal Indian Gaming Regulatory Act (IGRA), all four of the compacts approved by the Kansas Legislature were forwarded to the Bureau of Indian Affairs and were approved. At the present time, all four resident tribes have opened and are operating casino gaming facilities:

- Kickapoo Tribe opened the Golden Eagle Casino in May 1996;
- Prairie Band Potawatomi Nation opened a temporary facility in October 1996 and then Harrah's Prairie Band Casino in January 1998 (in 2007, Harrah's relinquished operation of the casino to the Prairie Band Potawatomi Nation);
- Sac and Fox Tribe opened the Sac and Fox Casino in February 1997; and
- Iowa Tribe opened a temporary facility in May 1998 and then Casino White Cloud in December 1998.

**Revenue.** Financial information concerning the operation of the four casinos is confidential. Under the existing compacts, the State does not receive revenue from the casinos, except for its oversight activities.

**State Gaming Agency.** The State Gaming Agency (SGA) was created by executive order in August 1995, as required by the tribal-state gaming compacts. Passage of the Tribal Gaming Oversight Act during the 1996 Legislative Session attached the SGA to the KRGC for budget purposes. All management functions of the SGA are administered by the Executive Director of SGA.

The gaming compacts define the relationship between the SGA and the tribes: regulation of the gaming facilities is performed by the tribal gaming commission, but enforcement agents of the SGA also work in the facilities on a daily basis and have free access to all areas of the gaming facility. The compacts also require the SGA to conduct background investigations on all gaming employees, manufacturers of gaming supplies and equipment, and gaming management companies and consultants. The SGA is funded through an assessment process, established by the compacts, to reimburse the State of Kansas for the costs it incurs for regulation of the casinos.

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### Federal and State Affairs

#### D-6 Red Flag Laws

##### What Are Red Flag Laws?

Red flag laws, sometimes called extreme risk protection order laws or gun violence restraining order laws, allow a judge to issue an order that enables law enforcement to confiscate firearms from individuals deemed a risk to themselves or others. Prior to the enactment of red flag laws, in most states, law enforcement had no authority to remove firearms from individuals unless they had been convicted of specific crimes, even if their behavior was deemed unsafe.

Depending on state laws, family members, household members, law enforcement, or a mixture of these groups, can ask the court for an order that would allow police to remove the firearm or firearms from the individual's home and restrict their ability to purchase firearms. Typically, the person seeking the order must provide evidence of behavior that presents a danger to others or themselves; then the court holds an expedited hearing. If a judge agrees the individual is a threat, the individual's firearms will be removed for a temporary period that can last from a few weeks to a year. However, the firearm owner is usually entitled to a hearing so that they may respond.

##### What Actions Constitute a 'Red Flag'?

While each state defines what constitutes a "red flag" differently, the following are some examples:

- Recent threats or acts of violence by such person directed toward themselves or other persons;
- The reckless use, display, or brandishing of a firearm by such person;
- History of documented evidence that would give rise to a reasonable belief the individual has a propensity for violent or emotionally unstable conduct;
- History of the use, attempted use, or threatened use of physical force by such person against other persons;
- History of mental illness or prior involuntary confinement of such person in a hospital for persons with psychiatric disabilities; and
- The illegal use of controlled substances or abuse of alcohol by such person.

## State Actions

### **Enacted**

Before 2018, only five states had enacted red flag laws: Connecticut, Indiana, California, Washington, and Oregon.

In 1999, Connecticut became the first state to enact a law permitting law enforcement the legal authority to temporarily remove firearms from individuals when there is probable cause to believe they are a risk to themselves or others (C.G.S.A. §29-38c).

Indiana enacted the state's red flag law in 2005 (IC 35-47-14 *et seq.*).

California became the first state to allow family members to file a petition for firearms to be removed from an individual's possession when the state enacted their red flag law in 2014. The California Legislature passed a measure in 2016 to allow high school and college employees, co-workers, and mental health professionals to file such petitions, but this legislation was vetoed by Governor Brown (CA Penal Code §18100 *et seq.*).

Washington also enacted a similar red flag law in 2016. Washington, like California, allows family members to petition for the removal of firearms (Chapter 7.94 RCW, Extreme Risk Protection Order Act).

In 2017, Oregon enacted its red flag law (O.R.S. §166.525 *et seq.*).

As of September 2018, an additional eight states have enacted red flag laws. These states are Delaware, Florida, Illinois, Maryland, Massachusetts, New Jersey, Rhode Island, and Vermont.

### **Considered**

During the 2017 and 2018 Legislative Sessions, 23 states and the District of Columbia considered red flag legislation. These states are Alabama, Alaska, Arizona, Colorado, Hawaii, Iowa,

Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Nevada, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Utah, Virginia, and Wisconsin.

### **Did Not Consider**

During the 2017 and 2018 Legislative Sessions, 14 states did not consider red flag legislation. These states are Arkansas, Georgia, Idaho, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, South Carolina, South Dakota, West Virginia, and Wyoming.

However, Arkansas and New Mexico have red flag bills drafted for the 2019 Legislative Session.

## Federal Legislation

Four bills have been introduced at the federal level concerning red flag laws. All but one bill, the Gun Violence Prevention Order Act of 2017, have received bipartisan support.

### **2017 Legislation**

The Gun Violence Restraining Order Act of 2017, H.R. 2598, introduced in May 2017, would define a gun violence prevention order as a written order, issued by a state court or signed by a magistrate, prohibiting a named individual from having custody, controlling, purchasing, possessing, or receiving any firearms, or would require the removal of firearms from that individual's possession. As of May 2017, the bill is in the House Committee on the Judiciary.

The Gun Violence Prevention Order Act of 2017, S. 1212, introduced in May 2017, would define a gun violence prevention order as a written order, issued by a state court or signed by a magistrate, prohibiting a named individual from having custody, owning, purchasing, possessing, or receiving any firearms, or would require the removal of firearms from that individual's possession. As of March 2018, the bill is in the Senate Committee on the Judiciary.



Both of the bills described would provide federal grants to states that implement red flag laws.

### **2018 Legislation**

The Federal Extreme Risk Protection Order Act of 2018, S. 2521, was introduced in the Senate in March 2018. The bill would amend Chapter 44 of Title 18 of the U.S. Code by including extreme risk protection orders in federal law. Under the bill, an extreme risk protection order would be issued by a federal court and would enjoin an individual from purchasing, possessing, or receiving, in or affecting interstate and foreign commerce, a firearm or ammunition. As of March 2018, the bill is in the Senate Committee on the Judiciary.

The Extreme Risk Protection Order and Violence Prevention Act of 2018, S. 2607, also introduced in March 2018, would add a new section to Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10101 *et seq.*). The bill would define an extreme risk protection order as a written order for a period not to exceed 12 months, issued by a state or tribal court or signed by a magistrate that would prohibit the individual named in the order from having custody, controlling, purchasing, possessing, or

receiving any firearms, or would require a firearm be removed from that individual's possession.

Under these bills, with the exception of the Gun Violence Restraining Order Act of 2017, a family or household member of the applicable individual, or a law enforcement officer, may submit a petition requesting that a court issue a gun violence prevention or an extreme risk protection order. Under the Gun Violence Restraining Order Act of 2017, only a family member or a law enforcement officer may submit a petition.

### **Kansas Legislation**

SB 390 was introduced during the 2018 Legislative Session. The bill would have created the Extreme Risk Protective Order Act, which would allow courts to grant an order prohibiting defendants from owning, controlling, or purchasing a firearm or ammunition for up to one year. A law enforcement officer or family member would have been allowed to file a petition for an Extreme Risk Protective Order (ERPO). After an ERPO was issued, the defendant would have been required to relinquish all firearms and ammunition to law enforcement. The bill died in the Senate Committee on Judiciary.

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### Federal and State Affairs

#### D-7 Regulation of Robocalls

Unsolicited calls are among the most frequent consumer complaints received by the Federal Communications Commission (FCC) and Federal Trade Commission (FTC). The use of automatic dialing-announcing devices (referred to as robocalls) to make these calls is on the rise, with estimates indicating 4.1 billion such calls were received across the United States in July 2018 alone. Utilities, pharmacies and health care providers, schools, and other entities use robocalls to provide billing, scheduling, and other information to the public. However, an increasing number of robocalls made to consumers are unsolicited, illegitimate, and unwanted. As the frequency of these calls increases, states have been taking action to minimize robocalls. This article discusses the current state of the law concerning robocalls in Kansas and other states, as well as recent legislation and court cases at both the state and federal levels.

#### Current Kansas Law

KSA 2018 Supp. 50-670 prohibits calls to consumers from automatic dialing-announcing devices in certain instances. The statute defines “automatic dialing-announcing device” to mean any user terminal equipment that when connected to a telephone line, can dial, with or without manual assistance, telephone numbers that have been stored or programmed in the device or are produced or selected by a random or sequential number generator, or when connected to a telephone line can disseminate a recorded message to the telephone number called, either with or without manual assistance. The statute requires any telephone solicitor making calls, including robocalls, to:

- Identify themselves;
- Identify the business on whose behalf such person is soliciting;
- Identify the purpose of the call immediately upon making contact by telephone with the person who is the object of the telephone solicitation;
- Promptly discontinue the solicitation if the person being solicited gives a negative response at any time during the consumer telephone call;
- Hang up the telephone, or in the case of an automatic dialing-announcing device operator, disconnect the

automatic dialing-announcing device from the telephone line within 25 seconds of the termination of the call by the person being called; and

- Answer the line within 5 seconds of the beginning of the call by a live operator or an automated dialing-announcing device. If answered by automated dialing-announcing device, the message provided shall include only caller identification information, but shall not contain any unsolicited advertisement.

The statute states a telephone solicitor shall not be allowed to do the following:

- Withhold the display of the telephone solicitor's telephone number from a caller identification service when that number is being used for telemarketing purposes;
- Transmit any written information by facsimile machine or computer to a consumer after the consumer requests orally or in writing that such transmissions cease; and
- Obtain by use of any professional delivery, courier, or other pickup service receipt or possession of a consumer's payment, unless the goods are delivered with the opportunity to inspect before any payment is collected.

The statute is supplemental to the Kansas Consumer Protection Act (KCPA) and provides local exchange carriers and telecommunications carriers shall not be responsible for the enforcement of the provisions of this section and any violation of this section is an unconscionable act or practice under the KCPA.

### State Action<sup>1</sup>

Currently, 44 states limit commercial robocalls in some way. Several states also limit robocalls to mobile devices. Laws in Arizona, California, Colorado, Connecticut, Florida, Indiana, Louisiana, Michigan, Missouri, North Dakota, Ohio, Oklahoma, Rhode Island, Utah, and Washington specifically limit the use of automated

text messages. Some states also specifically prohibit robocalls from being made to emergency rooms, hospitals, hotel rooms, vacation rentals, paging devices, unlisted or unpublished numbers, and other numbers.

Most states generally prohibit robocalls and automatic text messages, but have specific exceptions in their statutes. Examples of instances where automated calling or messaging may be allowed despite a general prohibition on the practice include delivery, delay, or other information about a purchase; prior relationship between the parties; charitable or nonprofit organization, public opinion polls, research surveys, or radio or television broadcast rating organization; collection of lawful debts; public school programs; and employee work schedules.

Additionally, some states have requirements for the time, day, duration, time of disconnection after call ended, and purpose for which robocalls may be used. Other requirements that states place on robocalls include providing the caller's contact information or not blocking the caller identification; stating the name of the person for whom the call is intended; a live operator obtaining permission before playing a recorded message; requiring automated systems to be attended while in use; and, for political calls, identifying who paid for the call, whether a candidate authorized the call, and other identifying information.

### **Kansas HB 2273 (2017)**

The bill would have increased restrictions on robocalls. Under the provisions of the bill, robocalls would have been prohibited unless the person who is receiving the call has consented to or has authorized receipt of the message or the message is immediately preceded by a live operator who obtains the person's consent. Additionally, the bill would have prohibited robocalls before 9:00 a.m. or after 8:00 p.m. The bill also would have prohibited calls from being made to hospitals, ambulatory surgical centers, recuperation centers, ambulance services, emergency medical service facilities, mental health centers, psychiatric hospitals, state institutions for people with intellectual disabilities,

law enforcement agencies, or fire departments. The bill died in the House Committee on Utilities at the end of the 2018 Legislative Session.

### **Connecticut HB 5563 (2018)**

This bill adds criminal penalties for a person making unsolicited recorded calls while using a blocking device or service to circumvent a caller identification service or device. Current state law already prohibits unsolicited robocalls. The bill was passed and signed into law during the 2018 Session of the Connecticut Legislature.

### **Kentucky HB 59 (2018)**

The bill would create a new section of law prohibiting the marketing, sharing, or selling of wireless telephone numbers of subscribers without express written consent of the subscriber and create a penalty between \$1,000 and \$10,000 for each violation. The bill died in the House Committee on Small Business and Information Technology at the end of the 2018 Session of the Kentucky Legislature.

### **Massachusetts HB 154, HB 201, and HB 2828 (2017)**

These proposals would prohibit all robocalls to hands-free mobile telephones, mobile electronic devices, and mobile telephones. Each of the bills contains a combination of the following exceptions: school districts, employers, correctional facilities, municipalities, utilities, health care services, or informational calls. HB 154 accompanied HB 138, which was referred to the House Committee on Ways and Means in March 2018. HB 201 is currently in the House Committee of the Whole. HB 2828 also accompanied HB 138. As of October 2018, none of the bills had been signed into law.

### **Massachusetts HB 138 (2017)**

This bill would amend current telephone solicitation laws to require the telephone number listed in the identification service or device to be a valid telephone number in which the consumer can directly communicate with the solicitor. The

bill, accompanied by HB 154 and HB 2828, was referred to the House Committee on Ways and Means in March 2018.

### **New Jersey SR 24 (2018)**

This resolution would urge the FCC to require landline and wireless telephone service providers to implement necessary technology to block robocalls to customers, free of charge, and to enact regulations to prevent robocalls from reaching customers. The resolution was passed during the 2018 Session of the New Jersey Legislature.

### **New York S 8674 and A 10739 (2018)**

These bills would limit autodialed telephone calls to state residents and require telephone service providers to offer free call mitigation technologies to telephone customers. Both bills died during the 2018 Session of the New York Assembly.

### **Pennsylvania HB 105 (2017)**

This bill would give consumers the ability to sign up for the national “do-not-call” list for as long as they hold the number they register, without requiring them to re-register every five years. The bill would also prohibit telemarketing on legal holidays and robocalls. The bill was laid on the table on July 27, 2017.

### **Vermont JRH 15 (2018)**

The resolution requests the FTC, the FCC, and Congress to adopt more effective measures to enforce the National Do Not Call Registry and to police illegal robocalls. The resolution was adopted by the Vermont House of Representatives on April 4, 2018, and the Vermont Senate on April 19, 2018.

## **Federal Legislation**

### **S 3078 and HR 6026 (2018)**

These pieces of legislation would give the FCC more authority to crack down on robocallers,

allow telephone customers to revoke permission they previously gave to receive calls, ban calls to numbers that have transferred from one customer to another, and extend the statute of limitations from one year to four years for prosecuting violators. S 3078 was referred to the Senate Committee on Commerce, Science, and Transportation in June 2018. HR 6026 was referred to the House Committee on Energy and Commerce in June 2018.

### Difficulties of Regulation

The Pew Charitable Trusts note regulation of these types of calls is difficult because of the impracticality of enforcement. Many companies

simply do not follow the laws concerning robocalls and increasingly these companies are operating overseas, away from the investigative jurisdiction of the states. The National Do Not Call Registry only blocks legally operating businesses. Telephone companies have stated they are blocking known offensive numbers and are working to help law enforcement agents trace illegal robocalls to identify their origin. The FTC is also working on identifying “spoofed” numbers, which are fake phone numbers beginning with a local or familiar looking area code. Many advocates urge federal and state partnerships for maximum impact in preventing these calls. Ultimately, most concerned parties agree technology and apps will likely be the answer to avoiding and ending illegal robocalls.

- 1 Delaware, Iowa, Ohio, Pennsylvania, Vermont, and West Virginia do not currently have statutory limits on commercial robocalls. Information provided by NCSL August 1, 2017. Updated by KLRD staff 2018.

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### Federal and State Affairs

#### D-8 Sanctuary Jurisdictions

In the wake of the federal repeal of the Deferred Action for Childhood Arrivals (DACA) policy, sanctuary jurisdictions have received more attention. The term has been defined in a U.S. Department of Justice (DOJ) memorandum to include jurisdictions who “willingly refuse to comply with 8 USC 1373” and are not eligible to receive federal grants administered by the DOJ or the Department of Homeland Security (DHS). The same federal law prohibits state and local jurisdictions from restricting communication to federal officials regarding citizenship or immigration status.

Additionally, the term “sanctuary jurisdiction” has been used to refer to jurisdictions with particular policies regarding immigration. Specifically, the term is used to refer to jurisdictions with policies that limit local or state involvement in federal immigration enforcement.

The policies of most sanctuary jurisdictions fall into one of three categories: limiting arrests for federal immigration violations; limiting police inquiries into persons’ immigration status; and limiting information sharing with federal immigration authorities.

#### Limiting Arrests for Federal Immigration Violations

Jurisdictions that limit arrests for federal immigration violations can be described as “Don’t Enforce” jurisdictions. Violations of federal immigration law can be classified as either civil or criminal offenses. For example, overstaying a visa is a civil offense, and removal may only be accomplished through a civil proceeding. In contrast, unlawful entry is a criminal offense.

Some jurisdictions prohibit police from detaining or arresting aliens for civil violations of federal immigration law. Others prohibit police from making arrests for criminal violations of federal immigration law. There are also jurisdictions that prohibit detention or arrests for either type of violation. It should be noted, although federal immigration law allows states and localities to engage in enforcement of federal immigration laws, nothing compels participation.

Pursuant to 8 USC 1357 (a), local and state jurisdictions may only enforce immigration laws under an agreement between the U.S. Attorney General and the state or local jurisdiction. These agreements include enforcement activities, such as interrogation

for purposes of determining lawful presence, arrest for certain violations, and searches within reasonable distance of the U.S. border.

### **Limiting Police Inquiries into Persons' Immigration Status**

Jurisdictions that limit police inquiries into a person's immigration status can be described as "Don't Ask" jurisdictions. Examples of restrictions include the following: police may not question persons about their immigration status, except as part of a criminal investigation; police may not initiate police activities for the purpose of determining a person's immigration status; police may not question crime victims and witnesses about their immigration status; and police may not gather information regarding a person's immigration status except as required by law.

### **Limiting Information Sharing with Federal Immigration Authorities**

Jurisdictions that limit information sharing with federal immigration authorities can be described as "Don't Tell" jurisdictions. Examples of restrictions include the following: police may not notify federal immigration authorities about release of aliens unless convicted of certain felonies; police may not disclose information about the immigration status of a person unless that individual is suspected of engaging in criminal activity other than unlawful presence; and police may not disclose information unless required by law.

### **Role of the Federal Government**

Immigration laws are strictly under the jurisdiction of the federal government, as such powers have been found to be within the scope of federal authority by the U.S. Supreme Court. Since that ruling, Congress has expanded federal immigration law and the enforcement of that law. Immigration and Customs Enforcement (ICE) agents handle enforcement under DHS. ICE agents may arrest and interrogate those suspected of unlawful presence. [8 U.S.C. 1357.]

In addition, DHS may issue a detainer to a local jurisdiction. A detainer is a request by ICE to hold an arrested individual or convicted criminal being released from state or local jails until ICE can pick them up for deportation. Individuals may not be held for more than 48 hours.

Stakeholders argue that detainers violate the Fourth Amendment of the *U.S. Constitution* because ICE does not have probable cause before issuance of a detainer. Additionally, stakeholders argue that detainers violate the Fifth Amendment because ICE does not provide notice when a detainer is issued. While federal courts have upheld this position, there has been no decision issued by the U.S. Supreme Court.

### **Recent Federal Legislation**

#### ***2017 HR 3003—No Sanctuary for Criminals Act***

The No Sanctuary for Criminals Act would expand what is required of cities regarding federal immigrant enforcement and allow the government to deny jurisdictions' federal law enforcement funds if they do not comply. The bill has passed the House of Representatives and is awaiting introduction in the Senate as of September 14, 2018.

#### ***2015 HR 3009—Enforce the Law for Sanctuary Cities Act***

The Enforce the Law for Sanctuary Cities Act would have withheld federal law enforcement funding for those jurisdictions that chose not to enforce federal immigration laws. The bill passed in the House of Representatives and died at the end of the term.

### **Department of Justice Grant Conditions**

Proposed federal legislation, such as 2017 HR 3003, would condition the receipt of federal grant moneys on cooperation with federal law enforcement in immigration matters. One such grant program is the Edward Byrne Memorial Justice Assistance Grants, administered by the



DOJ. The Byrne Grants provide funds to cities for law enforcement purposes.

On June 25, 2017, U.S. Attorney General Sessions announced new conditions would be imposed on grant recipients of Byrne funds. Namely, grant recipients must:

- Prove compliance with federal law that bars cities or states from restricting communications between DHS and ICE about the immigration or citizenship status of a person in custody;
- Allow DHS officials access into any detention facility to determine the immigration status of any aliens being held; and
- Give DHS 48 hours notice before a jail or prison releases a person when DHS has sent over a detention request so federal agents can arrange to take custody of the alien after he or she is released.

The City of Chicago filed a case in federal court asking for the directive to be struck down as unconstitutional. [*City of Chicago v. Sessions*, No. 1:17-cv-5720 (N.D. Ill. 2017).] On September 15, 2017, a judge issued a preliminary injunction against the directive, striking the latter two conditions as being unconstitutional because only Congress can impose grant conditions. The ruling was later affirmed by a panel of the 7th Circuit (Ct.) Court of Appeals. Attorney General Sessions requested an *en banc* hearing on the limited issue of whether the injunction should extend beyond the City of Chicago. The court stayed the injunction so that it only applied to the City pending a decision on the issue by the *en banc* court.

Additional lawsuits have been filed regarding an executive order issued by President Trump on January 25, 2017, which sought to withhold federal grant moneys from jurisdictions that did not comply with 8 USC 1373. The State of California and the City of San Francisco filed a lawsuit seeking an injunction of the executive order on January 31, 2017. In response to the filing, a federal judge issued an order that directed federal agencies not to follow the executive order. The DOJ has since filed an appeal.

On August 1, 2018, the U.S. 9th Ct. Court of Appeals ruled the federal government could not withhold federal funds from California sanctuary jurisdictions. However, on March 13, 2018, the U.S. 5th Ct. Court of Appeals allowed a Texas law requiring police chiefs and sheriffs to cooperate with federal immigration officials to go into effect.

## Role of State Governments

The role of states in immigration enforcement is limited by express or implied preemption due to federal law in the area. In other words, states cannot establish policies related to immigration where federal law has expressly limited such policies or where federal law is so comprehensive that Congress has signaled its intent to wholly occupy the regulatory field. The concept of preemption is what led the U.S. Supreme Court to invalidate several state immigration measures. [*Arizona v. United States*, 132 S. Ct. 2492 (2012).]

On the other hand, the federal government cannot “commandeer” state or local governments into assisting with federal law enforcement. [*Printz v. United States*, 521 U.S. 898 (1997).] However, reporting requirements and other federal measures requiring state or local cooperation may be acceptable in certain circumstances.

## Overview of Recent State Actions

According to a Pew Charitable Trusts article, Connecticut, Illinois, Rhode Island, Vermont, and Washington enacted statewide measures to limit law enforcement cooperation with immigration authorities. Iowa, North Carolina, and Tennessee enacted anti-sanctuary laws requiring cities to cooperate with immigration authorities. Sixteen other states proposed but did not pass similar legislation. Oregon placed a measure on the November ballot that would reverse the state’s 1987 sanctuary law. This measure did not pass.

**Recent Kansas Legislation****2017 SB 158—Prohibiting Adoption of Sanctuary Policies**

The bill would have prohibited municipalities and state agencies from adopting a “sanctuary policy.” Any municipality that enacted or adopted a sanctuary policy would have been deemed ineligible to receive any moneys from a state agency it was otherwise entitled to and would have remained ineligible until the sanctuary policy was repealed or no longer in effect. The Senate Committee on Federal and State Affairs

passed SB 158 out of Committee on March 27, 2017. No further action was taken and the bill died on General Orders on May 4, 2018.

**2017 HB 2275—Prohibiting Adoption of Sanctuary Policies**

The bill would have prohibited state agencies and municipalities from adopting a “sanctuary policy.” Any municipality that enacted or adopted a sanctuary policy would have been deemed ineligible to receive any state funding. The bill was introduced during the 2017 Legislative Session, but died on General Orders on May 4, 2018.

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### Federal and State Affairs

#### D-9 Sports Wagering

##### Background and Overview: Recent U.S. Supreme Court Decision

In *Murphy v. NCAA* 584 US \_\_\_\_ (2018), the U.S. Supreme Court struck down a 1992 law prohibiting states from allowing betting on sporting events. The Professional and Amateur Sports Protection Act (PASPA) (28 USC §§ 3701-3704) had prohibited all sports lotteries except those allowed under state law at the time PASPA was passed. Delaware, Montana, Nevada, and Oregon all had state laws providing for sports wagering in 1992; however, Nevada was the only one of those states conducting sports wagering in a meaningful way between 1992 and 2018.

In 2011, New Jersey passed a law authorizing sports betting. This law was struck down by the courts as a violation of PASPA as part of a challenge brought by five professional sports leagues. New Jersey later repealed the state law expressly authorizing sports wagering, but did not replace it with language expressly prohibiting sports betting. Again, the sports leagues sued New Jersey, claiming that by not expressly prohibiting sports wagering, the state law effectively authorized sports gambling by implication. In 2018, the U.S. Supreme Court issued a ruling striking down PASPA on the grounds that the federal law prohibited the modification or repeal of state law prohibitions and unlawfully regulated the actions of state legislatures.

##### State Action Since *Murphy v. NCAA*

As a result of the U.S. Supreme Court's declaring PASPA to be unconstitutional, states can legally regulate gambling on sporting events. Several states have legalized sports wagering or considered legislation related to legalizing the practice since the Supreme Court's decision was released in May 2018.

According to the Pew Research Center, as of September 2018, sports gambling is legal in nine states, currently being studied by three states, and an additional nine states considered legislation related to the legalization of sports wagering during the 2018 session.

Of the states that have laws authorizing sports betting, Delaware, Mississippi, Nevada, New Jersey, and West Virginia have passed

both laws and regulations and are currently accepting such wagers. Montana, New York, Pennsylvania, and Rhode Island have statutes authorizing sports gambling but have not yet fully implemented those statutes.

Illinois, Michigan, and Ohio are conducting informational hearings, participating in negotiations, or otherwise studying the topic of sports wagering ahead of the 2019 Session.

Legislation failed during the 2018 Legislative Sessions of California, Indiana, Kansas, Kentucky, Louisiana, Maryland, Missouri, Oklahoma, and South Carolina.

## Kansas Legislation

The Kansas Legislature considered a number of measures related to the legalization of sports wagering during the 2018 Legislative Session: SB 455, HB 2533, HB 2792, and HB 2793.

SB 455 and HB 2792 would have created the Kansas Sports Wagering Act (Act). Among other things, the Act would have authorized the Kansas Lottery to offer sports wagering:

- In-person at a facility operated by the Kansas Lottery;
- Through lottery retailers contracting with the Lottery;
- Over the Internet, including websites and mobile device applications; and
- Through a licensed interactive sports wagering platform.

All sports wagering would have been under the ultimate control of the Kansas Lottery. Counties would not have been allowed to be exempt from or effect changes in the Act.

The bill would have created two new crimes (severity level 5 nonperson felonies): misuse of nonpublic sports information and sports bribery.

The Act would have prohibited sports wagering for:

- Persons under 21 years old;

- Operators, as well as their directors, officers, owners, employees, or relatives of those individuals living in the same household;
- Athletes, coaches, referees, team owners, employees of a sports governing body or its member teams, and player and referee union personnel, who could not place wagers on any sporting event overseen by that governing body; and
- Any person with access to nonpublic confidential information held by the operator from placing wagers with the operator.

A sports governing body would have been allowed to:

- Notify the Kansas Racing and Gaming Commission (KRGC) that it desires to restrict, limit, or exclude wagering on its sporting event; and
- Bring a civil case to recover damages or other equitable relief against any person who knowingly engages in, facilitates, or conceals conduct related to sports bribery.

Sports wagering operators would have been required to:

- Cooperate with investigations by the KRGC, sports governing bodies, or law enforcement agencies, including:
- Immediately report to the KRGC any criminal or disciplinary proceedings;
  - Abnormal wagering activity;
  - Potential breaches of the sports governing body's rules and codes of conduct; or
  - Any other conduct that corrupts a betting outcome of a sporting event and suspicious or illegal wagering activities; and
- Remit a sports betting right and integrity fee to each sports governing body overseeing events wagers that were placed during the preceding quarter.

Under the Act, no less than 6.75 percent of the sports wagering revenues would have been distributed to the Expanded Lottery Act Revenues Fund (ELARF).

HB 2793 contained many of the same provisions as SB 455 and HB 2792, but amended the existing Kansas Expanded Lottery Act, rather than creating a separate sports wagering act. This bill did not include a sports betting right and integrity fee.

HB 2533 would have required any sports betting in Kansas to be conducted solely on the premises of a racetrack gaming facility and be managed and operated by one or more racetrack gaming facility managers.

All four of these bills died in Committee at the end of the 2018 Session. Two of the bills (SB 455 and HB 2792) had hearings held on them and one bill (HB 2792) received an informational hearing.

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### Financial Institutions and Insurance

#### E-1 Consumer Credit Reports and Security Freezes

Identity theft is a fast-growing crime in the United States. Consumers can combat identity theft by placing a security freeze on their credit reports (known as “consumer reports” under Kansas law), making it more difficult for identity thieves to open new accounts in the consumer’s name. In 2018, various states, including Kansas, and the federal government took action to allow consumers to place and remove security freezes on their credit reports for free.

##### Security Freezes

The Federal Trade Commission (FTC) provides consumer information on security freezes. A consumer may place a security freeze, also known as a credit freeze, on the consumer’s credit report. The security freeze allows a consumer to restrict access to the credit report (the credit report or any consumer information contained in the report cannot be released without authorization from the consumer), which makes it more difficult for identity thieves to open new accounts in the consumer’s name. A security freeze does not affect the consumer’s credit score or prevent the consumer from obtaining a free annual credit report. However, if the consumer wants to open a new account, apply for a job, rent an apartment, or buy insurance, the consumer will need to temporarily lift the freeze.

##### Consumer Reporting Agencies and Credit Reports

Consumer reporting agencies (CRAs), also known as credit bureaus or credit reporting companies, compile and sell credit reports. According to the Consumer Financial Protection Bureau, CRAs collect credit account information about consumer borrowing and repayment history, including the original amount of a loan; the credit limit on a credit card; the balance on a credit card or other loan; the payment status of the account, including whether the consumer has repaid loans on time; items sent for collection; and public records, such as judgments and bankruptcies. Credit reports also contain personal information, including the consumer’s name and any name used in the past in connection with a credit account, including nicknames; current and former addresses; birth date; Social Security number; and phone numbers.

CRAs then sell the information in a consumer’s report to creditors, insurers, employers, and other businesses. Lenders use these

reports to help determine whether they will loan a consumer money, what interest rates to offer, and to determine whether the consumer will meet the terms of a credit account. Other businesses might use these credit reports to determine whether to offer the consumer insurance; rent a home to a consumer; or provide the consumer with cable television, Internet, utilities, or cell phone service. The FTC specifies CRAs may not provide information about the consumer to the employer or a prospective employer without the consumer's written consent. (*Note:* Kansas law contains provisions governing release of consumer report information to employers; see KSA 50-705 and 50-712.)

The FTC protects consumers and promotes competition. The FTC enforces the Fair Credit Reporting Act (FCRA) with respect to CRAs. The FCRA is a federal law that provides directions and limits on how CRAs disclose credit report information. The FCRA requires each of the nationwide CRAs (Equifax, Experian, and TransUnion) to provide a consumer with a free copy of the consumer's credit report, at the consumer's request, every 12 months. A consumer may order reports from each of the three nationwide CRAs at the same time or separately. Equifax, Experian, and TransUnion have set up a central website, a toll-free telephone number, and a mailing address through which a consumer may obtain a free annual report.

Additionally, a consumer is entitled to a free credit report if a company takes adverse action against the consumer, such as denying an application for credit, insurance, or employment, and the consumer asks for the report within 60 days of receiving notice of action. The consumer is also entitled to one free report a year, if the consumer is unemployed and plans to look for a job within 60 days; the consumer is on welfare; or the report is inaccurate because of fraud or identity theft. Otherwise, a CRA may charge the consumer a reasonable amount for another copy of the report within a 12-month period.

Kansas also has a state version of the FCRA, KSA 50-701 *et seq.*

## **Equifax Data Breach and Subsequent Action by Kansas and the Federal Government**

On July 29, 2017, Equifax learned of a cybersecurity incident potentially impacting approximately 143.0 million U.S. consumers. According to Equifax, criminals exploited a U.S. website application vulnerability to gain access to certain files from May 13, 2017, through July 30, 2017. The information accessed primarily includes names, Social Security numbers, addresses, and, in some instances, driver's license numbers. Criminals also accessed credit card numbers for approximately 209,000 U.S. consumers and certain dispute documents with personal identifying information for approximately 182,000 U.S. consumers. As part of Equifax's investigation into application vulnerability, Equifax identified unauthorized access to limited personal information for certain United Kingdom and Canadian residents.

## **Kansas Law**

In 2018, the Kansas Attorney General requested introduction of a bill that would prohibit CRAs from charging consumers for placing or removing a security freeze in light of the Equifax data breach. The Kansas Legislature passed HB 2580, which amended the state's FCRA to clarify that continuing statutes governing security freezes on consumer reports fall within the FCRA. The legislation also amended KSA 2018 Supp. 50-723 to remove a provision allowing a \$5 fee to place, temporarily lift, or remove a freeze, and instead prohibited CRAs from charging a fee for these services.

Further, the bill amended KSA 2018 Supp. 50-725 governing security freezes for "protected consumers" (defined under the state's FCRA as an individual under 16 years of age when the request for a security freeze is made or an individual for whom a guardian or conservator has been appointed) to remove a provision allowing a \$10 fee to place or remove a security freeze.



**Federal Law**

In May 2018, President Trump signed the Economic Growth, Regulatory Relief, and Consumer Protection Act (S. 2155). The bill, among other things, amended the FCRA to require a CRA to provide consumers with free credit freezes and to notify consumers of their availability, established provisions related to placement and removal of these freezes, and created requirements related to the protection of the credit records of minors.

As of September 21, 2018, CRAs may not charge a fee for the placement or removal of a security freeze on consumer credit reports. If a consumer requests a security freeze online or by phone, the CRA must place the freeze within one business day. If the consumer requests a freeze to be lifted, the CRA must lift the freeze within one hour. If the consumer makes the request by mail, the agency must place or lift the freeze within three business days after the CRA receives the request.

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### Financial Institutions and Insurance

#### E-2 Kansas Health Insurance Mandates

##### Background

Health insurance mandates in Kansas law apply to:

- Individual health insurance policies issued or renewed in Kansas; and
- Group health insurance policies issued or renewed in Kansas. (The individual and group health policies are often referred to as accident and health or accident and sickness insurance policies in Kansas law.) Exceptions are noted below.

Health maintenance organizations (HMOs) are included in the listing of policy issuers.

These mandates do not apply to:

- Self-insured health plans (ERISA plans\*). Self-insured plans are governed by federal laws and are enforced by the U.S. Department of Labor. States cannot regulate these self-insured plans; or
- Supplemental benefit policies. Examples include dental care, vision (eye exams and glasses), and hearing aids.

\*ERISA = The Employee Retirement Income Security Act of 1974; states' laws that relate to employee benefits are pre-empted by this act.

Since 1973, the Kansas Legislature has added new statutes to insurance law that mandate certain health care providers be paid for services rendered (provider mandates) and be paid for certain prescribed types of coverage or benefit (benefit mandates). The Legislature more recently has authorized the study of proposed benefit mandates.

**Provider mandates.** The first mandates enacted in Kansas were on behalf of health care providers. In 1973, optometrists, dentists, chiropractors, and podiatrists sought and secured legislation directing insurers to pay for services the providers performed if those services would have been paid for by an insurance company if they had been performed by a practitioner of the healing arts (medical doctors and doctors of osteopathy). In 1974, psychologists sought and received approval of reimbursement for their services on the

same basis. In that same year, the Legislature extended the scope of mandated coverages to all policies renewed or issued in Kansas by or for an individual who resides in or is employed in this state (extraterritoriality). Licensed special social workers obtained a mandate in 1982. Advanced nurse practitioners received recognition for reimbursement for services in 1990. In a 1994 mandate, pharmacists gained inclusion in the emerging pharmacy network approach to providing pharmacy services to insured persons.

**Benefit mandates.** The first benefit mandate was passed by the 1974 Legislature to require coverage for newborn children. The newborn coverage mandate has been amended to include adopted children and immunizations, as well as a mandatory offer of coverage for the expenses of a birth mother in an adoption. The Legislature began its first review into coverage for alcoholism,

drug abuse, and nervous and mental conditions in 1977. The law enacted that year required insurers to make an affirmative offer of such coverage, which could be rejected only in writing. This mandate also has been broadened over time, first by becoming a mandated benefit and then as a benefit with minimum dollar amounts of coverage specified by law.

In 1988, mammograms and pap smears were mandated as cancer patients and various cancer interest groups requested mandatory coverage by health insurers. In 1998, male cancer patients and cancer interest groups sought and received similar mandated coverage for prostate cancer screening. After several attempts, supporters of coverage for diabetes were successful in securing mandatory coverage for certain equipment used in the treatment of the disease,

**Table A  
Kansas Provider and Benefit Mandates**

Provider Mandates	Year	Benefit Mandates	Year
Optometrists	1973	Newborn and Adopted Children	1974
Dentists	1973	Alcoholism	1977
Chiropractors	1973	Drug Abuse	1977
Podiatrists	1973	Nervous and Mental Conditions	1977
Psychologists	1974	Mammograms and Pap Smears	1988
Social Workers	1982	Immunizations	1995
Advanced Practice Registered Nurses	1990	Maternity Stays	1996
Pharmacists	1994	Prostate Screening	1998
		Diabetes Supplies and Education	1998
		Reconstructive Breast Surgery	1999
		Dental Care in a Medical Facility	1999
		Off-Label Use of Prescription Drugs*	1999
		Osteoporosis Diagnosis, Treatment, and Management	2001
		Mental Health Parity for Certain Brain Conditions	2001
		Autism Spectrum Disorder	2014

\* Off-label use of prescription drugs is limited by allowing for use of a prescription drug (used in cancer treatment) that has not been approved by the federal Food and Drug Administration (FDA) for that covered indication if the prescription drug is recognized for treatment of the indication in one of the standard reference *compendia* or in substantially accepted peer-reviewed medical literature.

as well as for educational costs associated with self-management training.

## Legislative Review

Kansas law (KSA 40-2249a) requires the Legislature to periodically review all State-mandated health insurance coverage. KSA 40-2248 requires the person or organization seeking a mandated coverage for specific health services, specific diseases, or certain providers of health care services as part of individual, group, or blanket health insurance policies to submit an impact report that assesses both the social and financial effects of the proposed mandated coverage to the legislative committees assigned to review the proposal. The law also requires the Commissioner of Insurance to cooperate with, assist, and provide information to any person or organization required to submit an impact report.

The social and financial impacts to be addressed in the impact report are outlined in KSA 40-2249.

Social impact factors include:

- The extent to which the treatment or service is generally utilized by a significant portion of the population;
- The extent to which such insurance coverage is already generally available;
- If coverage is not generally available, the extent to which the lack of coverage results in persons being unable to obtain necessary health care treatment;
- If coverage is not generally available, the extent to which the lack of coverage results in unreasonable financial hardship on those persons needing treatment;
- The level of public demand for the treatment or service;
- The level of public demand for individual or group insurance coverage of the treatment or service;
- The level of interest of collective bargaining organizations in negotiating

privately for inclusion of this coverage in group contracts; and

- The impact of indirect costs (other than premiums and administrative costs) on the question of the costs and benefits of coverage.

The financial impact factors include the extent to which the proposal would change the cost of the treatment or service; the extent to which the proposed coverage might increase the use of the treatment or service; the extent to which the mandated treatment or service might serve as an alternative for a more expensive treatment or service; the extent to which insurance coverage of the health care service or provider can reasonably be expected to increase or decrease the insurance premium and administrative expenses of the policyholders; and the impact of proposed coverage on the total cost of health care.

**State Employee Health Plan study.** KSA 40-2249a provides, in addition to the impact report requirements, that any new mandated health insurance coverage approved by the Legislature would only apply to the state health care benefits program (State Employee Health Plan [SEHP]) for a period of at least one year beginning with the first anniversary date of implementation of the mandate following its approval. On or before March 1, after this one-year period has been applied, the Health Care Commission is to report to the President of the Senate and the Speaker of the House of Representatives the impact the new mandate has had on the SEHP, including data on the utilization and costs of the mandated coverage. The report also is to include a recommendation of whether the mandated coverage should be continued by the Legislature to apply to the SEHP or whether additional utilization and cost data are required.

## Recent Review and Legislative Trends

### 2009 Session—Mandates Review

**Kansas legislative review (KSA 40-2249a).** The Senate Committee on Financial Institutions and Insurance and the House Committee on

Insurance received briefings, during the regular session, from committee staff on the current and recently considered health insurance mandates. Testimony was also received from interested parties.

### **2010 Session—An Emerging Trend: the Study Directive**

**The study before the law.** The Legislature's review and response to health insurance mandates has recently included a new direction: the study before the mandate is considered and passed by the Legislature. As prescribed by the 1999 statute, a mandate is to be passed by the Legislature, applied to the SEHP for at least one year, and a recommendation is made about continuation in the SEHP or statewide (KSA 40-2249a). Legislation in 2008 (HB 2672) directed the Kansas Health Policy Authority (KHPA) to conduct a study on the impact of extending coverage for bariatric surgery in the SEHP (corresponding mandate legislation in 2008: SB 511, HB 2864). (*Note:* In 2011, KHPA transitioned into the Kansas Department of Health and Environment as the Division of Health Care Finance.) No legislation requiring treatment for morbid obesity (bariatric surgery) was introduced during the 2009-2010 Legislative Biennium.

In addition, 2009 Sub. for HB 2075 would have directed the KHPA to study the impact of providing coverage for colorectal cancer screening in the SEHP, the affordability of the coverage in the small business employer group, and the state high-risk pool (corresponding legislation in 2009 SB 288). The study bill was re-referred to the House Committee on Insurance and no action was taken by the 2010 Legislature.

During the 2010 Session, the House Committee on Insurance considered the reimbursement of services provided by certain BSRB licensees (SB 104; HB 2088 and HB 2546). The House Committee recommended a study by KHPA on the topic of requiring this reimbursement. The study design would have included determining the impact that coverage has had on the SEHP, providing data on utilization of such professionals for direct reimbursement for services provided,

and comparing the amount of premiums charged by insurance companies that provide reimbursement for these provider services to the amounts of premiums charged by insurers that do not provide direct reimbursement. Under SB 388, KHPA would also have been required to conduct an analysis to determine if proactive mental health treatment results in reduced expenditures for future mental and physical health care services. SB 388 died in Conference Committee. The study requirement was also included as a proviso to the Omnibus appropriations bill (SB 572, section 76). The proviso was vetoed by the Governor; the veto was sustained.

**Autism benefit.** The 2010 Legislature considered mandating coverage for certain services associated with the treatment of Autism Spectrum Disorders (ASD). Senate Sub. for HB 2160 required the Health Care Commission, which administers the SEHP, to provide for the coverage of services for the diagnosis and treatment of ASD in any covered individual whose age was less than 19 years during the 2011 Plan Year. The services provided and limitations on benefits also were prescribed. The Health Care Commission was required to submit on or before March 1, 2012, a report to the Senate President and the House Speaker that included information (e.g., cost impact utilization) pertaining to the mandated ASD benefit coverage provided during the 2011 Plan Year. The Legislature considered in the next session following the receipt of the report whether to require the coverage for ASD to be included in any individual or group health insurance policy, medical service plan, HMO, or other contract that provided for accident and health services and was delivered, issued for delivery, amended, or renewed on or after July 1, 2013.

**Oral anticancer medications.** Senate Sub. for HB 2160 required all individual or group health insurance policies or contracts (including the municipal group-funded pool and the SEHP) that provide coverage for prescription drugs, on and after July 1, 2011, to provide coverage for prescribed, orally administered anticancer medications used to kill or slow the growth of cancerous cells on a basis no less favorable than intravenously administered or injected

cancer medications that are covered as medical benefits. The Health Care Commission, pursuant to KSA 40-2249a, was required to submit a report to the Senate President and the House Speaker that indicated the impact the provisions for orally administered anticancer medications had on the SEHP, including data on the utilization and costs of such coverage. The report also was required to include a recommendation on whether the coverage should continue for the SEHP or whether additional utilization and cost data was required. The report was required to be provided to the legislative representatives on or before March 1, 2011.

**Autism benefit.** The 2012 Legislature again considered legislation (HB 2764 and SB 226) to enact ASD coverage requirements for covered individuals under the age of 19, similar to those requirements specified in 2010 Senate Sub. for HB 2160; the proposed requirements, however, would have applied to all individual and group health insurance policies, plans, and contracts subject to state law. The 2012 bills exempted the proposed ASD coverage from the test track requirements specified in KSA 40-2249a.

HB 2764, as amended by the House Committee of the Whole, also would have required coverage in the State's Medicaid Autism Waiver, Children's Health Insurance Program (CHIP), and other Medicaid programs covering children. The bill, among other things, also would have required a study to determine the actual cost of providing coverage for the treatment and diagnosis of ASD in any individual living in Kansas who is under the age of 19. HB 2764, as amended, passed the House and was referred to a Senate Committee. Attempts to advance the bill to Senate General Orders failed and the bill died in Committee. ASD legislation was introduced during the 2013 Session (SB 175; HB 2317 and HB 2395.)

The Health Care Commission opted to continue ASD coverage in the SEHP, as had been required under the 2010 law for Plan Year 2011, for both Plan Year 2012 and Plan Year 2013. In June 2013, the Health Care Commission authorized a permanent ASD benefit (*Note:* Coverage affected by 2014 law).

The 2014 Legislature again considered ASD coverage in HB 2744. Following amendments in the House Committee and House Committee of the Whole, the bill passed the Senate and was signed into law on April 16, 2014. The bill required, subject to limitations on benefits and services provided, health insurance coverage for the diagnosis and treatment of ASD in children under the age of 12 years and also created the Applied Behavior Analysis (ABA) Licensure Act. The SEHP updated its benefits coverage for Plan Year 2015 to reflect the changes enacted in HB 2744.

### **2017-2018 Biennium**

The House Committee on Insurance held hearings on two benefit mandate bills: HB 2103 (amino acid-based elemental formula) and HB 2021 (hearing aids). No formal committee action was taken during the 2017 Session; however, a SEHP study has been requested relating to HB 2103 to provide more information on economic and social impact factors associated with the requirements of KSA 40-2249. Telehealth and telemedicine legislation, including proposed insurance coverage requirements, were assigned to the 2017 Interim Special Committee on Health.

**Amino acid-based elemental formula.** Following receipt of the SEHP report, the House Committee on Insurance recommended a substitute bill limiting the coverage of formula to the SEHP enrollees for a one-year ("test track") period in Plan Year 2019 and requiring a report to the 2020 Legislature. These provisions ultimately were enacted in 2018 SB 348.

**Telemedicine.** The 2017 Interim Special Committee on Health did not recommend the 2017 legislation (HB 2206 and HB 2254), but recommended the introduction of comprehensive telemedicine legislation in the 2018 Session. The Kansas Telemedicine Act (Senate Sub. for HB 2028) provides that coverage for a health care service delivered *via* telemedicine is not mandated if such service is not already covered when delivered by a health care provider and subject to the terms and conditions of the covered individual's health benefits plan. Further

information about telemedicine and telehealth services in Kansas is available in [F-6 Recent Telemedicine Legislation in Kansas](#).

### Affordable Care Act Requirements— Essential Health Benefits

The federal Affordable Care Act (ACA) does not directly alter or preempt Kansas or other states' laws that require coverage of specific benefits and provider services. However, the law (Section 1302(b) of the ACA and subject to future federal regulations by the U.S. Department of Health and Human Services [HHS]) directs the Secretary of HHS to determine the "essential health benefits" to be included in the "essential health benefits" package that qualified health plans (QHPs) in the Exchange marketplaces are required to cover. "Essential health benefits," as defined in Section 1302(b), include the required coverage of at least the following ten general categories:

- Ambulatory patient services;
- Emergency services;
- Hospitalization;
- Maternity and newborn care;
- Mental health and substance use disorder services, including behavioral health treatment;
- Prescription drugs;
- Rehabilitative and habilitative services and devices;
- Laboratory services;
- Preventive and wellness and chronic disease management; and
- Pediatric services, including oral and vision care.

Insurance policies are required to cover these benefits in order to be certified and offered in Exchanges. Women's preventive health services were separately defined by federal regulation in August 2011 (*Federal Register*, Vol. 76, No. 149: 46621-46626) and required that "a group health plan or health insurance issuer must cover certain items and services, without cost-sharing." Coverages included annual preventive-care medical visits and exams, contraceptives

(products approved by the FDA), mammograms, and colonoscopies.

Under the ACA, QHPs are not barred from offering additional benefits. However, starting in 2014, if a state law mandates coverage not included in the final HHS "essential benefits" list of coverages, the State must defray any additional costs for those benefits for Exchange enrollees.

**Benchmark.** HHS issued a bulletin on December 16, 2011, to provide information about the approach the agency plans to take in its rule-making for defining "essential benefits." The bulletin outlined a "benchmark approach" allowing states the ability to choose from the following benchmark health plans (a benchmark plan would reflect the scope of benefits and services offered by a "typical employer plan"):

- One of the three largest small group health plans in the state by enrollment;
- One of the largest state employee health plans by enrollment;
- One of the three largest federal employee health plans by enrollment; or
- The largest HMO plan offered in the state's commercial market by enrollment.

Should a state choose not to select a benchmark, the default option would become the small group plan with the largest enrollment in the state. In 2010, the Kansas Insurance Department contracted with Milliman, Inc., to analyze plans and related benefits and services available in Kansas. "The Milliman Report" analyzed nine plans, and its findings were included in a September 2012 public hearing on essential benefits and selection of a benchmark for Kansas.

The Commissioner of Insurance submitted the following recommendations and conclusions to the Governor for consideration of a state essential health benefits benchmark: selection of the largest small group plan, by enrollment (the Blue Cross Blue Shield of Kansas Comprehensive Plan); supplementing the recommended benchmark plan with the required pediatric oral and vision benefits available in the Kansas CHIP; and anticipation of further guidance from HHS on



the definition of “habilitative services” later in Fall 2012. No specific recommendation was made by the Commissioner.

Twenty-five states, Kansas included, did not provide a recommendation on a benchmark plan to HHS by the September 30, 2012, deadline; therefore, HHS assigned those states the largest small group plan as the benchmark for 2013-2016 (in August 2015, HHS extended the plans to 2017).

**Recent developments.** On April 9, 2018, the Centers for Medicare and Medicaid Services finalized its Benefits and Payment Parameters rule for 2019. Among changes prescribed in the rule, beginning in the 2020 Plan Year, states will have additional flexibility to define their benchmark plan and can update plans annually. States will also be permitted to maintain their current 2017 benchmark plan without taking any action.

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### Financial Institutions and Insurance

#### E-3 Kansas Uniform Consumer Credit Code

##### What is the UCCC?

Enacted in 1973, the Kansas Uniform Consumer Credit Code (UCCC or Code) applies to all aspects of consumer credit addressing transactions for personal, family, and household purposes. UCCC transactions include consumer sales (closed-end or revolving, including retail credit card purchases), consumer loans (including purchases using bank credit cards), and consumer leases. Consumer transactions may involve the consumer and retail merchants; banks, savings and loan associations, and credit unions; licensed lenders, including finance companies; and lender credit card companies. In general, transactions greater than \$25,000 are outside the scope of the UCCC, but any transaction may become a consumer credit transaction if the parties to the agreement choose to do so. The UCCC does not govern commercial transactions (e.g., the sale and lease of goods, negotiable instruments, bank deposits, and secured transactions); those transactions are subject to the Uniform Commercial Code.

##### Who is the Code Administrator?

The Office of the State Bank Commissioner (OSBC) provides oversight of the UCCC. During the 1998 Interim, the Special Committee on Financial Institutions and Insurance studied reorganization of the financial institutions' regulatory agencies and its recommendations included consolidation of the Office of the Consumer Credit Commissioner with the Office of the Bank Commissioner. As a result of action by the 1999 Legislature, the Office of the Consumer Credit Commissioner was abolished, and the powers and functions transferred to the OSBC. A Deputy Commissioner of Consumer Mortgage and Lending position was created within the OSBC, and the Deputy Commissioner is the Administrator of the UCCC.

##### What are the Permissible Interest Rates?

The UCCC establishes three categories of interest rates: closed-end or installment rates (KSA 16a-2-201); open-end or revolving credit rates (KSA 16a-2-202); and lender rates (KSA 16a-2-401). Closed-end installment contracts calculate in advance

the amount financed and the finance charge and provide payment of the calculated total in equal installments at equal intervals, *e.g.*, auto loans. Open-end credit includes revolving credit accounts offered by retailers and lines of credit (*e.g.*, bank credit cards) payable in amounts, usually monthly, that are a percentage of the outstanding balance. Lender rates are those charged on loans made by licensed lenders, supervised financial institutions, and lender credit card arrangements.

Under current law, closed-end, open-end, and lender rate consumer credit transactions allow a seller to set a finance charge at “any rate agreed to by the parties,” subject to the statutory limits of prepaid finance charges. The limitations and computations for the finance charges are as follows:

- Closed-end consumer credit sales:
  - Sales, other than manufactured homes: maximum amount is 2 percent of the amount financed or \$100, whichever is less; or
  - Sales, manufactured homes: maximum amount is 5 percent of the amount financed (fee must be used to reduce or “buy-down” the interest rate of the sale);
- Open-end consumer credit sales:
  - Average daily balance: finance charge is calculated on the sum of the amount of actual daily balances each day during the billing cycle divided by the number of days in the billing cycle; or
  - Ending balance: finance charge is calculated on the unpaid balance of the account at the end of the billing cycle;
- Lender credit sales:
  - Periodic rate ceilings (loans other than first or second mortgage): 36 percent per year on the portion of the unpaid balance that is \$860 or less, and 21 percent per year on the portion of the unpaid balance that exceeds \$860 (subject to limitations on prepaid finance charges); or
  - Periodic rate ceilings (loans secured by second mortgage, manufactured homes): 18 percent per year. The rate would apply to any first mortgage loans made subject to the UCCC;
- Prepaid finance charges on consumer loans:
  - First or second mortgage loan or certain manufactured home loans, not to exceed 8 percent of the amount financed; however, the total of all prepaid finance charges payable to the lender cannot exceed 5 percent of the amount financed; or
  - Other consumer credit loans: maximum amount is 2 percent of the amount or \$100, whichever is less; and
- Payday loan transactions are subject to special limitations for finance charges:
  - The loans and the cash advance must be \$500 or less with a finance charge not to exceed 15 percent of the amount of the advance. In addition, the Code includes a provision that the contract interest rate after maturity cannot be more than 3 percent per month.

### History of Interest Rates Charges

In 1980, the Kansas Legislature amended KSA 16a-2-201 to allow a seller in a closed-end credit sale or in an open-end sale to charge 18 percent interest as an alternative to other specified rates, including 21 percent on \$300 or less, 18 percent on amounts between \$300 and \$1,000, and 14.45 percent on amounts in excess of \$1,000. KSA 16a-2-401 was amended to allow a supervised financial institution to charge 18 percent interest without being a lender licensed by the Consumer Credit Commissioner. The rate charges were sunset at periods of one (1980-1982) and two years (1983-1987). In 1988, the Legislature (SB 507) amended the rates on closed-end

credit sales by reducing, from three to two, the applicable interest rates, establishing:

- 21 percent on the first \$1,000; and
- 14.45 percent on amounts over \$1,000; or 18 percent on the outstanding balance.

Interest rates on open-end credit sales also were amended to allow for an alternate rate. SB 507 authorized a nonrefundable origination fee not to exceed 2 percent or \$100 on closed-end credit sales. The 1993 Legislature amended the Code to allow that on and after January 1, 1994, all finance charges on consumer loans and consumer credit sales be computed on the unpaid principal balances by the actuarial method. Precomputed contracts created on and after January 1, 1994, were prohibited.

## Legislative Review

### **1999 Legislature—Sub. for SB 301**

The 1999 Legislature amended several sections of the UCCC relating to rates, terms, and conditions on consumer credit sales and consumer loans for personal, family, or household purposes, and allowed certain real estate transactions to be brought under the Code, specifying the rates, terms, and conditions for such loans. The legislation also added new sections that imposed new obligations on persons making loans under the Code.

Changes to the law included:

- Removing the definition of “origination fee” and adding a definition of “prepaid finance charge,” which for a consumer loan secured by a first or second mortgage may not exceed 8 percent of the amount financed (aggregate 5 percent), and for any other consumer loan and, for closed-end consumer credit sales, the prepaid finance charge may not exceed the lesser of 2 percent of the amount financed or \$100; and
- Establishing that the finance charge on a consumer loan or consumer credit sale

must be computed by using either the 365/365 or 360/360 method, but not on a 365/360 method (lender may assume that a month has 30 days, regardless of the actual numbers of days in a month).

In regard to consumer loan rate ceilings, the legislation:

- Removed the interest rate limitation on open-end consumer loans, including lender credit cards;
- Maintained a maximum interest rate of 36 percent on the first \$860 of a closed-end consumer loan;
- Increased the maximum allowable interest rate on amounts of a closed-end consumer loan in excess of \$860, from 18 percent to 21 percent (not applicable to loans secured by a first or second mortgage); and
- Established 18 percent as the maximum rate of interest that may be charged on a loan secured by a first or second mortgage, if the parties to the loan agree in writing to make the loan under the Code.

In addition, finance charges under the Code were amended to:

- Delete the cap on annual fees that may be charged for the privilege of using an open-end credit account; and
- Allow a creditor to charge fees on an annual or monthly basis, over limit fees, and cash advance fees on open-end credit in an amount agreed to by the consumer.

### **2000 Legislature**

The 2000 Legislature amended the Code to allow a seller to impose a prepaid finance charge in an amount not to exceed 5 percent for the purpose of reducing the interest rate on the sale of a manufactured home. Another bill (HB 2691) clarified the interest rate on a closed-end loan may be 36 percent on the first \$860 financed and 21 percent on the balance of the loan that exceeds \$860.

**2005 Legislature—Senate Sub. for HB 2172**

The 2005 Legislature amended several provisions of the Kansas Mortgage Business Act (KMBA) and the Code. The UCCC provisions:

- Established a contract rate to replace the annual rate in prior law. Calculations utilizing the 365/365 method and the 360/360 method for the rate of the finance charge remain unchanged;
- Amended provisions for the computation of finance charges for consumer loans secured by a first or second lien real estate mortgage by creating an amortization method: contract rate divided by 360 and the resulting rate is multiplied by the outstanding principal amount and 30 assumed days between scheduled due dates. The provision allows a creditor to assume there are 30 days in the computational period, regardless of the actual number of days between the scheduled dates;
- Amended the license requirements for individuals making supervised loans by requiring an applicant to provide evidence in the form and manner prescribed by the Code Administrator that establishes the applicant will maintain a satisfactory minimum net worth to engage in the credit transactions for which the applicant has proposed;
- Replaced the references in the bill to “supervised loans” with “loans for personal, family, or household purposes”;
- Clarified references to applicants and licensees to include persons the applicant or licensee contracts with or employs who is directly engaged in lending activities;
- Amended annual reporting requirements to include a provision to prevent alteration or any other destruction of records with the intent to impede, obstruct, or influence any investigation by the Administrator;
- Amended the requirement for first and second loan consumer mortgages to

allow that a mortgage not be recorded if moneys are not available for disbursement to the mortgagor upon expiration of all applicable waiting periods as required by law, unless the individual informs the mortgagor in writing of a definite date by which payment is to be made and obtains written permission for the delay;

- Authorized a statute of limitations for prosecution of crimes under the Code, no more than five years after the alleged violation. A restitution provision was added and includes that an order may include an interest rate not to exceed 8 percent; and
- If deemed necessary by the Administrator, required fingerprinting of applicants, licensees, copartnerships or associations, any agents, or others directly engaged in lending activities.

**UCCC—Payday Loan Regulation**

The 2005 legislation also amended the finance charges for payday loans under the UCCC (KSA 16a-2-404). The finance charge for cash advances equal to or less than \$500 is to be an amount not to exceed 15 percent of the amount of the cash advance. The bill also required publication of the notice in Spanish in payday loan agreements and included protections for military borrowers. (See [E-4 Payday Loan Regulation and Update on Small Dollar Lending in Kansas](#) for an in-depth discussion on payday loan laws and regulatory activities.)

**Other Legislative Review—2005-2006**

In addition to the enacted measures discussed previously, the Legislature reviewed the following proposed amendments to the UCCC.

HB 2143 would have amended the Code to allow a seller to charge an interest rate not to exceed 21 percent per year. The interest rate ceiling applies to the finance charges under the UCCC: closed-end consumer credit sales; open-end credit sales; and lender credit sales. The bill also would have removed the authority to impose deferral

charges on closed-end consumer credit sales. Under current law, the finance charge rates are not capped and instead are subject to the rate agreed to by the parties to the transaction with established limitations on any prepaid finance charges. HB 2278 would have amended the Code by creating an alternate finance charge to the finance charges currently specified in KSA 16a-2-401, providing for a sliding-scale rate structure for closed-end consumer installment loans financed between \$100 and \$1,500. Specifically, the bill would have allowed a licensee to charge in lieu of the charges specified in current law:

- A loan acquisition charge, not exceeding the lesser of 10 percent of the financed amount or \$75; and
- A monthly installment account handling charge, based on a sliding-scale rate. For example, an account handling charge for a loan financed in the amount of \$550 would be up to \$17.50, while the charge for a \$1,100 loan would be an amount up to \$22.50.

The bill would have defined the terms of the loan with a minimum of 4 months and a maximum amount of 18 months and 5 days. The bill also would have addressed loan refund rates, prepayments, notification, and contract rates. The rates and charges created by the bill would not apply to payday loans.

During the 2005 Interim, the Special Committee on Financial Institutions and Insurance was charged, among other things, to review HB 2143 and to study the current finance charges, rates, and terms under the UCCC and the impact of the Code on financial institutions, loan companies, and Kansas consumers, and the current regulatory environment in Kansas. The Committee concluded the interest rate ceiling legislation (HB 2143) should not be recommended and the alternate finance charge for closed-end consumer installment loans legislation (HB 2278) should not be recommended to the 2006 Legislature and recommended new legislation to address the requested HB 2278 amendments. SB 376 was introduced during the 2006 Session. The bill received a hearing in the Senate Committee on Financial Institutions and Insurance, but no

further action was taken and, with HB 2143 and HB 2278, died at the end of the 2006 Session.

### Recent UCCC Amendments

The 2009 Legislature amended the UCCC in 2009 SB 240. The bill was requested by the OSBC in response to the requirements of Title V (the Secure and Fair Enforcement [S.A.F.E.] for Mortgage Licensing Act) of the Federal Housing and Economic Recovery Act of 2008. The bill made amendments to both the KMBA and the UCCC to include prohibited acts and define the practices and registration requirements of residential mortgage loan originators. Among the requirements, mortgage loan originators are required to submit certain application and related information to a nationwide mortgage loan originator registry (established by the S.A.F.E. Act). Information reported to the registry includes violations of the law (loan originators), as well as enforcement actions. Kansas entered the registry in 2010.

The 2010 Legislature amended the Code in SB 410. The bill prohibits retailers from imposing a surcharge on a cardholder who uses a debit card in lieu of a cash payment. Under prior law, the prohibition applied only to credit card holders.

#### Does the UCCC prohibit debit and credit card fees?

The UCCC does not prohibit all credit and debit card fees. The UCCC does prohibit application of a surcharge fee when a consumer opts to use a credit or debit card in lieu of cash payment (*e.g.*, a gas station could not charge \$0.10 more per gallon for a customer using a card; however, the station could choose to discount for cash payment.)

The 2011 Legislature modified Code licensee fee provisions to change the percentage remitted to the State General Fund from 20 percent to 10 percent.

**2017 Study.** The Legislative Coordinating Council directed a study of legislation relating to the Code

and regulation of small dollar lending in Kansas. The Special Committee on Financial Institutions and Insurance was convened in October 2017 to study the impact of 2017 HB 2267. This review included a study of current finance charges, rates, and terms under the UCCC; the impact of the proposed legislation and potential modifications related to the Consumer Financial Protection Bureau's anticipated Final Rule on small dollar lending on financial institutions, loan

companies, and Kansas consumers; and the current regulatory environment in Kansas. The Special Committee made no recommendation relative to the bill. The bill died at the end of the 2018 Session.

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**Consumer Credit**  
**Reports and Security**  
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**E-4**  
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**Lending in Kansas**

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### Financial Institutions and Insurance

#### E-4 Payday Loan Regulation and Update on Small Dollar Lending in Kansas

The Kansas Legislature began its review of payday lending during the 1991 Session. At that time, the Consumer Credit Commissioner requested legislation, citing a concern that check cashing for a fee had become a prevalent practice in Kansas and was being conducted in a manner violating the Kansas Uniform Consumer Credit Code (generally referred to as either the UCCC or Code). The unregulated entities were advancing money and agreeing to hold a post-dated check for a specified, short period of time and were collecting charges exceeding those allowed under the UCCC.

The Consumer Credit Commissioner indicated to the Senate Committee on Financial Institutions and Insurance (Senate Committee) there appeared to be both a need for this type of service and a need to regulate the activity in a manner that allowed the activity to take place lawfully while at the same time providing protection to consumers utilizing the check-cashing service. The Attorney General, concurring such practice violated the UCCC, had taken action to enforce the law against the payday lenders. The financial records of seven companies were subpoenaed and examined, and all but one of those companies closed their businesses in Kansas.

SB 363 (1991) addressed the concern about excessive interest charges and fees, and the Attorney General supported its passage. In some instances, the annual percentage rate (APR) on these short-term loans ranged from 600.0 percent to 1,600.0 percent. Despite these rates, neither the Consumer Credit Commissioner nor the Office of the Attorney General had received many complaints. When the companies closed, the Attorney General received a number of telephone calls from consumers asking when those companies would reopen. Although the bill was recommended favorable for passage by the Senate Committee, it was defeated on final action by a vote of 6-32. The Senate later reconsidered its action and sent the bill back to the Senate Committee for possible action at a later date.

Review of payday loan regulation continued for a second year. During the 1992 Session, the Senate Committee further considered SB 363, and the House Committee on Commercial and Financial Institutions reviewed HB 2749. The House Committee recommended its bill favorable for passage. On final action in the

House, a member reported in his vote explanation that passage of such legislation would burden poor consumers as it would raise the interest rate tenfold from 36.0 percent to 360.0 percent. Several members changed their votes, and the legislation was killed. When the Senate returned to its consideration of payday loan regulation, the Consumer Credit Commissioner explained the House action on HB 2749 and rebutted the conclusion that the bill raised interest rates. The Senate Committee received favorable testimony from both the Office of the Attorney General and the payday loan industry and voted to amend SB 363 by inserting the provisions of HB 2749. SB 363, as amended, passed the Senate 40-0 and was referred to the House Committee, which recommended it favorable for passage after considerable discussion. Ultimately, the bill died at the end of the 1992 Session.

In the Legislature's third year of consideration of payday loan legislation, the House and Senate agreed on 1993 HB 2197, and the bill was signed by the Governor with an effective date of April 8, 1993. This new law, made supplemental to and a part of the UCCC, applied to short-term consumer loan transactions with a single repayment schedule, for which cash is advanced in an amount equal to or less than the maximum allowed to a supervised lender (\$680) and subject to the following conditions:

- On any amount up to and including \$50, a finance charge of \$5.50 could be charged; on amounts in excess of \$50 but not more than \$100, the finance charge could be 10.0 percent of the amount, plus a \$5.00 administrative fee;
- On amounts in excess of \$100 but not more than \$250, the finance charge could be 7.0 percent of the amount with a \$10 minimum, plus a \$5.00 administrative fee; and
- For amounts in excess of \$250 but less than the maximum amount, the finance charge could be 6.0 percent of the amount with a minimum of \$17.50, plus a \$5.00 administrative fee.

The law also provided:

- The maximum term of the loan cannot exceed 30 days;
- The contract interest rate after maturity cannot be more than 3.0 percent per month;
- No charge for insurance or any other charge can be made of any nature except as provided, including cashing the loan proceeds if given in a check;
- No loan made under this section may be repaid with the proceeds of another loan made by the same lender;
- If cash is advanced in exchange for a personal check and the check is returned for insufficient funds, only a return check charge provided in the UCCC is allowed; and
- Certain loans made under this section may be unconscionable conduct—the Consumer Credit Commissioner is to consider in making such a finding the ability of the borrower to repay the loan and whether the loan meets the amount and terms limitations of this section.

Kansas was one of the first states to enact legislation specific to the regulation of payday loans.

The payday loan statute remained substantively unchanged for a number of years. There have been attempts, however, to amend the law. In 1999, for example, a model act drafted by the Consumer Federation of America was introduced in Kansas as SB 272. The proponent of SB 272 explained at the time of its introduction that it was “legislation addressing the exorbitant interest rates charged by payday loan companies and how such consumer issues fall under the auspices of the UCCC.” At the time of the hearing on the bill, other than the sponsor, there were no proponents present to testify on its behalf. The Acting Consumer Credit Commissioner commented to the Senate Committee the bill “would substantially alter the rates charged by payday loan companies.” In testimony on another UCCC bill (SB 301) before the Senate Committee, the Attorney General advised that while the “Office

does not take complaints on consumer credit, the Attorney General is of the opinion that the payday loan industry is not in the best interest of society as it spirals people into bankruptcy.” Opponents of the bill, several operators of payday loan shops in the state, argued that reducing the allowable interest rate charge to 36.0 percent would have the effect of putting them out of business. The Senate Committee took no action on the measure.

SB 301, as enacted in 1999, made several significant changes in the UCCC. Among those changes was the transfer for the enforcement of the UCCC from the Consumer Credit Commissioner to a newly designated position of Deputy Commissioner for Consumer and Mortgage Lending and the elimination of interest rate caps on consumer loans.

During the 2001 Session, the Deputy Commissioner (who is the Code Administrator) requested the passage of HB 2193, which would limit the number of loans a consumer could have from a single payday lender to two at any one time and require a “Notice to Borrower” appear on each loan agreement stating that Kansas law prohibits a lender and its related interest from having more than two loans outstanding to the same borrower at any one time. While the bill was amended by the House Committee of the Whole, those amendments were removed from the bill, and the bill passed as proposed by the Deputy Commissioner. During the 2002 Session, HB 2877 was introduced, which would have reduced the allowable charges permitted on payday loans. On loan amounts up to and including \$50, the charge would have been reduced from \$5.50 to \$4.00; on amounts in excess of \$50 but not more than \$100, the charge would have been reduced from 10.0 percent to 8.0 percent; on amounts in excess of \$100 but not more than \$250, the charge would have been reduced from 7.0 percent to 5.0 percent and the minimum allowable charge would have been reduced from \$10 to \$8; and on amounts of \$250 but not greater than \$860, the charge would have been reduced from 6.0 percent to 4.0 percent and the minimum reduced from \$17.50 to \$12.50.

HB 2877 did not have a hearing and died in the House Committee on Financial Institutions at the

end of the 2002 Session. The Chairpersons of the House Committee on Financial Institutions and the Senate Committee requested, and the Legislative Coordinating Council created, an interim Special Committee on Financial Institutions and Insurance to study, among other topics, the regulation of payday loans and entities making such loans, including allowable loan rates and charges; loan terms and conditions and collection issues; and appropriate levels of regulation of lenders, including the activities of some lenders to associate with federally chartered financial institutions and then claim exemption from state regulation. The Special Committee on Financial Institutions and Insurance did not meet during the 2002 Interim, nor complete a report on its assigned subject matter.

The 2004 Legislature passed a measure, HB 2685, addressing the regulation of payday loans.

The bill:

- Established a seven-day minimum term for any loan;
- Limited the number of loans to three for any borrower within a 30-day period and required lenders to keep a journal of all loan transactions, which includes the name, address, and telephone number of the borrower, and the date each loan is made and the date each is due;
- Required the lender, upon receipt of a check from the borrower, to immediately stamp the check with an endorsement that states: “Negotiated as part of a loan made under KSA 16a-2-404. Holder takes subject to claims and defenses of maker. No criminal prosecution”;
- Allowed a borrower, under the terms specified, to rescind the transaction without cost not later than the end of the business day following the day on which the transaction was made; and
- Outlined a list of acts or practices prohibited in connection with a payday loan.

The Senate Committee also reviewed a payday loan bill, SB 439, that would have created a

maximum loan amount (\$500, rather than \$860) and a flat fee (not more than \$15 per \$100 loaned). The bill received a hearing, but no action was taken on the bill, and the bill died in Committee.

### **Finance Charge, Protections for Military Borrowers**

The Office of the State Bank Commissioner's (OSBC) representatives brought legislation to the 2005 Legislature to enhance enforcement of both mortgage brokers under the Kansas Mortgage Business Act and supervised lenders under the Code. Senate Sub. for HB 2172 contained the provisions of another measure, Sub. for SB 223, which included provisions for both mortgage brokers and supervised lenders. In addition to the new enforcement powers and penalties created by the bill, the legislation also amended the finance charges for payday loans under the UCCC (KSA 16a-2-404). The finance charge for cash advances equal to or less than \$500 is to be an amount not to exceed 15.0 percent of the amount of the cash advance. The bill also required publication of the notice in payday loan agreements in Spanish.

In addition, Senate Sub. for HB 2172 enacted new law concerning military borrowers, with lender provisions to:

- Not garnish any wages or salary for service in the U.S. Armed Forces;
- Defer all collection activity against a borrower who is deployed to combat or combat support posting for the duration of such posting;
- Not contact any person in the military chain of command of a borrower in an attempt to make collection;
- Honor all terms of the repayment agreement; and
- Not make any loan to any military borrower whenever the base commander has declared such person's place of business off limits to military personnel.

A "military borrower" is defined as any member of the U.S. Armed Forces, any member of the

National Guard, or any member of the Armed Forces Reserve.

The Special Committee on Financial Institutions and Insurance convened during the 2005 Interim to study topics that included a broad review of the UCCC. A proposed non-depository lending model, a closed-end installment loan (proposed in 2005 HB 2278 and 2006 SB 376), was reviewed by the Committee. A hearing was held on SB 376 during the 2006 Session, but no action was taken on the bill and it died in Committee.

### **Legislative Proposals (2007-2010)**

The regulation of payday lending again was addressed during the 2007, 2008, and 2010 Sessions. SB 217 (2007) and HB 2244 (2007) would have added requirements to the law regulating payday lenders. Under the proposals, consumers would not be allowed to have more than two outstanding loans at any one time and they would not be allowed more than five consecutive loans with the same lender. Under terms of both bills, a statewide database would have been developed to ensure compliance. The House Committee on Insurance and Financial Institutions held a hearing on HB 2244 and a related bill, HB 2245 (addressing vehicle title loans), during the 2007 Session; no action was taken on either bill at the time of the hearing. The 2008 Legislature introduced an additional measure to address payday lending, HB 2717 (a bill similar to HB 2244), without the database requirements. No action was taken on the payday lending legislation or the vehicle title legislation during the 2007-2008 Biennium. Similar legislation was not introduced during the 2009 Session.

The 2010 Legislature introduced legislation (SB 503) that would have required a \$1 surcharge to be assessed on each payday and title loan. The surcharge would have been paid by the borrower to the lender and then remitted to the OSBC. The moneys would have been transferred to the Professional Development Fund (Department of Education) and expended to fund professional development programs or topics that dealt with personal financial literacy. The OSBC had

indicated in the fiscal note the bill would generate approximately \$1.2 million from the estimated \$1.2 million payday and title loans that would be issued in FY 2011. The bill was referred to the Senate Committee; the bill died in Committee.

### **Recent Legislative Proposals (2013-2018)**

The 2013 Legislature introduced legislation (SB 30 and HB 2036) that would have amended the UCCC to prevent lenders from making payday loans to a consumer who already has two outstanding loans with any lender. Restrictions would have been established on the amount of consecutive loans allowable between a particular borrower and lender. Additionally, the bill would have permitted the Code Administrator to establish an Internet database; a verification fee of up to \$1 could be charged by the OSBC or its vendor to each lender that would be required to access the database prior to making a new loan. SB 30 was referred to the Senate Committee and HB 2036 was referred to the House Committee on Financial Institutions. The bills died in their respective committees.

The 2015 Legislature introduced SB 100, which would have set a single finance charge not to exceed 36.0 percent for closed-end credit consumer loans. SB 100 was referred to the Senate Committee. A hearing was not held on the bill, and the bill died in the Committee.

During the 2016 Legislative Session, HB 2695 was introduced and referred to the House Committee on Insurance and Financial Institutions. HB 2695 would have added a new section to the UCCC, to be known as the “Respectful Lending to Kansas Seniors Act.” The bill would have placed a 36.0 percent interest cap on payday loans for senior citizen consumers, as well as allowed a modification for a senior citizen’s federal adjusted gross income for the taxable year. A hearing was not held on the bill, and it died in Committee.

The 2017 Legislature introduced SB 234, which would have set a 36.0 percent cap and restricted the terms of payday loans. The bill was referred to the Senate Committee on Federal and State Affairs. A hearing was not held on the bill, and

the bill died in the Committee. (*Note:* the Senate Committee on Federal and State Affairs held an informational briefing on payday lending during the 2017 Session, but did not hold a hearing on a specific piece of legislation.) The 2017 Legislature also introduced HB 2267, which would have, among other things, amended provisions in the Code relating to consumer loans and would impose a cap of 36.0 percent annual percentage rate on all consumer loans with open-end credit, including all fees, interest, and charges. The bill would have amended the definition of “consumer loan” and rules relating to how consumer loans can be repaid by borrowers and how many consumer loans a single borrower can have outstanding from a single lender. The bill was originally referred to the House Committee on Financial Institutions and Pensions, but was re-referred to the House Committee on Federal and State Affairs.

HB 2267 and related regulatory review was assigned by the Legislative Coordinating Council to the interim Special Committee on Financial Institutions and Insurance (Special Committee). The Special Committee met in October 2017. As part of the Report of the Special Committee to the 2018 Legislature, the Special Committee noted its discussion on HB 2267, the UCCC and its present structure, and the update and comments submitted by stakeholders on the small dollar lending Final Rule published by the Consumer Financial Protection Bureau (CFPB). The Special Committee also encouraged the OSBC to hold regular stakeholder meetings to assist in drafting changes to the UCCC and requested regular updates during the 2018 Session.

No further action was taken on HB 2267 during the 2018 Session. In addition, the 2018 Legislature introduced SB 402, which would have established the Kansas Veterans Loan Act and added a new section to the UCCC regarding consumer loan transactions made with veterans. SB 402 was referred to the Senate Committee. A hearing was not held on the bill, and the bill died in Committee.

## Small Dollar Lending Activity in Kansas

During the 2017 Special Committee meeting, the Deputy Commissioner addressed trends in small dollar lending, noting some lenders have moved away from the traditional payday loan model into an installment loan product (also permitted under the UCCC) and a growing challenge in unlicensed lenders that operate primarily, or only, online.

Data provided by the Deputy Commissioner in September 2018 summarized small dollar loans provided by licensees: payday only (44); payday only branches (81); payday and title (12); payday and title branches (116); title only (6); and title only branches (42). The number of locations for these loans totals 301 (62 companies, 239 branches). The calendar year (CY) 2017 loan volume for payday loans was an estimated \$294.0 million (in CY 2013, the volume was an estimated \$396.0 million).

The OSBC—Division of Consumer and Mortgage Lending maintains an online database available to the public of entities that are authorized to engage in the practice of consumer lending or mortgage business entities, as well as those lenders. The searchable database contains the license number, company name, company location, date of next renewal, and notes the status of each license. This information is accessible on the OSBC's website at <https://online.osbckansas.org/Lookup/LicenseLookup.aspx>.

## Federal Financial Regulatory Reform, Consumer Protections and Payday Loans

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act into law ("Dodd-Frank Act," PL 111-203). Title X of the Dodd-Frank Act, entitled the Consumer Financial Protection Act of 2010, established the CFPB within the Federal Reserve System with rulemaking, enforcement, and supervisory powers over a number of financial products and services and the entities selling them (including payday and student loans). The law also transferred to the CFPB the primary rulemaking and enforcement authority over several federal

consumer protection laws, including the Truth in Lending Act. The CFPB does not, however, have the authority to establish usury limits (such as a cap on interest rates) on payday loans. Among the provisions applicable to the use of payday loans (short-term loan products) is Title XII of the Dodd-Frank Act, the Improving Access to Mainstream Financial Institutions Act of 2010.

The CFPB has been evaluating what rules may be appropriate to address the "sustained use of short-term, high-cost credit products" (various types of small dollar loans). In June 2016, it proposed a rule intended to require lenders to "take steps to make sure consumers have the ability to repay their loans" and include other borrower protections to address debit fees assessed on payday loans. The comment period closed on October 7, 2016 (see *Federal Register* for the Final Rule, 12 CFR part 1041). On October 5, 2017, the CFPB issued its Final Rule. The implementation period would be 21 months following the formal publication of the Final Rule. The Final Rule covers short-term loans less than 45 days in duration that are open-end or closed-end, as well as longer-term loans more than 45 days in duration that are either open-end or closed-end and have a balloon payment feature.

**CFPB Statement—January 16, 2018.** On January 16, 2018, the CFPB issued the following statement:

"January 16, 2018 is the effective date of the Bureau of Consumer Financial Protection's final rule entitled "Payday, Vehicle Title, and Certain High-Cost Installment Loans" ("Payday Rule"). The Bureau intends to engage in a rulemaking process so that the Bureau may reconsider the Payday Rule."

The CFPB expects to issue a notice of the proposed rulemaking by early 2019.

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### Health and Social Services

#### F-1 Family First Prevention Services Act

##### Background and History

The federal Family First Prevention Services Act (FFPSA), included in the Bipartisan Budget Act of 2018 (HR 1892), was signed into law on February 9, 2018. FFPSA enables states to use funds under Title IV-E and Title IV-B of the Social Security Act (designated in this article as SSA) to provide enhanced support to children at risk of entering foster care. The bill authorizes federal reimbursement of mental health and substance abuse prevention and treatment services, in-home parent skills-based programs, and kinship navigator services. The bill also includes new restrictions on federal reimbursement for children placed in non-foster home placements.

Prior to the enactment of FFPSA, the Title IV-E foster care maintenance payments program provided federal reimbursement to states for payments made to provide shelter, food, and clothing for children in foster care. The funding also covered administrative costs, training of child welfare staff and foster parents, recruitment of foster parents, and data collection.<sup>1</sup> States, territories, and tribes with an approved Title IV-E plan have the option to use these funds for prevention services for children at risk of entering foster care.

Title IV-B provides funding for services to ensure children at risk of entering foster care can safely stay at home. The funding can be used for child protective services, caseworker activities, counseling, emergency assistance, family preservation services, time-limited family reunification services, and family support or prevention services.<sup>2</sup> FFPSA eliminates the time limit for family reunification services, requires states to implement electronic interstate processing systems for children in foster care, and reauthorizes Regional Partnership Grants.

#### Part I – Prevention Activities Under Title IV-E

##### *Eligibility*

States that choose to provide Title IV-E prevention services must submit a Prevention Services and Programs five-year plan as part of the state's Title IV-E plan (SSA Section 471(3)(5)). The plan must describe the target population for the services, specific outcomes

for children and families, the state's evaluation strategy, the specific practices the state plans to use, the state's plan for implementation, the state's consultation with other agencies that serve children and families, steps taken to support and enhance child welfare caseworkers, the state's plan to oversee caseload size, and an assurance that the state will report to the U.S. Department of Health and Human Services (HHS).

The Kansas Department for Children and Families (DCF) intends to submit a Prevention Services and Programs five-year plan as part of its Title IV-E plan due on June 30, 2019. DCF is waiting on additional guidance from HHS.

States may use Title IV-E to provide prevention services to a child who is a "candidate for foster care," defined as a child at imminent risk of entering foster care but who can remain safely in the child's home as long as services or programs are provided or a child whose adoption or guardianship arrangement is at risk of disruption or dissolution (SSA Section 475(13)), a child in foster care who is pregnant or parenting foster youth (SSA Section 471(e)(2)(B)), or parents or kin caregivers (Section 471(e)(1) of the SSA).

Services available for federal reimbursement under Title IV-E include in-home parent skills-based programs (such as parent skills training, parent education, and individual and family counseling) and mental health and substance abuse prevention and treatment services provided by a qualified clinician. These services are limited to 12 months, beginning on the date the child or family is identified in a prevention plan as eligible for services under Section 471(e)(1)(A) and (B) of the SSA.

### **State Requirements**

States must maintain a written prevention plan that identifies the prevention strategy, lists all services or programs that will be provided to or on behalf of the child, and complies with any other requirements HHS establishes. Additionally, in the case of a youth in foster care who is pregnant or parenting a child in foster care while in state custody, the prevention plan must be included in

the child's case plan and include the prevention strategy for any child born to the youth (SSA Section 471(e)(4)(A)).

Services and programs provided to or on behalf of the child must be trauma informed. Trauma-informed services are provided under an organizational structure and treatment framework that involves understanding, recognizing, and responding to the effects of all types of trauma and in accordance with recognized principles of a trauma-informed approach and trauma-specific interventions (SSA Section 471(e)(4)(B)).

Any service provided must meet the following general practice requirements:

- The practice has a book, manual, or other available writings that specify the components of the practice protocol and describe how to administer the practice;
- There is no empirical basis suggesting, compared to its likely benefits, the practice constitutes a risk of harm to those receiving it;
- If multiple outcome studies have been conducted, the overall weight of evidence supports the benefits of the practice;
- Outcome measures are reliable and valid, and are administered consistently and accurately across all those receiving the practice; and
- There is no case data suggesting a risk of harm that was probably caused by the treatment and that was severe or frequent.

In addition to the general practice requirements, the services must be provided in accordance with promising, supported, or well-supported practice requirements (SSA Section 471(e)(4)(C)). States may not receive a federal reimbursement unless the state plan includes a well-designed and rigorous evaluation strategy. HHS may waive this requirement if the evidence of the practice is compelling and the state meets continuous quality improvement requirements for the practice (SSA Section 471(e)(5)(iii)(II)). HHS is anticipated to issue guidance regarding specific

practice criteria and pre-approved services and programs by October 1, 2018.

States are required to collect and report information for each child for whom, or on whose behalf, mental health and substance abuse prevention and treatment services or in-home parent skills-based programs are provided. This information must include the specific services or programs provided, the duration of services, and the child's placement status at the beginning and the end of the one-year period for any child determined to be a candidate for foster care and whether the child entered foster care within two years after being determined a candidate for foster care.

DCF is currently identifying evidence-based practices in Kansas the agency may be able to develop to meet the requirements of FFPSA. These programs include Healthy Families, Parent Management Training–Oregon Model, Trust-Based Relational Intervention, and Health in Pregnancy. The agency is also considering other home visitation programs.

### **Federal Payments**

Prevention services will be reimbursable at 50.0 percent from federal fiscal year (FFY) 2020 to FFY 2026. This includes allowable administrative costs necessary for the proper and efficient administration of the state plan and training costs for personnel employed or preparing for employment by the state agency or local agency administering the plan. Beginning FFY 2027, prevention services are reimbursable at the applicable Federal Medical Assistance Percentages (FMAP) rate. Additionally, at least 50.0 percent of the amount paid to the state in any fiscal year must be for prevention services that meet the well-supported practice criteria.

Maintenance of effort is required for foster care expenditures. States electing to provide Title IV-E prevention services and programs must maintain the same level of state foster care prevention expenditures each fiscal year as the expenditure amount for FFY 2014. States must report state foster care expenditures for each

fiscal year the state participates in the Title IV-E prevention program. State foster care prevention expenditures include Temporary Assistance for Needy Families (TANF), Title IV-B, Social Services Block Grant (SSBG), and any other state or local agency funds used for prevention services and activities (SSA Section 471(e)(7)).

### **Payments for Children with Parents in a Licensed Residential Treatment Facility**

A child who is placed with a parent who is in a licensed residential treatment facility for substance abuse is eligible for Title IV-E payments if the recommendation for the placement is specified in the child's case plan before the placement, the treatment facility provides parenting skills training, parent education and individual and family counseling, and the facility has a trauma-informed treatment model (SSA Section 472(j)).

DCF is working to identify a substance abuse treatment program to provide the services required under FFPSA. The agency is in the process of developing referral policies and procedures.

### **Payments for Evidence-Based Kinship Navigator Programs**

Approved kinship navigator programs are eligible for Title IV-E payments if the program is operated in accordance with promising, supported, or well-supported practices and meet the criteria for the practices (SSA Section 471(e)(4)(C)).

### **Annual Updates and Assistance**

Beginning FFY 2021, HHS must annually publish the percentage of candidates for foster care who did not enter foster care, the total amount of expenditures made for mental health and substance abuse prevention and treatment services or in-home parent skills-based programs, and data regarding prevention services measures. Prevention services measures will be published annually for each state. HHS must submit periodic reports on the provision of prevention services and programs to Congress and make the reports available to

the public. FFPSA provides an appropriation of \$1.0 million per year, beginning FFY 2018, for the clearinghouse, data collection, and evaluations under Section 476(d) of the SSA.

## Other Changes

### ***Changes to Title IV-B***

Title IV-B of the SSA promotes state flexibility in the development and expansion of a coordinated child and family services program that ensures all children are raised in safe, loving families by protecting and promoting the welfare of all children; preventing neglect, abuse, and exploitation of children; supporting at-risk families; promoting safety, permanence, and the well-being of children in foster care and adoptive families; and providing training, professional development, and support to ensure a well-qualified child welfare workforce (SSA Section 421). FFPSA makes the following changes to Title IV-B funding:

- Eliminates the time limit for family reunification services while in foster care and permitting time-limited family reunification services when a child returns home from foster care (SSA Section 431(a)(7));
- Requires states to implement an electronic interstate case processing system for children in foster care, guardianship, or adoption by 2026 (SSA Section 471(a)(25));
- Provides \$5.0 million in grants for FFY 2018 for states to develop the electronic interstate case processing system (SSA Section 437(b)); and
- Reauthorizes regional partnership grants that work to alleviate substance abuse and support parents for five years. These grants can be used on a statewide basis and can be awarded to both non-profit and state programs (SSA Section 437(f)).

DCF is currently partnering with the University of Kansas to provide Kansas Serves Substance Affected Families (KSSAF), a five-year project

funded through a regional partnership grant. KSSAF serves families with children ages zero to three who are in out-of-home placements due to reasons associated with parental substance abuse. The project began in 2014 and will continue through 2019.

### ***Reviewing and Improving Licensing Standards for Placement in a Relative Foster Family Home***

HHS is expected to identify reputable model licensing standards for foster family homes (as defined in Section 472(c) of the SSA) by October 1, 2018. States must report by April 1, 2019, whether state licensing standards are in accordance with model standards identified by the Secretary of HHS, and, if not, the reason for the specific deviation and a description as to why the national model standard is not appropriate for the state. Additionally, states must report whether the state has elected to waive standards established in Section 471(a)(10)(A) of the SSA for relative foster family homes and describe which standards the state waives. If the state elects to waive the standards, the state must explain how caseworkers are trained to use the waiver authority, whether the state has developed a process or provided tools to assist caseworkers in waiving non-safety standards to quickly place children with relatives, and a description of the steps the state is taking to improve caseworker training on the process. If the state is not electing to waive the standards, the state must report the reason why (SSA Section 471(a)).

### ***Development of a Statewide Plan to Prevent Child Abuse and Neglect Fatalities***

States must report on steps taken to track and prevent child maltreatment death. The state will submit a description of the steps the state is taking to compile complete and accurate information on the child deaths as required by federal law. This includes gathering relevant information on the deaths from organizations in the state (such as state vital statistics, child death review teams, law enforcement agencies, and offices of medical examiners), and describing the steps

the state is taking to develop and implement a comprehensive statewide plan to prevent the fatalities (SSA Section 422(b)).

### ***Ensuring the Necessity of Placement That Is Not a Foster Family Home***

FFPSA limits foster care maintenance payments to two weeks for placements that are not foster homes or qualified residential treatment programs (QRTP). Additionally, the state will only receive payments on behalf of a child in a placement other than a foster home or QRTP if the child is placed in a child-care institution or a licensed residential family-based treatment facility. Child-care institutions include QRTPs; a setting specializing in providing prenatal, postpartum, or parenting supports for youth; a supervised setting in which the child is living independently (for children 18 years and older); and a setting providing high-quality residential care and supportive services to youth who have been found to be, or are at risk of becoming, sex-trafficking victims.

Under FFPSA, the term “foster family home” means the home of any individual or family that is licensed or approved by the state where the foster child resides, adheres to the reasonable and prudent parenting standard, provides 24-hour substitute care for the child, and provides care for no more than 6 foster children (with some exceptions for parenting youth, siblings, meaningful relationships with a family, and special training) (SSA Section 472(c)).

QRTPs must have a trauma-informed treatment model, registered or licensed nursing staff on-site to the extent the program’s treatment model requires, facilitate outreach to family members, document family integration into the treatment process, and provide discharge planning and family-based care support for six months after discharge (SSA Section 472(k)(4)). A trained

professional or licensed clinician must complete an assessment for each child placed in a qualified residential treatment center to determine if the placement is appropriate. The assessment must determine the strengths and needs of the child using age-appropriate evidence-based validated functional assessment tools approved by HHS. The state will only receive federal payments on behalf of the child in a qualified residential treatment facility if the assessment is completed within 30 days. Additionally, if the assessment determines the placement in the QRTP is no longer appropriate, the child returns home, or the child is placed in a foster home or adoptive placement, federal payments will only be made on behalf of the child during the period necessary to transition the child home or to the new placement. The state will not receive any federal payment after 30 days of the determination that the placement in the QRTP is no longer appropriate.

As of June 30, 2018, 620 youths are currently placed in a congregate care setting, including psychiatric residential treatment facilities. Many of these facilities have indicated to DCF they can meet the QRTP standards by October 1, 2019.

### ***Continuing Support for Child and Family Services***

Several federal grants are available for child welfare programs under FFPSA. An appropriation of \$8.0 million is available through FFY 2022 for competitive grants to support the recruitment and retention of high-quality foster family homes. FFPSA also reauthorizes the Stephanie Tubbs Jones Child Welfare Services Program, the Promoting Safe and Stable Families Program, the Court Improvement Program, and the John H. Chaffee Foster Care Independence Program through FFY 2021.

- 1 NCSL. (2018, May 15). Family First Prevention Services Act (FFPSA). Retrieved from <http://www.ncsl.org/research/human-services/family-first-prevention-services-act-ffpsa.aspx>
- 2 NCSL. (2017, May 17). Child Welfare Financing 101. Retrieved from <http://www.ncsl.org/research/human-services/child-welfare-financing-101.aspx>

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**F-1**  
**Family First Prevention  
Services Act**

**F-2**  
**Foster Care**

**F-3**  
**Medicaid Waivers**

**F-4**  
**The Opioid Crisis**

**F-5**  
**Recent Changes to  
Health Professions'  
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**F-6**  
**Recent Telemedicine  
Legislation in Kansas**

**F-7**  
**State Hospitals**

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### Health and Social Services

#### F-2 Foster Care

Foster care services are provided when the court finds a child to be in need of care pursuant to the Revised Kansas Code for the Care of Children (KSA 2018 Supp. 38-2201 to 38-2283). Child in Need of Care (CINC) proceedings can be divided into two categories: those concerning children who lack adequate parental care or control, or have been abused or abandoned; and those concerning children who commit certain offenses listed in KSA 2018 Supp. 38-2202(d)(6)-(10). This article focuses on the first group.

Foster care services in Kansas were privatized in 1997 due in part to long standing concerns about the quality of services for children in state custody, in addition to a 1989 class action lawsuit alleging the Department of Social and Rehabilitation Services (SRS), now known as the Department for Children and Families (DCF), failed to care adequately for children who may have been victims of abuse or neglect. The court approved a settlement in 1993 containing 153 requirements with which SRS was required to comply within certain time frames. SRS did not achieve compliance with many of the settlement requirements for handling cases, and in early 1996, SRS officials informed the Legislature they were moving toward privatization to improve the quality and efficiency of services. After what contractors conceded was a chaotic transition, SRS was found to have successfully completed its settlement terms in 2002.

Currently, DCF contracts with two service providers in four regions for foster care placements, adoptions, and family preservation services: Saint Francis Community Services, which provides service to the West and Wichita regions, and KVC Health Systems, Inc., which provides service to the East and Kansas City regions. The service providers subcontract with other providers. Several other agencies throughout the state are involved with foster care, such as the Kansas Children's Service League and the Children's Alliance of Kansas. These agencies and others provide a variety of services, including information and resources for current and prospective foster parents.

The current contracts run through the end of FY 2019 (June 30, 2019). New child welfare grants and contracts will take effect on July 1, 2019. As of September 2018, proposals for these new grants and contracts were being presented, with selection of providers being scheduled to take place by December 2018.

While the details of the new grants and contracts will not be finalized and known until the selection and negotiation process is complete, when announcing its request for proposals for the new grants and contracts in May 2018, DCF outlined a variety of desired changes from the current contracts, including:

- Increasing foster care catchment areas from four to eight, making each area smaller;
- DCF contracting directly with child placing agencies (CPAs);
- Implementing new caseload size limits for case managers; and
- Requiring every provider use a single, unified statewide placement management system.

### **Preliminary Issues for CINC Proceedings**

CINC proceedings typically begin with a report to DCF, which may be made by anyone who suspects a child may be in need of care.

Additionally, the following are required to report any suspicion of abuse or neglect:

- Persons providing medical care or treatment;
- Persons licensed by the State to provide mental health services;
- Teachers and other employees of educational institutions;
- Licensed child care providers;
- Firefighters, emergency medical services personnel, and law enforcement officers;
- Juvenile intake and assessment workers, court services officers, and community corrections officers;
- Case managers and mediators appointed to help resolve any contested issue of child custody, residency, visitation, parenting time, division of property, or other issue; and
- Persons employed by or working for an organization that provides social services to pregnant teenagers.

Reports can be made to local law enforcement when DCF is not open for business. Once a report is received, KSA 2018 Supp. 38-2226 requires DCF and law enforcement to investigate the validity of the claim and determine whether action is required to protect the child. When a report indicates there is serious physical harm to, serious deterioration of, or sexual abuse of the child and action may be required to protect the child, DCF and law enforcement conduct a joint investigation. If there are reasonable grounds to believe abuse or neglect exist, DCF must take immediate steps to protect the health and welfare of the child, as well as that of other children under the same care.

KSA 2018 Supp. 38-2231 requires law enforcement to place a child in protective custody when an officer reasonably believes the child will be harmed if not immediately removed from the situation where the child was found or the child is a missing person. A court may not remove a child from parental custody unless it finds there is probable cause to believe: the child is likely to be harmed if not immediately removed from the home; allowing the child to remain in the home is contrary to the welfare of the child; or immediate placement is in the child's best interests. The court also must find there is probable cause to believe reasonable efforts have been made to maintain the family unit and prevent the unnecessary removal of the child from the child's home, or an emergency exists that threatens the child's safety.

To issue an *ex parte*<sup>1</sup> order for protective custody, the court also must find there is probable cause to believe the child is in need of care. An *ex parte* order must be served on the child's parents and any other person having legal custody of the child. Along with the order, the court may enter an order restraining any alleged perpetrator of physical, sexual, mental, or emotional abuse from residing in the child's home; visiting, contacting, harassing, or intimidating the child, another family member, or witness; or attempting to visit, contact, harass, or intimidate the child, another family member, or witness. A restraining order must be served on the alleged perpetrator.



The court may place the child in the protective custody of a parent or other person having custody of the child; another person, who is not required to be licensed under the Kansas law governing child care facilities; a youth residential facility; a shelter facility; or, under certain circumstances, the Secretary for Children and Families (Secretary). Once issued, an *ex parte* order typically will remain in effect until the temporary custody hearing.

When a court evaluates what custody, visitation, or residency arrangements are in the best interests of a child no longer residing with a parent, KSA 2018 Supp. 38-2286 requires substantial consideration of a grandparent who requests custody, which must be included in the record. The court must consider the wishes of the parents, child, and grandparent; the extent to which the grandparent has cared for the child; the intent and circumstances under which the child is placed with the grandparent; and the physical and mental health of all involved individuals. If the court places the child in the custody of the Secretary for placement (rather than a grandparent), the law requires substantial consideration of a grandparent who requests placement in the evaluation for placement. If the grandparent is not selected, the Secretary must prepare and maintain a written report with specific reasons for the finding.

## **Court Proceedings**

### ***CINC Petition***

If DCF determines it is not otherwise possible to provide services necessary to protect the interests of the child, it must recommend that the county or district attorney file a CINC petition. Pursuant to KSA 2018 Supp. 38-2233, the county or district attorney will then review the facts, recommendations, and any other evidence available and determine whether the circumstances warrant filing a petition. If warranted, KSA 2018 Supp. 38-2214 provides the county or district attorney prepares and files the petition, the contents of which are outlined in KSA 2018 Supp. 38-2234, and appears and presents evidence at all subsequent proceedings. KSA

2018 Supp. 38-2233 also allows an individual to file a CINC petition and be represented by the individual's own attorney in the presentation of the case.

Once filed, if the child is in protective custody, KSA 2018 Supp. 38-2235 allows the court to serve a copy of the petition on all parties and interested parties in attendance at the temporary custody hearing or issue summons to all those persons if not present. Otherwise, KSA 2018 Supp. 38-2236 instructs the court to serve the guardian *ad litem*<sup>2</sup> (GAL) appointed to the child, custodial parents, persons with whom the child is residing, and any other person designated by the county or district attorney with a summons and a copy of the petition, scheduling a hearing within 30 days of when the petition was filed. Grandparents are sent a copy of the petition by first class mail.

### ***Interested Parties and Attendance at Court Proceedings***

In addition to receiving notice of hearings, KSA 2018 Supp. 38-2241 gives parties and interested parties the right to present oral or written evidence and argument, call and cross-examine witnesses, and be represented by an attorney. Grandparents are interested parties in CINC proceedings and have participatory rights, subject to the court's restriction on participation if it is in the child's best interests. Other interested parties may include persons with whom the child has resided or shares close emotional ties and other persons as the court allows based on the child's best interests.

KSA 2018 Supp. 38-2247 allows anyone to attend CINC proceedings leading up to and including adjudication, unless the court determines closed proceedings or the exclusion of an individual would be in the child's best interests or is necessary to protect the parents' privacy rights. Dispositional proceedings for a child determined to be in need of care, however, may be attended only by the GAL, interested parties and their attorneys, officers of the court, a court-appointed special advocate, the custodian, and any other person the parties agree to or the court orders to admit. Likewise, the court may exclude a person

if it determines it would be in the best interests of the child or the conduct of the proceedings.

### ***Temporary Custody Hearing***

KSA 2018 Supp. 38-2243 governs temporary custody hearings, which must be held within three business days of a child being placed in protective custody. Notice of the hearing must be provided to all parties and nonparties at least 24 hours prior to the hearing. After the hearing, the court may enter a temporary custody order if there is probable cause to believe the child is a danger to self or others, is not likely to be available within the jurisdiction of the court for future proceedings, or the child's health or welfare may be endangered without further care. The court may modify this order during the pendency of the proceedings to best serve the child's welfare and can enter a restraining order against an alleged perpetrator of physical, sexual, mental, or emotional abuse. The court may place the child with a parent or other person having custody of the child; another person who is not required to be licensed under the Kansas law governing child care facilities; a youth residential facility; a shelter facility; or, under certain circumstances, the Secretary.

### ***Order of Informal Supervision***

At any time after the petition is filed and prior to an adjudication, a court can enter an order for continuance and informal supervision pursuant to KSA 2018 Supp. 38-2244, placing conditions on the parties and entering restraining orders as needed. The order can continue for up to six months and may be extended for an additional six months. If the child is not placed with a parent, the court must give substantial consideration to a grandparent who requests custody, as discussed above.

### ***Adjudication and Disposition***

KSA 2018 Supp. 38-2251 requires the court to enter a final adjudication or dismissal of a CINC petition within 60 days of the filing of the petition, unless good cause for a continuance is shown on the record. KSA 2018 Supp. 38-2250 specifies the petitioner must prove by clear and convincing

evidence the child is in need of care. Otherwise, KSA 2018 Supp. 38-2251 requires the court to dismiss the proceedings. If the child is found to be in need of care, however, pursuant to KSA 2018 Supp. 38-2253, the court will receive and consider information concerning the child's safety and well-being and enter orders concerning custody and a case plan, which governs the responsibilities and time lines necessary to achieve permanency for the child.

Prior to entering an order of disposition, KSA 2018 Supp. 38-2255 requires the court to consider the child's physical, mental, and emotional condition and need for assistance; the manner in which the parent participated in the abuse, neglect, or abandonment of the child; any relevant information from the intake and assessment process; and evidence received at disposition concerning the child's safety and well-being. Based on these factors, the court may place the child with a parent; a relative of the child; another person who is not required to be licensed under the Kansas law governing child care facilities; any other suitable person; a shelter facility; a youth residential facility; or, under certain circumstances, the Secretary. This placement will continue until further order of the court. Along with the dispositional order, the court may grant reasonable visitation rights upon finding visitation would be in the child's best interests or may enter a restraining order against an alleged perpetrator of physical, sexual, mental, or emotional abuse.

### ***Permanency***

If the child is placed with a parent, KSA 2018 Supp. 38-2255 allows the court to impose terms and conditions to assure the proper care and protection of the child, including supervision of the child and parent, participation in available programs, and any special treatment the child requires. If permanency is achieved with one parent without terminating the other's parental rights, the court may enter child custody orders, including residency and parenting time, determined to be in the child's best interests and must complete a parenting plan pursuant to KSA 2018 Supp. 23-3213.

If the child is not placed with a parent, a permanency plan must be developed and submitted to the court within 30 days of the dispositional order by the person with custody of the child or a court services officer, ideally in consultation with the child's parents. KSA 2018 Supp. 38-2263 outlines the required contents of the plan, including descriptions of the child's needs and services to be provided in addition to whether the child can be "reintegrated," *i.e.*, reunited with a parent or parents. If there is disagreement among the persons necessary to the success of the plan, a hearing will be held to consider the merits of the plan.

KSA 2018 Supp. 38-2255 lists the relevant factors in determining whether reintegration is a viable alternative, including, among others, whether the parent has committed certain crimes, previously been found unfit, and worked towards reintegration. If reintegration is not a viable alternative, within 30 days, proceedings will be initiated to terminate parental rights, place the child for adoption, or appoint a permanent custodian. A hearing on the termination of parental rights or appointment of a permanent custodian will be held within 90 days. An exception exists when the parents voluntarily relinquish parental rights or consent to the appointment of a permanent custodian.

KSA 2018 Supp. 38-2269 allows courts to terminate parental rights if it finds by clear and convincing evidence the parent is unfit by reason of conduct or condition that renders the parent unable to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future. Further, it lists factors the court can consider to determine parental unfitness and provides a parent may be found unfit if the court finds the parent has abandoned the child; custody of the child was surrendered or the child was left under such circumstances that the identity of the parents is unknown and cannot be determined, in spite of diligent searching; and the parents have not come forward to claim the child within three months after the child is found.

Finally, KSA 2018 Supp. 38-2271 outlines circumstances that create a presumption of unfitness, including a previous finding of unfitness;

two or more occasions in which a child in the parent's custody has been adjudicated a child in need of care; failure to comply with a reasonable reintegration plan; and conviction of certain crimes. Parents bear the burden of rebutting these presumptions by a preponderance of the evidence. When the court finds a parent is unfit, it can authorize an adoption if parental rights were terminated, appoint a permanent custodian, or continue permanency planning. Preference for placement is given to relatives and persons with whom the child has close emotional ties.

A permanency plan may be amended at any time upon agreement of the plan participants. If the permanency goal changes, however, a permanency hearing will be held within 30 days, as outlined in KSA 2018 Supp. 38-2264 and 2018 Supp. 38-2265. Even without a change in the permanency goal, KSA 2018 Supp. 38-2264 requires a permanency hearing be held within 12 months after a child is removed from the home and at least annually thereafter. If parental rights are terminated or relinquished, the requirements for permanency hearings will continue until the child is adopted or a permanent custodian is appointed. When permanency has been achieved with either a parent or nonparent to the satisfaction of the court, the court will close the case.

### **Fiscal Year 2018 Statewide Foster Care Statistics**

An average of 351 children were removed from the home and placed into foster care each month, with a total number of 4,212 children placed during fiscal year (FY) 2018. An average of 317 children exited foster care placement outside of their home each month, with a total of 3,805 children exiting during FY 2018. In 70 percent of cases, the primary reason for removal was abuse or neglect. A majority of children in out-of-home settings were placed in family foster homes, and the most common permanency goal was reunification. The total average out-of-home placement length of stay was 19.1 months, with reunification as the leading reason for ending placement. Further information on statistics, as well as current figures and regional data, can

be found at <http://www.dcf.ks.gov/services/PPS/Pages/FosterCareDemographicReports.aspx>.

## Recent Legislation and Reform Efforts

In addition to many existing workgroups, task forces, and committees that consider possible reforms to the CINC process and the delivery of foster care services, standing and special legislative committees also have considered changes in recent years. Most recently, the 2017 Legislature established the Child Welfare System Task Force. More details regarding these efforts follow.

### Legislation

Beginning in 2011, the Legislature made changes to the law to expand the rights of grandparents, designating them as interested parties (2011 House Sub. for SB 23) and requiring substantial consideration of grandparents who request custody when a child is removed from parental custody (2012 SB 262).

In 2014, a foster parents' bill of rights, Sub. for SB 394, was introduced, considered, and ultimately referred to the Judicial Council and to the Special Committee on Judiciary for interim study. The Special Committee recommended introduction of a bill proposed by the Judicial Council and that additional consideration be given to the grievance process. That bill was introduced in 2015 as SB 37, which was heard by the Senate Judiciary Committee; however, the Committee did not take action on the bill.

In 2016, the House and Senate Judiciary Committees discussed variations on legislation introduced in 2015 concerning use of a power of attorney to delegate care and custody of a child to another, which had been referred to the Judicial Council for further study. The 2016 Legislature ultimately passed SB 418, the Host Families Act, which allows a child placement agency or charitable organization to provide temporary care of children by placing a child with a host family. Host families are subject to screening and background checks and do not receive payment other than reimbursement for actual expenses.

The Act also allows DCF to provide information about respite care, voluntary guardianship, and support services, including organizations operating programs under the Act, to families experiencing financial distress, unemployment, homelessness, or other crises and to parents or custodians during a child protective investigation that does not result in an out-of-home placement due to abuse of a child.

Placement must be voluntary and shall not be considered an out-of-home placement, supersede any court order, or preclude any investigation of suspected abuse or neglect. A parent may place a child by executing a power of attorney that delegates to a host family any powers regarding the care and custody of the child, except power to consent to marriage or adoption, performance or inducement of an abortion, or termination of parental rights. The power of attorney may not be executed without the consent of all individuals with legal custody of the child, and execution is not evidence of abandonment, abuse, or neglect.

The power of attorney may not exceed one year but may be renewed for one additional year. The bill includes an exception, however, for parents serving in the military, who may delegate powers for a period longer than one year if on active duty service, but no more than the term of active duty service plus 30 days. A parent executing a power of attorney under the Act can revoke or withdraw the power of attorney at any time. Upon such withdrawal or revocation, the child must be returned to the parent as soon as reasonably possible.

Additionally, 2016 SB 418 specified nothing in the CINC Code compels a parent to medicate a child if the parent is acting in accordance with a physician's medical advice, and in these circumstances, absent a specific showing of a causal relation between the actions and harm to the child, a parent's actions do not constitute a basis for determination that a child is a CINC, removal of custody of a child, or termination of parental rights. Further, the bill allowed county or district attorneys from another jurisdiction to access the official file and social file in a CINC proceeding when involved with a pending

CINC case involving any of the same parties or interested parties.

### **Special Committee on Foster Care Adequacy**

The Legislative Coordinating Council created a Special Committee on Foster Care Adequacy in 2015 and again in 2016 to study DCF oversight of foster care contractors; whether a working group would aid in addressing foster care concerns; and the selection, qualification, and responsibilities of foster parents. The 2015 Special Committee recommended evidence-based, peer-reviewed research on family structure be given high priority when considering best interests and making foster care placement decisions. Additionally, it recommended introduction of legislation creating a joint committee to oversee foster care or alternatively, that a Senate committee and a House committee be charged with reviewing the topic of foster care.

The 2016 Special Committee studied similar issues and considered a two-part report of DCF released by the Legislative Division of Post Audit (LPA). The 2016 Special Committee identified a number of concerns and recommended:

- Reintroduction of a bill establishing a foster care oversight task force;
- Expanded use of citizen review boards in CINC cases;
- Affirmation of the right of biological parents and grandparents to visitation;
- The Legislature address the LPA findings on foster care and adoption and concerns raised by the audit;
- DCF investigate the value of additional vendors for foster care programs;
- DCF report annually to Senate and House standing committees; and
- The LPA committee consider addressing concerns regarding the low response rate to LPA's survey of public employees and contractor employees.

### **LPA Report on Foster Care and Adoption**

Parts 1, 2, and 3 of the report, entitled "Foster Care and Adoption in Kansas: Reviewing Various Issues Related to the State's Foster Care and Adoption System," are available on LPA's website. Search "foster care" at <http://www.kslpa.org/search/> to find the report.

Part 1 identified concerns and made recommendations related to ongoing efforts to improve child protective services; failure to consistently perform background checks for foster parents and to conduct monthly in-person visits; and foster homes with insufficient sleeping space and insufficient financial resources.

Part 2 looked at compliance with state and federal law and found DCF had not followed some of the safety and living condition requirements reviewed in Part 1. Further, it found DCF had materially complied with most, but not all, federal requirements in 2014 and 2015 and had exceeded half of the federal outcome requirements in FY 2016 but did not meet others. Finally, it found DCF must implement a program improvement plan to address issues identified by a 2015 federal review.

Part 3 examined whether the Kansas foster care system has had sufficient capacity to provide necessary foster care services, finding issues with staffing shortages, large caseloads, and low morale among caseworkers. Children in foster care received most of the physical and mental health services they needed, with exceptions. Many counties and cities did not appear to have enough licensed foster homes, although there were sufficient open beds statewide. DCF could be more proactive in monitoring and collecting management information about the foster care system, but has recently begun to expand its use of data in overseeing the foster care system. LPA identified several instances in which children were placed in foster homes that did not comply with licensing standards, but noted that DCF is making significant changes to the inspection process.

Part 3 also looked at Kansas' performance on federal outcomes for children and families over

time, finding no significant change from 2000 to 2013 and noting the significant limitations of these outcome measures, including for comparison between states.

Finally, Part 3 compared the cost of the State directly providing foster care and adoption services with maintaining the current privatized system, estimating such transition would incur up to \$8 million more in ongoing costs and significant start-up costs. LPA also noted the other significant factors that would have to be considered in making such a transition.

### **Child Welfare System Task Force**

The 2017 Legislature passed House Sub. for SB 126, which directed the Secretary for Children and Families to establish a Child Welfare System Task Force to study the child welfare system in the State of Kansas. The bill specified various entities and stakeholders to be represented on the Task Force (including six legislators) and directed the Task Force to convene working groups to study the following topics: the general administration of child welfare by DCF; protective services; family preservation; reintegration; foster care; and permanency placement. Additionally, the Task Force and each working group were directed to study the following topics:

- The level of oversight and supervision by DCF over each entity that contracts with DCF to provide reintegration, foster care, and adoption services;
- The duties, responsibilities, and contributions of state agencies, nongovernmental entities, and service providers that provide child welfare services in the State of Kansas;
- The level of access to child welfare services, including, but not limited to, health and mental health services and

community-based services, in the State of Kansas;

- The increasing number of children in the child welfare system and contributing factors;
- The licensing standards for case managers working in the child welfare system; and
- Any other topic the Child Welfare System Task Force or working group deems necessary or appropriate.

The appointments of Task Force members were completed in July 2017, and the Task Force began meeting in August 2017. Working group appointments were completed in September 2017 and began meeting in October 2018.

In accordance with SB 126 requirements, the Task Force submitted a preliminary progress report to the 2018 Legislature. The Task Force and Working Groups continued meeting in 2018, with the Working Groups submitting their reports and recommendations to the Task Force in August and September 2018.

SB 126 requires the Task Force to submit a final report to the Legislature by January 14, 2019. The final report must include, but is not limited to:

- Recommended improvements regarding the safety and well-being of children in the Kansas child welfare system;
- Recommended changes to law, rules and regulations, and child welfare system processes; and
- Whether an ongoing task force or similar advisory or oversight entity could aid in addressing child welfare concerns and any other topics the Task Force deems appropriate.

- 1 *Ex parte* orders are orders issued involving one party, usually for temporary or emergency relief.
- 2 For more information on the role of the GAL, see KSA 2018 Supp. 38-2205.

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### Health and Social Services

#### F-3 Medicaid Waivers

This article provides information related to the history of Medicaid waivers in the United States, Medicaid waivers specific to Kansas, and the history of waiver integration proposals.

#### The History of Medicaid

Medicaid is a partnership between the federal government and the states with shared authority and financing, created by Congress in 1965 (Title XIX of the Social Security Act). The program was designed to finance health care services for low-income children, their parents, the elderly, and people with disabilities. Medicaid has become the nation's largest source of funding to provide health services to low-income people.

State participation in Medicaid is optional. However, the federal government's financial share of Medicaid financing creates an incentive for the states. To date, no state has declined to participate. All 50 states, the District of Columbia, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands participate and administer their own Medicaid plans. Although all states participate, eligibility varies widely because the states can choose to cover additional people and services above and beyond the federal minimum requirements.

#### Medicaid Expansion

Provisions of the federal Patient Protection and Affordable Care Act (referred to throughout this article as ACA) expanded Medicaid to all Americans under age 65 whose family income is at or below 138 percent of the federal poverty level (FPL) by January 1, 2014. (Note: This amount has been cited as 133 percent FPL. However, because of modified adjusted gross income calculations, this threshold is effectively 138 percent FPL). Under the provisions of the ACA, if a state did not expand Medicaid, the state risked losing its entire federal Medicaid allotment.

The Medicaid expansion provision led to challenges in the U.S. Supreme Court. On June 28, 2012, the Supreme Court ruled in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012), that Congress may not make a state's entire existing Medicaid funding

contingent upon the state's compliance with the ACA provision regarding Medicaid expansion. Consequently, Medicaid expansion is voluntary and has become a highly discussed topic in state legislatures across the country.

As of November 7, 2018, 36 states and the District of Columbia have expanded Medicaid, and 14 states have not participated in expansion.

### **KanCare: Medicaid in Kansas**

Kansas participates in Medicaid, but it has not expanded the program under the ACA. In 2017, legislative action was taken to expand Medicaid through HB 2044. The bill passed the Legislature, but was vetoed by the Governor. The House of Representatives sustained the Governor's veto.

Kansas administers Medicaid through the program known as KanCare, which was launched in January 2013 and currently serves more than 415,000 Kansans. Some of the services provided under KanCare include doctor's office visits and hospital care, behavioral health services, dental and vision care, medicine, non-emergency medical transportation, nursing facility services, weight-loss surgery, and contractor specific value-added services.

The Kansas Department of Health and Environment (KDHE) and the Kansas Department for Aging and Disability Services (KDADS) administer the KanCare program.

KDHE maintains financial management and contract oversight as the single state Medicaid agency, while KDADS administers the Medicaid waiver programs for disability services, mental health, and substance abuse and operates the state hospitals and institutions. Additionally, Kansas contracts with three managed care organizations (MCOs) to coordinate health care for nearly all Medicaid beneficiaries. In June 2018, KDHE awarded contracts to Sunflower State Health Plan, United Healthcare, and Aetna Better Health of Kansas, Inc., to serve as the state's MCOs. These new contracts are set to begin January 1, 2019, and end December 31, 2023.

Each Medicaid consumer is enrolled with one of the KanCare health plans. Consumers have the option during open enrollment once a year to change to a different KanCare health plan if they wish to do so.

KDHE submitted a request to extend the KanCare program under a Section 1115 waiver to the Centers for Medicare and Medicaid Services (CMS). CMS approved a one-year extension of the current KanCare demonstration, which was set to expire on December 31, 2018. The State submitted an application to renew KanCare through 2023. The application was approved by CMS on December 18, 2018.

### **Types of Medicaid Waivers Approved by CMS**

Sections 1115 and 1915(b) and (c) of the Social Security Act give the U.S. Secretary of Health and Human Services (HHS) authority to waive provisions of the law to encourage states to test new or existing ways to deliver and pay for health care services in Medicaid and the Children's Health Insurance Program (CHIP). A state must apply for and receive approval from CMS in order to operate a waiver.

### **Section 1115 Research & Demonstration Projects**

Section 1115 of the Social Security Act gives the Secretary of HHS authority to approve experimental, pilot, or demonstration projects. These demonstrations can give states additional flexibility to design and improve their Medicaid programs. The purpose of these demonstrations is to demonstrate and evaluate state-specific policy approaches to better serve Medicaid populations. See the CMS website for more information: <https://www.medicaid.gov/medicaid/section-1115-demo/about-1115/index.html>.

CMS performs a case-by-case review of each state's Medicaid proposal. CMS has invited states to propose reforms that promote Medicaid's objectives, such as reforms that would:

- Improve access to high-quality, person-centered services that produce positive health outcomes for individuals;
- Promote efficiencies that ensure Medicaid's sustainability for beneficiaries over the long term;
- Support coordinated strategies to address certain health determinants that promote upward mobility, greater independence, and improved quality of life among individuals;
- Strengthen beneficiary engagement in their personal health care plan, including incentive structures that promote responsible decision making;
- Enhance alignment between Medicaid policies and commercial health insurance products to facilitate smoother beneficiary transition; and
- Advance innovative delivery system and payment models to strengthen provider network capacity and drive greater value for Medicaid.

In general, Section 1115 waivers are approved for an initial five-year period and can be extended for an additional three to five years. Demonstrations must be "budget neutral" to the federal government, which means during the course of the project, federal Medicaid expenditures cannot be more than federal spending without the waiver.

Currently, there are 27 states that have approved Section 1115 waivers. Those states are Alabama, Arkansas, California, Colorado, Delaware, Florida, Illinois, Indiana, Iowa, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, and Wyoming. Additionally, several states have Section 1115 waivers that are listed as "pending" approval with CMS. According to a search of the CMS website on September 14, 2018, KanCare is listed by CMS as pending approval, although the KanCare demonstration was extended until December 31, 2018. See <https://www.medicaid.gov/medicaid/section-1115-demo/demonstration->

[and-waiver-list/index.html](https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/index.html) to search for the current status of states' waiver authority.

In January 2018, CMS posted new guidance for state Section 1115 waiver proposals to condition Medicaid on meeting work requirements. Arkansas, Indiana, and New Hampshire have approved Section 1115 Medicaid waivers containing work requirements. Section 1115 waivers with work requirements are pending in Alabama, Arizona, Kansas, Maine, Michigan, Mississippi, Ohio, South Dakota, Utah, and Wisconsin. In June 2018, the District of Columbia federal district court invalidated the Secretary of HHS's approval of Kentucky's Section 1115 waiver containing work requirements (*Stewart v. Azar*, 313 F. Supp. 3d 237, 245 (D.D.C. 2018)).

### **Section 1915(b) Managed Care Waivers**

Section 1915(b) waivers are one of several options available to states that allow the use of managed care in the Medicaid program. Under the 1915(b) waiver, states have the following four options:

- 1915(b)(1): restricts Medicaid enrollees from receiving services within the managed care network (freedom of choice);
- 1915(b)(2): utilizes a "central broker" (enrollment broker);
- 1915(b)(3): uses cost savings to provide additional services to beneficiaries (non-Medicaid services waiver); and
- 1915(b)(4): restricts the provider from whom the Medicaid eligible may obtain services (selective contracting waiver).

Thus, the 1915(b) waivers allow the state to provide Medicaid services through managed care delivery systems, effectively limiting the consumer's choice of providers. CMS has started the process of "modularizing" its current 1915(b) waiver application to separate the various statutory authorities. See <https://www.medicaid.gov/medicaid/managed-care/authorities/index.html> for more information.

Currently, there are 35 states that have approved Section 1915(b) waivers with CMS. Those states are Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

### **Section 1915(c) Home and Community Based Services Waivers**

The Medicaid Home and Community Based Services (HCBS) Waiver program is authorized under Section 1915(c) of the Social Security Act. Through the HCBS Waiver, states can assist Medicaid beneficiaries by providing a wide range of services that permit individuals to live in their homes or communities and avoid institutionalization. Programs can provide a combination of standard medical services and non-medical services. Standard medical services include, but are not limited to, case management, home health aides, personal care, adult day health services, and respite care. States can propose other services that may assist in diverting or transitioning individuals from institutional settings to their homes or communities.

Currently, 47 states and the District of Columbia have 1915(c) waivers approved with CMS. The only states that currently do not have an approved 1915(c) waiver with CMS are Arizona, Rhode Island, and Vermont.

### **Section 1332 State Innovation Waivers**

Section 1332 of the ACA permits a state to apply for a State Innovation Waiver (Section 1332 waiver, now also referred to as a State Relief and Empowerment Waiver). Guidance was issued in 2015 related to these new waivers, and waivers were available beginning January 1, 2017. According to the National Conference of State Legislatures, at least 35 states have considered legislation to begin the Section 1332 waiver

application process as of late October 2018. However, on October 22, 2018, CMS, HHS, and the Department of the Treasury published new guidance intended to “expand state flexibility, empowering states to address problems with their individual insurance markets and increase coverage options for their residents, while at the same time encouraging states to adopt innovative strategies to reduce future overall health care spending.” The comment period for the rule ends December 24, 2018. For more information, see <http://www.ncsl.org/research/health/state-roles-using-1332-health-waivers.aspx> and <https://www.federalregister.gov/documents/2018/10/24/2018-23182/state-relief-and-empowerment-waivers>.

## **Medicaid Waivers in Kansas**

### **Current Medicaid Waivers**

KanCare allows the state to provide all HCBS through managed care. Currently, Kansas operates seven separate 1915(c) waivers alongside a Section 1115 waiver. The seven 1915(c) waivers are Autism (AU), Frail Elderly (FE), Intellectual and Developmental Disabilities (I/DD), Physical Disabilities (PD), Serious Emotional Disturbance (SED), Technology Assisted (TA), and Traumatic Brain Injury (TBI).

To participate in a 1915(c) waiver, the individual requiring services must be financially and functionally eligible for Medicaid. Individuals with income above \$747 a month must share in the cost of care, called the “client obligation.” The client obligation is paid to a medical provider, not to the State of Kansas or to a KanCare MCO. Additional information for each of the seven 1915(c) waivers follows.

### **Autism**

The Autism (AU) Waiver provides services to children from the time of diagnosis of Autism Spectrum Disorder, Asperger syndrome, or pervasive developmental disorder not otherwise specified until the child’s sixth birthday. Autism services are limited to three years; however, an

additional year may be submitted for approval. To qualify for an additional year of service, the child must meet eligibility based on the level of care assessment at the annual review on the third year of services, and data collected by the MCO must demonstrate a need for continued AU Waiver services.

To apply for the AU Waiver, a parent or guardian must complete an application. The application requests basic information about the child and the child's family. Also, the application requires the parent or guardian to indicate the screening tool used in the child's diagnosis and documentation of an autism diagnosis or a signature of a licensed medical doctor or psychologist.

The Autism Program manager pre-screens for the autism diagnosis and places the child on the proposed recipient list. As of August 31, 2018, there were 263 children on the proposed recipient list. Once a position becomes available, the Program manager contacts the family to offer them the potential position. As of September 14, 2018, there were 48 children eligible to receive services under this waiver.

Kansas received direction from CMS to move consultative clinical and therapeutic services, intensive individual supports, and interpersonal communication therapy from the AU Waiver to the Medicaid State Plan Amendment. The three services that will continue to be part of the Autism Waiver are respite care, family adjustment counseling, and parent support and training. The Autism Waiver amendments were approved by CMS in June 2017.

### *Frail Elderly*

The Frail Elderly (FE) Waiver provides home and community-based services to Kansas seniors as an alternative to nursing facility care. The waiver serves those individuals 65 and older who choose HCBS and are functionally eligible for nursing facility care. If applying for the FE Waiver, the individual should contact their local Aging and Disability Resource Center (ADRC). There are 11 ADRCs in the state. Services and supports included under the FE Waiver are adult day care,

assistive technology, personal care services, comprehensive support, financial management services, home telehealth, medication reminder, nursing evaluation visit, oral health services, personal emergency response, enhanced care services (previously referred to as sleep cycle support), and wellness monitoring.

As of September 14, 2018, there were 4,628 individuals eligible to receive services without the Money Follows the Person (MFP) program and 16 individuals eligible under the MFP program. The MFP program is a federal demonstration grant given to help individuals currently living in institutional settings to choose to transition into community-based services. Individuals must qualify for Medicaid and also qualify for either the FE, PD, I/DD, or TBI waivers to participate in the program.

According to KDADS, MFP federal grant funding is coming to an end, and KDADS' last transition from the federally funded MFP occurred in July 2017. Individuals transitioning by July 2017 then have 365 days of MFP. After this period, individuals will be transitioned to the appropriate HCBS program.

### *Intellectual and Developmental Disability*

The Intellectual and Development Disability (I/DD) Waiver provides services to individuals five years of age and older who meet the definition of intellectual disability, have a developmental disability, or are eligible for care in an intermediate care facility for individuals with intellectual disabilities. Those with a developmental disability may be eligible if their disability was present before age 22 and they have a substantial limitation in three areas of life functioning.

The point of entry into the I/DD Waiver is an individual's local community developmental disability organization (CDDO). The Program manager provides final approval of program eligibility. As of September 14, 2018, there were 3,761 individuals on the I/DD waiting list.

Services and supports under the I/DD Waiver can include assistive services, adult day supports,

financial management services, medical alert rental, overnight respite, personal care services, residential supports, enhanced care services, specialized medical care, supported employment, supportive home care, and wellness monitoring. As of September 14, 2018, there were 9,097 individuals eligible to receive services without the MFP program and 1 individual eligible under the MFP program.

### *Physically Disabled*

The Physically Disabled (PD) Waiver provides services to individuals who are at least 16 years of age and no older than 65 years. The individual must be determined disabled by the Social Security Administration, need assistance to perform activities of daily living, and meet the Medicaid nursing facility threshold.

The point of entry for the PD Waiver is an individual's local ADRC. The Program manager provides final approval of program eligibility. As of September 14, 2018, there were 1,657 individuals on the PD waiting list. The following services and supports can be provided under the PD Waiver: assistive services, financial management services, home-delivered meals, medication reminder services, personal emergency response systems and installation, personal care services, and enhanced care services. As of September 14, 2018, 5,877 individuals were eligible to receive services without the MFP program and 25 individuals were eligible under the MFP program.

### *Serious Emotional Disturbance*

The Serious Emotional Disturbance (SED) Waiver provides services to individuals ages 4 to 18 who have been diagnosed with a mental health condition that substantially disrupts the individual's ability to function socially, academically, emotionally, or all. The waiver is designed to divert the individual from psychiatric hospitalization to intensive home and community-based supportive services.

Services and supports under this waiver include attendant care, independent living and skills

building, short-term respite care, parent support and training, professional resource family care, and wraparound facilitation. As of September 14, 2018, there were 3,437 individuals eligible to receive services under this waiver.

### *Technology Assisted*

The Technology Assisted (TA) Waiver provides services to people through the age of 21 who require substantial and ongoing daily care comparable to the care provided in a hospital.

The individual is determined TA program eligible if he or she is 0 through 21 years of age, is chronically ill or medically fragile, requires one or more of the identified primary medical technologies and meets the minimum technology score for the specified age group, and meets the minimum nursing acuity level of care threshold for the specified age group. The point of contact for the program is the Children's Resource Connection.

Services and supports under this waiver can include financial management services, health maintenance monitoring, intermittent intensive medical care, specialized medical care, medical respite, personal care services, and home modification. As of September 14, 2018, there were 532 individuals eligible to receive services under this waiver.

### *Traumatic Brain Injury*

The Traumatic Brain Injury (TBI) Waiver provides services to individuals ages 16 to 65 who have sustained a traumatic brain injury and would otherwise require institutionalization in a TBI rehabilitation facility. The TBI Waiver is a short-term rehabilitative program.

To be eligible for the TBI waiver, the individual must provide medical documentation to support the TBI, meet the criteria for TBI rehabilitation hospital placement, be determined disabled or have a pending determination by the Social Security Administration, and have active rehabilitation needs. If a TBI is obtained prior to

the age of 21, the individual may be considered developmentally disabled and will be referred to the CDDO prior to a TBI screening.

The point of entry for an individual is their local ADRC. Services and supports under this waiver may include assistive services; financial management services; home-delivered meals; medication reminder services; personal emergency response system and installation; personal care services; rehabilitation therapies, including behavior therapy, cognitive rehabilitation, physical therapy, speech-language therapy, and occupational therapy; enhanced care services; and transitional living skills. As of September 14, 2018, there were 398 individuals eligible to receive services without the MFP program and 1 individual eligible under the MFP program.

### ***Waiver Integration***

In the summer of 2015, KDHE and KDADS announced a plan to fully integrate the seven 1915(c) waivers into the 1115 waiver. Under this waiver integration plan, entrance to HCBS would remain the same, but services would fall into two broader categories: children's services and adults' services. The new integrated waiver would be called KanCare Community Care. KDHE and KDADS planned for this waiver integration to begin on January 1, 2017, if approved by CMS.

KDHE and KDADS held public information sessions and stakeholder work groups regarding the planned integration and continued forward with the proposal. However, the House Committee on Health and Human Services (House Committee) appointed a subcommittee to study the issue during the 2016 Legislative Session. The subcommittee issued a report proposing a bill to be considered by the House Committee requiring legislative approval of waiver integration and prohibiting implementation of waiver integration prior to January 1, 2018. The subcommittee also recommended KDHE report on the status of waiver integration planning to the Legislature in January 2017 and March 2017.

HB 2682 (2016) was introduced by the House Committee. The bill would have prohibited any state agency from making any changes to waiver services without express legislative authorization. The bill was heard by the House Committee, but died in that Committee. However, in the 2016 omnibus appropriations bill (House Sub. for SB 249), language was added directing no expenditures could be made during FY 2016 and FY 2017 to proceed with waiver integration if the proposed integration was planned to occur prior to FY 2019.

In 2017, a HCBS integration proviso was added to the omnibus appropriations bill, Senate Sub. for HB 2002. The proviso would have prohibited the integration, consolidation, or otherwise altering the structure of HCBS waivers, or submitting a proposal to combine, reassign, or otherwise alter the designated responsibilities to provide intake, assessment, or referral services for medical services, behavioral health services, transportation, nursing facilities, other long-term care, or HCBS waivers prior to FY 2020. This proviso was line-item vetoed by the Governor. In his veto message, the Governor stated concern over the broad nature of the proviso language and its potential to limit changes to non-HCBS programs within KDADS. The veto message also stated the Brownback administration would not integrate or consolidate HCBS waivers, nor make any substantive changes to the intake, assessment, and referral system for the I/DD Waiver without meaningful engagement with stakeholders and approval of the Legislature.

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### Health and Social Services

#### F-4 The Opioid Crisis

##### Background, Definitions, and Statistics

According to the Centers for Disease Control and Prevention (CDC), between 1999 and 2016, more than 630,000 people died from a drug overdose in the United States. Just over 63,000 overdose deaths occurred in 2016, with the CDC reporting that in 2016 more than 99 people died every day from an opioid-related overdose. While some deaths involve more than one drug, more than 43,000 of these deaths can be attributed to opioids, with 19,413 related to synthetic opioids, 17,087 related to prescription opioids, and more than 15,000 related to heroin.

In 2017, approximately 17.4 percent of the U.S. population filled an opioid prescription. In 2015, almost 2.0 million people suffered from prescription opioid abuse disorders, and nearly 600,000 suffered from a heroin use disorder, according to Substance Abuse and Mental Health Services Administration (SAMHSA). In 2016, an estimated 11,824,000 individuals, or 4.4 percent of persons aged 12 and older, reported opioid misuse in the past year. According to the SAMHSA, nearly 80.0 percent of new heroin users began by abusing prescription opioids.

While the crisis has affected every demographic group in the United States, non-Hispanic whites between the ages of 18-25 seem to be most heavily impacted. In 2013, the CDC estimated the total economic burden of the opioid crisis at about \$78.5 billion a year. This includes the costs of health care, lost productivity, addiction treatment, and criminal justice involvement.

New synthetic opioids that have begun to appear more frequently in the United States are intensifying the opioid crisis and increasing overdoses. Fentanyl, which is 50 times more potent than heroin, is one of the driving forces behind the continued opioid crisis. While some fentanyl is made in professional labs, much of what is available is illicitly manufactured and often mixed with heroin or cocaine, sometimes without the user's knowledge. Just 2.0 milligrams of fentanyl is enough to be lethal. Police officers and first responders are particularly at risk, as inhaling even a few airborne particles can cause an overdose. Fentanyl analogues have also been more prevalent in recent years and can be so strong that multiple doses of naloxone are required to reverse an overdose.

## National Opioid Legislation

The opioid epidemic has been addressed by Congress and Presidents many times in the past three years. President Obama signed into law the Comprehensive Addiction and Recovery Act and appropriated funds to each of the 50 states through the 21st Century Cures Act. Several hundred bills have been introduced in the 115th Congress that address the opioid epidemic in some capacity. President Trump issued an executive order that created a national opioid commission, and Congress, through 2017 HR 244, appropriated \$113.0 million to combat the opioid crisis.

## States' Responses

The opioid crisis has now become a priority in every state. However, the impact varies considerably between states, with Kentucky, New Hampshire, Ohio, Pennsylvania, and West Virginia experiencing the largest number of overdoses. And while the opioid crisis has shown few signs of slowing, there has been some progress among states to combat further acceleration. Below are some of the approaches states have initiated.

### ***Compact to Fight Opioid Addiction***

In response to the crisis, 46 governors, including Governor Brownback, signed the Compact to Fight Opioid Addiction at the 2016 National Governors Association Winter Meeting. The Compact's goals are to reduce inappropriate opioid prescribing, change the nation's understanding of opioids and addiction, and ensure a pathway to recovery for individuals with addiction.

On March 1, 2018, Governor Colyer issued an Executive Order creating the Governor's Task Force to Address Substance Use Disorders. The Order stated the crisis of substance use disorder, particularly addiction to opioids, heroin, and methamphetamine, has truly become an epidemic in Kansas and the country. The Task Force's report is dated September 2018 and can

be accessed at <http://www.preventoverdoseks.org/>.

### ***Prescription Drug Monitoring Programs***

Forty- nine states have a prescription drug monitoring program (PDMP) in place to track the prescribing and dispensing of all controlled substances. (*Note:* Missouri does not have a statewide PDMP; however, some Missouri counties and cities do participate in a PDMP.) State requirements vary concerning who and what is tracked, who is required or authorized to check or submit information, and the frequency information needs to be checked and updated. Many states share their data with other states' PDMPs and authorized users in those states. However, there are no federal regulations requiring states to share their information with all other states or the federal government.

### ***Limiting Prescriptions***

Some states have begun looking into placing limitations on opioid prescriptions. The Association of State and Territorial Health Officials (ASTHO) says 9 states currently have laws limiting initial opioid prescriptions to a 7-day supply instead of the previously allowed 30-day supply. The only exception is New Jersey, with a 5-day prescription limit. More states have begun to consider similar legislation as well. Other states, and even health insurance companies, are also utilizing prior authorization as a tool to limit the quantities of opioids dispensed. As of April 2018, at least 28 states had enacted legislation concerning prescription limits.

### ***Opioid Intervention Court***

Buffalo, New York, created the nation's first opioid crisis intervention court after determining its ordinary drug treatment court was not enough to combat the opioid crisis. The court gets addicts into treatment in a matter of hours instead of days; requires them to check in with a judge every day for a month; and utilizes strict curfews. It has been funded *via* a U.S. Justice Department grant with the intent of treating 200 people in a year. During the first 9 months of the program, only 1 of the 92 people in the program had overdosed.

### **Good Samaritan Overdose Immunity Laws**

Forty states and the District of Columbia have enacted some form of a Good Samaritan or 911 drug immunity law, according to the National Conference of State Legislatures (NCSL). These laws provide immunity from arrest, charge, or prosecution for certain controlled substance possession and paraphernalia offenses when someone is either experiencing an opioid-related overdose or calling 911 to seek medical attention for someone else suffering from an opioid-related overdose. What is covered under the law varies depending on the state.

### **Naloxone Access**

All 50 states have passed legislation to expand access to naloxone in some form. Naloxone, also known by the brand name Narcan, is an opioid antagonist that can bind to opioid receptors and reverse or block the effects of other opioids, thereby reversing opioid induced overdoses. It can be administered *via* nasal spray or injected into the outer thigh muscle, veins, or under the skin. New evidence has shown that opioid-related deaths have been reduced by 9.0 to 11.0 percent in states that have promoted naloxone. Most states have also passed laws to allow first responders to carry and administer naloxone. As of July 2017, the Prescription Drug Abuse Policy System (PDAPS) stated all 50 states have expanded the law to include the general public as well. Some states, such as Arizona, Maryland, and New Mexico, have utilized Medicaid to purchase naloxone to promote access for the public. Some states are also providing naloxone to at-risk inmates and training on how to use it upon their release from jail. Officials hope this will reduce overdose deaths as well as expand the community's knowledge about naloxone and how to use it to save others.

### **Medication Assisted Treatment**

According to SAMHSA, 49 states have federally certified treatment locations. However, the laws concerning the programs and requirements vary by state. Medication-assisted treatment (MAT) works to normalize brain chemistry and body functions, block the euphoric effects of

opioids, and relieve physiological cravings. All three Food and Drug Administration (FDA)-approved medications have different licensure requirements, with methadone requiring a SAMHSA certification, buprenorphine requiring federal licensure, and naltrexone requiring an individual licensed to prescribe medicines. According to the Commission on Combating Drug Addiction, only about 10.0 percent of conventional drug treatment facilities in the United States provide MAT for opioid addiction.

### **Needle Exchanges**

Forty-one states and the District of Columbia have some form of a needle exchange program. Currently, only one in four drug users obtains needles from a sterile source. With the increase in the use of heroin and other drugs injected *via* needle, there is also a rise in the number of cases of HIV and hepatitis B and C. One way to help combat the spread of disease is to facilitate access to sterile needles *via* needle exchanges. The federal government lifted a ban on federal funding for needle exchanges in early 2016. Some states have also followed suit by making it easier to establish needle exchanges. Many locations provide sterile needles, test for HIV and hepatitis B and C, and provide condoms and naloxone. They will also help those who want to find treatment enter a program.

### **States and Cities Sue Drug Makers**

Some cities and states have taken the fight against opioids to the door of opioid manufacturers. Mississippi was the first state to sue opioid manufacturers, filing lawsuits against Purdue Pharma and seven other companies. Ohio filed a lawsuit against five drug manufacturers. Missouri and Oklahoma have also initiated suits against opioid manufacturers. All the lawsuits filed by states allege that opioid manufacturers misrepresented the risks of opioids. Recently, a group of state attorneys general announced a joint investigation into the marketing and sales practices of opioid manufacturers, which they contend contributed to the opioid crisis.

## **Kansas**

While Kansas has not been as deeply affected as other states by the opioid crisis, there were 146 opioid-related deaths in 2016. The Kansas Bureau of Investigation also saw heroin-related cases increase 87.0 percent in 2016. In response to the growing threat of the opioid crisis, Kansas has begun to implement measures to mitigate the effects. Below are some of the measures Kansas has implemented.

### ***Prescription Drug Monitoring Programs***

K-TRACS, the state prescription drug monitoring program authorized by law in 2008, has been operating since April 1, 2011. The program provides a database of controlled substance prescriptions that have been dispensed by Kansas pharmacies and from out-of-state pharmacies to Kansas residents. The purpose of the database is to provide up-to-date web-based patient information to assist prescribers in providing appropriate treatment for their patients. Additionally, drugs federally scheduled in levels II through IV are monitored.

The program requires pharmacists to document prescription dispensing data on every written controlled substance prescription and allows both prescribers and pharmacists to check prescription histories to determine, in advance, if patients are acquiring drugs from multiple prescribers or pharmacies.

### ***Drug Treatment Courts***

Kansas has not established a statewide program for drug treatment courts. However, the cities of Kansas City, Topeka, and Wichita have developed their own municipal- or county-level programs. Chase, Geary, and Lyon counties also have a drug court program. Drug treatment courts are established as an alternative to incarceration for those convicted of misdemeanors and offer treatment, support, and counseling. Many times, those who suffer from mental health disorders also suffer from addiction to drugs like opioids. For some mental health courts, diagnosis of a major mental health disorder is required for

participation. However, if the participant is also addicted to drugs, treatment for that addiction will coincide with treatment for the underlying mental health disorder.

### ***Naloxone Access***

On April 7, 2017, Governor Brownback signed HB 2217 into law, expanding access to naloxone. The bill amended the Kansas Pharmacy Act to create standards governing the use and administration of emergency opioid antagonists approved by the FDA to inhibit the effects of opioids and for the treatment of an opioid overdose. The bill requires the Kansas Board of Pharmacy (Board) to issue a statewide opioid antagonist protocol, define applicable terms, establish educational requirements for the use of opioid antagonists, and provide protection from civil and criminal liability for individuals acting in good faith and with reasonable care in administering an opioid antagonist. The bill also required the Board to adopt rules and regulations necessary to implement the provisions of the bill prior to January 1, 2018. The Board met this requirement in June 2017 (KAR 68-7-23).

### ***Grant Moneys Received***

Pursuant to the 21st Century Cures Act, each of the 50 states were authorized to receive federal grant money to combat the opioid epidemic. The first half of the funding was distributed on April 17, 2017, at which time Kansas received \$3.11 million from SAMHSA. Kansas' second installment of \$3.11 million was released on April 18, 2018.

The FY 2017 Adult Drug Court and Veteran Treatment Courts Discretionary Grant Programs, administered by the U.S. Department of Justice, awarded the City of Wichita \$398,972 to enhance its mental health court program.

Additionally, in FY 2017 the Board was awarded \$178,000 under the Harold Rogers Prescription Drug Monitoring Program, administered by the U.S. Department of Justice. The funds allow prescribers in the state to submit quarterly reports and to compare their prescribing activity with other practitioners.

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### Health and Social Services

#### F-5 Recent Changes to Health Professions' Scope of Practice

This article provides information related to the legislative changes made to scopes of practice for health professions from 2011 to 2018. The health professions affected include the following: acupuncturists, addiction counselors, advanced practice registered nurses, applied behavior analysis service providers, dental hygienists, dentists, emergency medical services attendants, licensed practical nurses, mental health technicians, nurse-midwives, optometrists, pharmacists, pharmacy students or interns, pharmacy technicians, physical therapists, physician assistants, podiatrists, professional counselors, psychiatrists, and registered nurses. A brief summary of the Nurse Licensure Compact (2018 HB 2496) and changes related to the Behavioral Sciences Regulatory Board (BSRB) and the Board of Healing Arts that affected the licensure of multiple health professions are also included.

#### *Acupuncturists*

HB 2615 (2016) created the Acupuncture Practice Act, which provides for the licensure of acupuncturists by the Board of Healing Arts (active, exempt, and inactive licenses are created); exempts licensed physical therapists from the Acupuncture Practice Act when performing dry needling, trigger point therapy, or services specifically authorized under the Physical Therapy Practice Act; and exempts licensed acupuncturists from the Physical Therapy Practice Act. The Board of Healing Arts has adopted the required rules and regulations applicable to dry needling by physical therapists. (*Note:* See the "Physical Therapists" section in this article for additional information.)

The practice of acupuncture includes, but is not limited to the following: techniques sometimes called "dry needling," "trigger point therapy," "intramuscular therapy," "auricular detox treatment," and similar terms; mechanical, thermal, pressure, suction, friction, electrical, magnetic, light, sound, vibration, manual, and electromagnetic treatment; the use, application, or recommendation of therapeutic exercises, breathing techniques, meditation, and dietary and nutritional counselling; and the use and recommendation of herbal products and nutritional supplements, according to the acupuncturist's level of training and certification

by the National Certification Commission for Acupuncture and Oriental Medicine, or its equivalent.

The practice of acupuncture does not include prescribing, dispensing, or administering any controlled substances as defined in KSA 65-4101 *et seq.* or any prescription-only drugs, or the practice of the following: medicine and surgery, including obstetrics and the use of lasers or ionizing radiation; osteopathic medicine and surgery or osteopathic manipulative treatment; chiropractic; dentistry; or podiatry.

Additionally, the Acupuncture Practice Act provides a detailed list of the health professions exempt from acupuncture licensure.

### **Addiction Counselors**

The Addiction Counselor Licensure Act (Act) was created by 2010 HB 2577. Any person licensed as an addiction counselor, licensed addiction counselor, or substance abuse counselor prior to enactment of the bill was prohibited from practicing without being licensed under the Act and was required to meet the applicable requirements effective August 1, 2011. The Act provided for grandfathering of certain registered or credentialed professionals.

Subsequently, changes to the scope of practice for licensed addiction counselors (LACs) and licensed clinical addiction counselors (LCACs) were made by 2011 HB 2182. Case management was removed from the scope of addiction counseling. The independent practice of addiction counseling by LCACs was expanded to include not only the diagnosis and treatment of substance abuse disorders, but also to allow for both independent practice and diagnosis and treatment of substance abuse disorders. The bill also allowed a LAC to practice in treatment facilities exempted under KSA 59-29b46(m). (Among the exempted facilities are licensed medical care facilities, licensed adult care homes, community-based alcohol and drug safety action programs, and state institutions at which detoxification services may have been obtained.) Individuals credentialed as alcohol and drug counselors who

met the necessary requirements were allowed to be LCACs, engage in the independent practice of addiction counseling, and diagnose and treat substance use disorders.

SB 290 (2012) amended the Act to clarify the licensure requirements for LACs and LCACs and to address reciprocal licensure.

HB 2615 (2016) created a new category of licensure for master's level addiction counselors, who engage in the practice of addiction counseling limited to substance use disorders. Such a counselor is allowed to diagnose substance use disorders only under the direction of a LCAC, a licensed psychologist, a person licensed to practice medicine and surgery, or a person licensed to provide mental health services as an independent practitioner and whose licensure allows for the diagnosis and treatment of substance use disorders or mental disorders.

Effective September 1, 2016, pursuant to HB 2615, no person may engage in the practice of addiction counseling or represent oneself as a licensed master's addiction counselor, a master's addiction counselor, master's substance abuse counselor, or a master's alcohol and drug counselor without having first obtained a license as a master's addiction counselor. The requirement to practice only in a facility licensed by the Kansas Department for Aging and Disability Services (KDADS) was eliminated by the bill.

HB 2615 also grandfathered credentialed or registered alcohol and other drug counselors who complied with specific requirements prior to July 1, 2017. (*Note:* See page 9 for changes to the regulatory statutes administered by the BSRB for additional changes impacting multiple professions, including those involved in addiction counseling.)

### **Advanced Practice Registered Nurses**

In 2011, HB 2182 amended the Nurse Practice Act with regard to advanced practice registered nurses (APRNs). All references to an advanced registered nurse practitioner were changed in statute to APRN, and licensure of APRNs was required.



In 2016, HB 2615 authorized the Independent Practice of Midwifery Act by certified nurse-midwives who were licensed as APRNs. Further information is included in the section on nurse-midwives.

### **Applied Behavior Analysis Service Providers**

HB 2744 (2014) created the Applied Behavior Analysis (ABA) Licensure Act for the licensure of ABA service providers by the BSRB. ABA means the design, implementation, and evaluation of environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvement in human behavior, including the use of direct observation, measurement, and functional analysis of the relationship between environment and behavior.

The bill established the licensed assistant behavior analyst and the licensed behavior analyst. The bill established a January 1, 2015, effective date of Autism Spectrum Disorder (ASD) coverage by large health insurance plans and extended the requirement to grandfathered individual and small group plans effective July 1, 2016. The licensure requirements for ABA providers were phased in and certain providers were exempt from licensure.

The bill also outlined a broader range of providers allowed to receive reimbursement for ABA services from January 1, 2015, through June 30, 2016. Reimbursement narrowed beginning July 1, 2016, to services provided by an autism services provider licensed or exempt from licensure under the ABA Licensure Act, except reimbursement is allowed for services provided by an autism specialist, an intensive service provider, or any other individual qualified to provide services under the Home and Community Based Services Autism Waiver administered by KDADS.

The bill required the BSRB to adopt rules and regulations for the implementation and administration of the ABA Licensure Act, by July 1, 2016. The BSRB has established these rules and regulations (KAR 102-8-1 through 102-8-12).

In 2015, the ABA Licensure Act was amended by HB 2352 with regard to the number of employees constituting a large and small employer, terms used in connection with group health benefit plans, and the ASD coverage requirement. HB 2615 (2016) clarified the duties, powers, and functions of the BSRB as involving the regulation of individuals under several named acts, including the ABA Licensure Act.

### **Dental Hygienists**

HB 2631 (2012) made several changes and additions to the Dental Practices Act for the purpose of expanding dental service in the state, including targeting children who are dentally underserved. The bill created an additional extended care permit (ECP) level of service of dental hygienists, ECP III, for those dental hygienists who met the increased qualifications.

An ECP III does not have prescribing authority and must be sponsored by a dentist licensed in Kansas, as confirmed by a signed agreement stating the dentist will monitor the activities of the ECP III dental hygienist. A dentist is not allowed to monitor more than five ECP III dental hygienists. The ECP III is required to advise patients and legal guardians that the services provided are palliative or preventive and are not comprehensive dental diagnosis and care.

The tasks and procedures an ECP III may perform are limited to those activities that can be performed by a hygienist under the ECP I or ECP II, plus additional tasks that include the identification and removal of decay using hand instrumentation and placing a temporary filling; services related to dentures, including adjustment and checking for sore spots; smoothing of a sharp tooth with a slow speed dental hand-piece; use of a local anesthetic within certain limitations; extraction of deciduous teeth within certain limitations; and other duties delegated by the sponsoring dentist consistent with the Dental Practices Act. The bill also detailed the population to be served by an ECP III.

## **Dentists**

HB 2182 (2011) amended the Dental Practices Act to allow for the franchise practice of dentistry. The bill also allowed licensed dentists to practice dentistry as employees of a general hospital in counties with populations of less than 50,000.

A special volunteer dental license was established in HB 2631 (2012) for dentists who are retired from active practice and wish to donate their expertise for the dental care and treatment of indigent and underserved persons in Kansas. The bill set forth stipulations related to this license, including that no payment of an application fee, license fee, or renewal fee is required and no continuing education is required for issuance or renewal.

Dentists with a special volunteer dental license are limited to providing dental care without payment or compensation only to underserved and indigent persons in the state.

## **Emergency Medical Services Attendants**

The statutory changes made by House Sub. for SB 262 in 2010, allowing Emergency Medical Services (EMS) attendants to transition from authorized activities to a scope of practice established by the Kansas Board of Emergency Medical Services (Board) through rules and regulations, renaming attendant levels to reflect national nomenclature, and allowing for enhanced skill sets to create the ability to provide a higher level of care, were amended in 2011 by HB 2182. The 2011 changes were to support the transition and to provide options for those required to meet the transition requirements. EMS attendants were allowed the option to transition to a lower level of certification.

In addition, the 2011 changes allowed an emergency medical technician–intermediate (EMT-I), an advanced emergency medical technician (AEMT), an emergency medical technician (EMT), an EMT-defibrillator (EMT-D), and an emergency medical responder (EMR) to provide medical services within their scope of practice when authorized by medical protocols or upon order when direct voice communication was

maintained and monitored by specific authorized medical personnel.

In 2011, HB 2182 also changed the initiation date to allow attendants complete certification cycles to accomplish the transition requirements and provided the conditions to be met by each EMS certificate holder to transition to a higher level. The scopes of practice of an EMT-I, an AEMT, an EMT, an EMT-D, and an EMR were set out in detail by the bill. The term “medical advisor” was replaced with “medical director” and each EMS was required to have a medical director whose duties included the implementation of medical protocols and the approval and monitoring of the attendants’ education.

In 2016, HB 2387 made changes to the authorized activities of those who have certain EMS certifications. Under continuing law, each classification of EMS attendant is authorized to perform the interventions of the lower levels of certified attendants. The bill changed authorized activities by an EMT-I transitioning to an AEMT and updated and changed authorized activities by EMTs and EMRs. The terms EMT, EMT-I, EMT-D, mobile intensive care technician (MICT), EMT-I/D, AEMT, and paramedic were removed from the list of those individuals of whom at least one must be on each vehicle providing emergency medical services and the list was replaced with a reference to an attendant certified under statutes applicable to those listed categories.

In 2018, SB 311 added EMS attendants to the list of mandatory reporters of abuse, neglect, exploitation, or need of protective services as it pertains to a resident or certain adults (as defined in continuing law). The applicable definition in continuing law for “resident” is found in KSA 2018 Supp. 39-1401(a) and for “adult” in KSA 2018 Supp. 39-1430(a). The definition of “adult” excludes residents of adult care homes.

## **Mental Health Technicians**

In 2017, HB 2025 amended the Mental Health Technician’s Licensure Act. The bill changed the description of services in the definition of “practice of mental health technology” by deleting

“responsible nursing for patients with mental illness or intellectual disability” and inserting “participation and provision of input into the development of person-centered treatment plans for individuals or groups of individuals specified in paragraph (b)” (those specified in paragraph (b) are “the mentally ill, emotionally disturbed, or people with intellectual disability”) and by including facilitating habilitation of individuals. The bill also replaced the term “patient” with “individual.”

### **Nurse-Midwives**

The Independent Practice of Midwifery Act (Midwifery Act) was created by 2016 HB 2615. Effective January 1, 2017, the Midwifery Act allows certified nurse-midwives to practice without a collaborative practice agreement under specific conditions set forth below and requires the certified nurse-midwife to hold a license from the Board of Nursing as an APRN and the Board of Healing Arts for the independent practice of midwifery. The bill required the Board of Healing Arts, in consultation with the Board of Nursing, to promulgate rules and regulations no later than January 1, 2017, pertaining to certified nurse-midwives engaging in the independent practice of midwifery and governing the ordering of tests, diagnostic services, prescribing of drugs, and referral or transfer to physicians in the event of complications or emergencies.

On December 8, 2017, the Board of Healing Arts considered and formally approved proposed regulations, which were forwarded to the Board of Nursing. On March 28, 2018, upon consideration of concerns expressed by its APRN Committee, the Board of Nursing declined the regulations and referred them back to the Board of Healing Arts for consideration of nationally recognized standards of practice. General Counsel for the Board of Healing Arts appeared before the Board of Nursing at its September 2018 meeting to request the Board of Nursing concur on the proposed regulations, or in the alternative, specify the portions of any regulations to which they objected and propose revisions or alternatives to those portions. At that meeting, the Board of Nursing voted to concur on 14 of the 18 proposed

regulations and nonconcur on the 4 remaining regulations. The Board of Nursing agreed to provide the Board of Healing Arts with proposed alternatives to the nonconcurrent regulations. All of the concurred regulations have been submitted to the Department of Administration for review. The Board of Healing Arts, at its October 12, 2018, meeting, discussed the language proposed by the Board of Nursing for the four remaining nonconcurrent regulations. Counsel for both boards are in the process of exchanging proposed changes to determine if the differences can be resolved.

“Independent practice of midwifery” means the provision of clinical services by a certified nurse-midwife without the requirement of a collaborative practice agreement with a person licensed to practice medicine and surgery. The clinical services are limited to those associated with a normal, uncomplicated pregnancy and delivery, including the prescription of drugs and diagnostic tests; the performance of an episiotomy or a repair of a minor vaginal laceration; the initial care of the normal newborn; and family planning services, including treatment or referral of a male partner for sexually transmitted infections.

The standards of care in the ordering of tests, diagnostics services, and the prescribing of drugs shall be those standards that protect patients and are comparable to those for persons licensed to practice medicine and surgery providing the same services.

The bill also prohibited nurse-midwives engaged in the independent practice of midwifery from performing or inducing abortions or from prescribing drugs for an abortion.

### **Optometrists**

In 2012, HB 2525 updated the optometry law to reflect the single licensure level of optometrists required by the Board of Examiners in Optometry by eliminating language referring to three different levels of licensure, as well as clarifying the minor surgical procedures optometrists may perform.

### **Pharmacists, Pharmacy Students or Interns, and Pharmacy Technicians**

The Pharmacy Act was amended by 2012 SB 211 to add a second exception to the requirement that pharmacists fill all prescriptions in strict conformity with the directions of the prescriber. The exception allows a pharmacist to provide up to a three-month supply of a prescription drug that is not a controlled substance or a psychotherapeutic drug when a practitioner has written a drug order to be filled with a smaller supply, but the prescription includes enough refills to fill a three-month supply.

Another statutory exception allows a pharmacist who receives a prescription order for a brand-name drug to substitute a different brand in order to achieve a lesser cost to the purchaser, unless the prescriber has instructed the prescription be dispensed as written or as communicated, or the federal Food and Drug Administration has determined the generic prescription medication is not bioequivalent to the prescribed brand name prescription medication.

Senate Sub. for HB 2055 (2017) added a third exception to the requirement prescriptions be filled in strict conformity with any directions of the prescriber concerning biological products. The bill allows a pharmacist to exercise brand exchange (substitution) without prior approval from the prescriber, unless certain conditions exist. A pharmacist who receives a prescription order for a biological product may exercise brand exchange with a view toward achieving a lesser cost to the purchaser, unless the prescriber has instructed the prescription be dispensed as written or as communicated or the biological product is not an interchangeable biological product for the prescribed biological product. The bill required pharmacists to notify the patient and prescriber of the substitution of a biological product after the exchange has occurred and established recording requirements for biological product substitutions.

The bill also defined “biological product” and “interchangeable biological product” and clarified the definition of a “brand exchange” to distinguish between a brand exchange for a prescribed drug

product and brand exchange for a prescribed biological product, provided for emergency refills of biological products by pharmacists, and addressed allowable charges for brand exchange of biological products.

Additionally, the bill required the Board of Pharmacy to adopt rules and regulations restricting the tasks a pharmacy technician may perform prior to passing any required examinations and required every pharmacy technician registered after July 1, 2017, to pass a certified pharmacy technician examination approved by the Board of Pharmacy. The Board of Pharmacy established rules and regulations addressing the certification of required examinations and requests for extension. However, the Board of Pharmacy determined additional practice limitations prior to passage of the certification exam should not be imposed because it would place too many restrictions on on-the-job training.

Senate Sub. for HB 2146 (2014) amended the “practice of pharmacy” definition to include performance of collaborative drug therapy management pursuant to a written collaborative practice agreement with one or more physicians who have an established physician-patient relationship. Other definitions added to the Pharmacy Act were “collaborative practice agreement” and “collaborative drug therapy management.”

A collaborative practice agreement is a written agreement or protocol between one or more pharmacists and one or more physicians providing for collaborative drug therapy management.

The collaborative practice agreement must contain conditions or limitations pursuant to the collaborating physician’s orders and be within the physician’s lawful scope of practice and appropriate to the pharmacist’s training and experience.

Collaborative drug therapy management allows a pharmacist to perform patient care functions for a specific patient delegated to the pharmacist by a physician through a collaborative practice agreement. A physician who enters into an agreement remains responsible for the care of

the patient throughout the collaborative drug therapy management process. Under this management process, a pharmacist cannot alter a physician's orders or directions, diagnose or treat any disease, independently prescribe drugs, or independently practice medicine and surgery.

The bill also provided for the registration, discipline, training, and oversight of pharmacist interns. These new provisions relating to pharmacist interns are considered part of the Pharmacy Act. The bill authorized the Board of Pharmacy to adopt rules and regulations necessary to ensure pharmacist interns are adequately trained as to the nature and scope of their duties. No such rules or regulations have been adopted as of September 12, 2018. Pharmacist interns must work under the direct supervision and control of a pharmacist who is responsible to determine the pharmacist intern is in compliance with applicable rules and regulations of the Board of Pharmacy and is responsible for the acts and omissions of the pharmacist intern in performing the intern's duties.

The Pharmacy Act was amended in 2017 HB 2030 to change, from 18 to 12 years of age, the minimum age for a person to whom a pharmacist, or a pharmacy student or intern working under the direct supervision and control of a pharmacist, is authorized to administer a vaccine, other than the influenza vaccine, pursuant to a vaccination protocol and with the requisite training. Continuing law requires immunizations provided under the authorization of the Pharmacy Act be reported to appropriate county or state immunization registries. The bill allowed the person vaccinated or, if the person is a minor, the parent or guardian of the minor, to opt out of the registry reporting requirement.

### **Physical Therapists**

In 2013, HB 2066 amended the Physical Therapy Practice Act to allow physical therapists to initiate a physical therapy treatment without referral from a licensed health care practitioner. In prior law, physical therapists were allowed only to evaluate patients without physician referrals and to initiate

treatment only after approval by certain health care providers.

The bill also required physical therapists, in instances where treatment of a patient occurs without a referral, to obtain a referral from an appropriate licensed health care practitioner to continue treatment if, after 10 patient visits or a period of 15 business days from the initial treatment visit (following the initial evaluation), the patient is not progressing toward documented treatment goals as demonstrated by objective, measurable, or functional improvement, or any combination of these criteria.

When a patient self-refers to a physical therapist, the physical therapist is required, prior to commencing treatment, to provide written notice to the patient that a physical therapy diagnosis is not a medical diagnosis by a physician. The bill also provided that new provisions of law created by the bill were not to be construed to prevent a hospital or ambulatory surgical center from requiring a physician order or referral for physical therapy services for a patient currently being treated in such facility.

HB 2066 also authorized physical therapists to perform wound debridement services only after approval by a person licensed to practice medicine and surgery or other licensed health care practitioner in appropriately related cases. The bill deleted the requirements limiting physical therapists to evaluation of patients without a physician referral and the conditions and time frame specified for permitted evaluation and treatment without referral. Prior to this bill, physical therapists were permitted to initiate treatment only after approval by a licensed physician; a licensed podiatrist; a licensed physician assistant or a licensed advanced practice registered nurse, working pursuant to the order or direction of a licensed physician; a licensed chiropractor; a licensed dentist; or a licensed optometrist in appropriately related cases. The bill also deleted provisions authorizing physical therapists to initiate treatment under the approval of a healing arts practitioner licensed by another state.

HB 2615 (2016) amended the Physical Therapy Practice Act to include the practice of dry

needling within the scope of practice for licensed physical therapists, exempted licensed physical therapists from the Acupuncture Practice Act when performing dry needling, and exempted licensed acupuncturists from the Physical Therapy Practice Act. The Board of Healing Arts has adopted the required rules and regulations applicable to dry needling (KAR 100-29-18 through 100-29-21).

### **Physician Assistants**

HB 2673 (2014) made changes to the Kansas Physician Assistant Licensure Act to replace the statutory limitation on the number of physician assistants (PAs) who may be supervised by a physician and directed the Board of Healing Arts to establish regulations imposing limits appropriate to different patient care settings and creating new licensure designations for PAs. In 2015, Senate Sub. for HB 2225 amended the statutory limitation on the number of PAs a physician may supervise to two until January 11, 2016.

The bill also created licensure designations of “active license” and “licensure by endorsement,” and eliminated the designation of a “federally active license.”

Additionally, the practice of a PA was expanded to allow a PA, when authorized by a supervising physician, to dispense prescription-only drugs according to rules and regulations adopted by the Board of Healing Arts governing prescription-only drugs, when dispensing is in the best interest of the patient and pharmacy services are not readily available, and the amount dispensed is not in excess of the quantity necessary for a 72-hour supply. The effective date of a PA’s authority to dispense prescription-only drugs was amended by Senate Sub. for HB 2225 to an effective date of January 11, 2016.

Senate Sub. for HB 2225 amended the Physician Assistant Licensure Act to create the designations of “exempt license” and “federally active license.”

An “exempt license” may be issued to a licensed PA who is not regularly engaged in PA practice in Kansas and does not hold himself or herself out publicly to be engaged in such practice. An

exempt licensee is entitled to all privileges of a PA, is subject to all provisions of the Physician Assistant Licensure Act, and is allowed to be a paid employee of a local health department or an indigent health care clinic.

The Board of Healing Arts may issue a “federally active license” to a licensed PA who practices as a PA solely in the course of employment or active duty with the federal government. Under this designation, a person may engage in limited practice outside the course of federal employment consistent with the scope of practice of the exempt licensees, except the scope is limited to performing administrative functions; providing direct patient care services gratuitously or providing supervision, direction, or consultation for no compensation (payment for subsistence allowances or actual and necessary expenses incurred in providing such services is allowed); and rendering professional services as a charitable health care provider.

Senate Sub. for HB 2225 also allowed a PA to write do-not-resuscitate (DNR) orders if delegated the authority by a physician, and revised the DNR statutory form to include a PA signature line.

It should be noted, with the enactment of 2017 Sub. for SB 85 (Simon’s Law), a DNR or similar physician’s order cannot be instituted for an unemancipated minor unless at least one parent or legal guardian of the minor has been informed, orally and in writing, of the intent to institute the order. A reasonable attempt to inform the other parent must be made if the other parent is reasonably available and has custodial or visitation rights. The information need not be provided in writing if, in reasonable medical judgment, the urgency of the decision requires reliance on providing the information orally. The bill provides that either parent or the unemancipated minor’s guardian may refuse consent for a DNR or similar order, either orally or in writing. Further, the bill provides that no DNR or similar order can be instituted, orally or in writing, if there is a refusal of consent.

Senate Sub. for HB 2225 also changed “written protocol” to “written agreement” and “responsible physician” to “supervising physician” with regard

to the authority of a PA to prescribe drugs. The bill reverted to the use of the terms in law prior to July 1, 2014, but only until January 11, 2016, when the new terms became effective. Supervising physician means a physician who has accepted responsibility for the medical services rendered and the actions of the PA while performing under the direction and supervision of the supervising physician. The Board of Healing Arts has adopted the required rules and regulations governing the practice of PAs.

### **Podiatrists**

The Podiatry Act was amended by 2014 HB 2673 to expand and clarify the scope of podiatry and podiatric surgery and to create a Podiatry Interdisciplinary Advisory Committee to the Board of Healing Arts to advise and make recommendations on matters relating to the licensure of podiatrists to perform surgery on the ankle. "Podiatry" was previously defined as the diagnosis and treatment of all illnesses of the human foot. The bill changed the definition of "podiatry" to mean the diagnosis and medical and surgical treatment of all illnesses of the human foot, including the ankle and tendons that insert into the foot, as well as the foot. The bill prohibits podiatrists from performing ankle surgery unless the podiatrist has completed a three-year post-doctoral surgical residency program in reconstructive rear foot/ankle surgery and is either board-qualified (progressing to certification) or board-certified in reconstructive rear foot/ankle surgery by a nationally recognized certifying organization acceptable to the Board of Healing Arts. Surgical treatment of the ankle by a podiatrist is required to be performed only in a medical care facility.

### **Professional Counselors**

SB 386 (2018) amended the Professional Counselors Licensure Act with regard to educational requirements for licensure as a professional counselor. In continuing law, an applicant to the BSRB for licensure as a professional counselor is required, among other things, to have earned a graduate degree in counseling. The bill allows licensure for

an applicant who earned a graduate degree in a counseling-related field if the remaining qualifications set forth in statute are met. The change applies to individuals applying for initial licensure and to individuals applying for licensure who are licensed to practice professional counseling in another jurisdiction.

The bill also clarified the licensure requirement of 45 graduate semester hours in various areas set forth in statute is counseling coursework.

### **Psychiatrists**

HB 2615 (2016) provided for a temporary license, not to exceed two years, to be issued to persons who have completed all requirements for a doctoral degree approved by the BSRB, but have not received such degree conferral, and who provide documentation of such completion.

### **Other Changes Related to Licensure of Health Professions**

Changes made from 2014 to 2018 related to the BSRB, the Board of Healing Arts, and the Board of Nursing that affected multiple health professions are outlined below.

#### **Board of Nursing**

HB 2496 (2018) enacted the Nurse Licensure Compact (Compact) and amended the Kansas Nurse Practice Act to enable the Board of Nursing to carry out the provisions of the Compact and establish the duties of registered nurses (RNs) and licensed practical nurses (LPNs) under the Compact. The Compact allows RNs and LPNs to have one multi-state license, with the privilege to practice in the home state of Kansas and in other Compact states physically, electronically, telephonically, or any combination of those.

The bill takes effect from and after July 1, 2019, and upon publication in the statute book.

#### **Behavioral Sciences Regulatory Board**

HB 2615 (2016) standardized regulatory statutes administered by the BSRB that apply

to psychologists, professional counselors, social workers, addiction counselors, and marriage and family therapists. The bill clarified the duties, powers, and functions of the BSRB as involving the regulation of individuals under the Social Workers Licensure Act, the Licensure of Master's Level Psychologists Act, the Applied Behavior Analysis Licensure Act, the Marriage and Family Therapists Licensure Act, and the Addiction Counselor Licensure Act. The standardized provisions pertain to licensure by reciprocity, the reasons for disciplinary action against a licensee, and the licensure fees charged by the BSRB.

The bill allows the BRSB to require fingerprinting and background checks on licensees, places licensed psychologists and social workers under the Kansas Administrative Procedure Act, establishes supervisory training standards for professional counselors and marriage and family therapists, and creates a new category of licensure for master's level addiction counselors.

Additionally, the bill requires a two-thirds majority vote of the BSRB to issue or reinstate the license of an applicant with a felony conviction. The bill updates several statutes by deleting the terms "state certified alcohol and drug abuse counselor" and "counselor" from applicable statutes and inserting "licensed addiction counselor," "licensed master's addiction counselor," and "licensed clinical addiction counselor" into applicable statutes.

## Healing Arts Act

HB 2673 (2014) amended provisions of the Healing Arts Act related to institutional licenses. The bill removed the requirement for applicants who attend out-of-state schools of medicine or osteopathic medicine to have attended a school that has been in operation for at least 15 years. The requirement that the applicant has attended an institution whose graduates have been licensed in a state or states with standards similar to Kansas remains.

The bill removed the option for an institutional license holder to provide mental health services pursuant to written protocol with a person who

holds a license that is not an institutional license. Instead, the institutional license holder is required to meet the previously optional requirements of employment by certain mental health facilities for at least three years and requiring the institutional license holder's practice be limited to providing mental health services that are a part of the licensee's paid duties and are performed on behalf of the employer.

However, in 2017, Senate Sub. for HB 2027 amended the statute governing institutional licenses and restrictions placed on practice privileges of these license holders. The bill reinserted the language removed in 2014 to allow for reinstatement of an institutional license of an individual who was issued an institutional license prior to May 9, 1997, and who is providing mental health services under a written protocol with a person who holds a Kansas license to practice medicine and surgery other than an institutional license.

The Healing Arts Act was again amended by 2015 Senate Sub. for HB 2225 to clarify a reentry license must be an "active" reentry license and to create a resident active license. A resident active licensee is entitled to all privileges attendant to the branch of the healing arts for which such license is used. A resident active license can be issued to a person who has successfully completed at least one year of approved postgraduate training; is engaged in a full-time, approved postgraduate training program; and has passed the examinations for licensure. The Board of Healing Arts is required to adopt rules and regulations regarding issuance, maintenance, and renewal of the license. The Board of Healing Arts submitted KAR 100-6-2a, pursuant to KSA 65-2873b, to the Department of Administration in July 2018. The regulation is pending approval by the Department of Administration, the Division of the Budget, and the Attorney General.

Additionally, Senate Sub. for HB 2225 expanded the scope of the "special permit"—to include the practice of medicine and surgery—that may be issued by the Board of Healing Arts to any person who has completed undergraduate training at the University of Kansas School of Medicine who has not yet commenced a full-time approved



postgraduate training program. The holder of the special permit is allowed to be compensated by a supervising physician, but is not allowed to charge patients a fee for services rendered; is not allowed to engage in private practice; is allowed to prescribe drugs, but not controlled substances; is required to clearly identify himself or herself as a physician in training; is not deemed to be rendering professional service as a health care provider for the purposes of professional liability insurance; is subject to all provisions of the Healing Arts Act, except as otherwise provided in the bill; and is required to be supervised by

a physician who is physically present within the health care facility and is immediately available.

The special permit expires the day the holder of the permit becomes engaged in a full-time approved postgraduate training program or one year from issuance. The permit may be renewed one time. The Board of Healing Arts is allowed to adopt rules and regulations to carry out the provisions related to the special permit holder. The Board has not identified a need for regulations specific to special permit holders, other than the generally applicable regulations already in existence.

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### Health and Social Services

#### F-6 Recent Telemedicine Legislation in Kansas

Telemedicine legislation was introduced during the 2017 and 2018 Legislative Sessions. This article discusses the legislative history of those bills and provides summary information on the Kansas Telemedicine Act (Act), KSA 2018 Supp. 40-2,210 *et seq.*, and other provisions enacted in 2018 Senate Sub. for HB 2028.

#### Recent Telemedicine-related Legislation

During the 2017 Legislative Session, two pieces of telemedicine-related legislation were introduced and referred to the House Committee on Health and Human Services (House Committee), HB 2206 and HB 2254. Hearings were held on these bills, but no action was taken at that time. The Legislative Coordinating Council, in 2017, appointed a Special Committee on Health, which was tasked with studying the subjects of telehealth and telemedicine in order to increase and improve health care access for all Kansans, and review and consider the two bills.

The Special Committee, in its meetings on October 19 and 20, 2017, viewed demonstrations of telemedicine technologies; heard testimony from individuals, organizations, and providers; and participated in a roundtable discussion with select stakeholders. Following discussion, the Special Committee noted the importance of keeping the patient first when crafting legislation; did not recommend 2017 HB 2206 or 2017 HB 2254; and recommended the introduction of comprehensive telemedicine legislation, to begin in the House, early in the 2018 Legislative Session.

During the 2018 Legislative Session, the House Committee held hearings on two telemedicine bills, HB 2512 and HB 2674. The House Committee did not take action on HB 2512, but referenced the testimony of HB 2512 during the hearing on HB 2674. HB 2674 was amended by both the House Committee and the Senate Committee on Public Health and Welfare, and eventually inserted into Senate Sub. for HB 2028 as the report from the third Conference Committee. Senate Sub. for HB 2028 was approved by the Governor on May 12, 2018.

The majority of the provisions contained in Senate Sub. for HB 2028 will take effect on and after January 1, 2019. The Board of Healing Arts (BOHA) and the Behavioral Sciences Regulatory

Board (BSRB) are required to adopt rules and regulations related to the Act by December 31, 2018.

Additionally, Senate Sub. for HB 2028 provided for coverage of speech-language pathologist and audiologist services *via* telehealth under the Kansas Medical Assistance Program (KMAP), if such services would be covered under KMAP when delivered *via* in-person contact. The Kansas Department of Health and Environment (KDHE) is required to adopt rules and regulations related to coverage of these services by December 31, 2018.

### **Summary of Provisions Contained in Senate Sub. for HB 2028**

#### ***Definition of “Telemedicine” and How Services are Provided***

The Act defines “telemedicine, including telehealth” as the delivery of healthcare services or consultations while the patient is at an originating site and the healthcare provider is at a distant site. The “distant site” is the site at which a healthcare provider is located while providing healthcare services *via* telemedicine, and the “originating site” is the site at which a patient is located at the time healthcare services are provided.

The Act directs telemedicine services to be provided by means of real-time two-way interactive audio, visual, or audio-visual communications, including the application of secure video conferencing or store-and-forward technology to provide or support healthcare delivery that facilitates the assessment, diagnosis, consultation, treatment, education, and care management of a patient’s healthcare. “Telemedicine,” for purposes of the Act, does not include communication between healthcare providers consisting solely of a telephone voice-only conversation, e-mail, or facsimile transmission, or between a physician and a patient consisting solely of an e-mail or facsimile transmission.

#### ***Standards and Practices Applicable to Telemedicine Services***

The Act specifies the same requirements for patient privacy and confidentiality under the Health Insurance Portability and Accountability Act of 1996 and 42 CFR § 2.13 (related to confidentiality restrictions and safeguards), as applicable, applying to healthcare services delivered *via* in-person visits also apply to healthcare visits delivered *via* telemedicine. The Act does not supersede other state law related to the confidentiality, privacy, security, or privileged status of protected health information.

The Act authorizes telemedicine to be used to establish a valid provider-patient relationship and requires the same standards of practice and conduct that apply to healthcare services delivered *via* in-person visits apply to healthcare services delivered *via* telemedicine. A person authorized by law to provide and who provides telemedicine services to a patient is required to provide the patient with guidance on appropriate follow-up care.

Additionally, if the patient consents and has a primary care or other treating physician, the person providing telemedicine services is required to send a report to the primary care or other treating physician of the treatment and services rendered to the patient within three business days of the telemedicine encounter. A person licensed, registered, certified, or otherwise authorized to practice by the BSRB is not required to comply with this reporting requirement.

#### ***Application of Insurance Policies, Contracts, and KMAP to Telemedicine under the Act***

The Act applies to any individual or group health insurance policy, medical service plan, contract, hospital service corporation contract, hospital and medical service corporation contract, fraternal benefit society, or health maintenance organization that provides coverage for accident and health services delivered, issued for delivery, amended, or renewed on or after January 1, 2019. The Act also applies to KMAP.

The policies, plans, contracts, and KMAP are prohibited from excluding an otherwise covered healthcare service from coverage solely because the service is provided through telemedicine rather than in-person contact or based upon the lack of a commercial office for the practice of medicine, when such service is delivered by a healthcare provider. The Act prohibits such groups from requiring a covered individual to use telemedicine or in lieu of receiving in-person healthcare service or consultation from an in-network provider.

The Act specifies these groups shall not be prohibited from providing coverage for only those services that are medically necessary, subject to the terms and conditions of the covered individual's health benefits plan. The insured's medical record serves to satisfy all documentation for the reimbursement of all telemedicine healthcare services, and no additional documentation outside the medical record is required.

Additionally, the Act authorizes an insurance company, nonprofit health service corporation, nonprofit medical and hospital service corporation, or health maintenance organization to establish payment or reimbursement of covered healthcare services delivered through telemedicine in the same manner as payment or reimbursement for covered services delivered *via* in-person contact. However, the Act does not mandate coverage for a healthcare service delivered *via* telemedicine if such service is not already a covered service when delivered by a healthcare provider, and subject to the terms and conditions of the covered individual's health benefits plan.

### ***Prohibition on Delivery of Abortion Procedures via Telemedicine***

Nothing in the Act is construed to authorize the delivery of any abortion procedure *via* telemedicine.

### ***Severability and Non-severability Clauses***

If any provision of the Act, or the application thereof to any person or circumstance, is held invalid or unconstitutional by court order, the remainder of

the Act and application of such provision is not affected. Additionally, it is conclusively presumed the Legislature would have enacted the remainder of the Act without the invalid or unconstitutional provision. Further, the provision of the Act related to abortion is expressly declared to be non-severable. If the abortion language is held invalid or unconstitutional by court order, the entire Act is affected.

### **Other Provisions Included in Legislation, but Not Part of the Act**

The following provisions of 2018 Senate Sub. for HB 2028 are not included in the Act.

#### ***Coverage of Speech-Language Pathology and Audiology Services***

##### *Coverage Requirement under KMAP*

On and after January 1, 2019, KDHE and any managed care organization providing state Medicaid services under KMAP is required to provide coverage for speech-language pathology services and audiology services by means of telehealth, as defined in the Act, when provided by a licensed speech-language pathologist or audiologist licensed by the Kansas Department for Aging and Disability Services if such services are covered by KMAP when delivered *via* in-person contact.

##### *Implementation and Administration by KDHE*

KDHE is required to implement and administer the coverage of these services consistent with applicable federal laws and regulations. KDHE is required to submit to the Centers for Medicare and Medicaid Services any state Medicaid plan amendment, waiver request, or other necessary approval request.

##### *Impact Report*

On or before January 13, 2020, KDHE is required to prepare an impact report that assesses the social and financial effects of the coverage

mandated for speech-language pathology and audiology services, including the impacts listed in KSA 40-2249(a) and (b) relating to social and financial impacts of mandated health benefits. KDHE is required to submit such report to the Legislature, the House Committee on Health and Human Services, the House Committee on Insurance, the Senate Committee on Public Health and Welfare, and the Senate Committee on Financial Institutions and Insurance.

### ***Application of the Act to Insurance Policies***

Senate Sub. for HB 2028 amended KSA 2018 Supp. 40-2,103 to specify the requirements of the Act apply to all insurance policies, subscriber contracts, or certificates of insurance delivered, renewed, or issued for delivery within or outside

of Kansas, or used within the state by or for an individual who resides or is employed in the state.

### ***Corporations Under the Nonprofit Medical and Hospital Service Corporation Act***

Senate Sub. for HB 2028 amended KSA 2018 Supp. 40-19c09 to specify corporations organized under the Nonprofit Medical and Hospital Service Corporation Act are subject to the provisions of the Act.

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### Health and Social Services

#### F-7 State Hospitals

The Kansas Department for Aging and Disability Services (KDADS) is responsible for the administration of Larned State Hospital (LSH) and Osawatomie State Hospital (OSH) for Kansans suffering from mental illness, and for the Kansas Neurological Institute (KNI) and Parsons State Hospital and Training Center (PSH&TC) for individuals with intellectual and developmental disabilities. An overview of issues related to the state hospitals, summaries of recent legislation, and an overview of state hospital financing are provided in this article.

#### Osawatomie State Hospital

OSH, established in 1855, provides services to adults diagnosed with psychiatric disorders, regardless of ability to pay or legal status. OSH is licensed by the Kansas Department of Health and Environment (KDHE) to serve a maximum of 206 patients and currently serves 146 individuals from 44 counties in Kansas in collaboration with 12 Community Mental Health Centers. These centers refer individuals to OSH through a screening process; however, a moratorium on voluntary admissions and a limit on involuntary admissions was issued in June 2015.

In addition to being licensed by KDHE, OSH receives oversight and certification from the federal Centers for Medicare and Medicaid Services (CMS). CMS issues Medicare and Medicaid Disproportionate Share for Hospital (DSH) programs payments to OSH. In December 2015, CMS decertified OSH and subsequently suspended Medicare and DSH payments.

**Decertification.** In 2014, OSH began having issues with maintaining census. OSH was over-census for 9 months from March 3 through December 6, 2014. The number of patients at OSH reached an overall 10-year high on August 23, 2014, with a weekly average of 251 patients. (OSH began maintaining census at its licensed capacity on December 13, 2014.) The increased census during this 9-month period triggered a CMS survey of OSH. On December 5, 2014, CMS sent a letter citing issues with the physical environment at OSH that had to be remediated to maintain certification. Renovations to complete a Plan of Correction for CMS began in Spring 2015. In May 2015, 60 beds were removed from use to complete the CMS-mandated construction. Approximately \$3.5 million was added in a 2016 Governor's Budget Amendment

to support individuals and communities impacted by the OSH reduced census during renovation.

On November 3, 2015, CMS conducted another survey at OSH amid concerns the nursing service requirements were not being met. On November 24, 2015, CMS released its survey findings stating, among other things, various nursing security protocols were not being followed. On December 21, 2015, CMS decertified OSH, citing the facility for issues related to patient health and safety. The main impact on funding was through the loss of DSH and Medicare reimbursements for any patients who would have been eligible during their treatment at OSH. (As of October 2017, OSH is still taking patients in accordance with the moratorium; CMS decertification pertains to billing rather than admissions.) The Kansas Department for Aging and Disability Services (KDADS) estimates that during the period the hospital is decertified, the loss in combined revenue is roughly \$1.0 million per month, starting January 2016, until the hospital is recertified.

On May 8th, 2017, federal CMS surveyors conducted a full recertification survey for the 60 beds of Adair Acute Care (AAC) at OSH. On June 9, 2017, CMS released a report citing OSH for sanitation issues related to the kitchen, disease control for patients, and internal policies needing revisions. KDADS took corrective actions and requested CMS to revisit. In August and November 2017, CMS returned to survey issues previously cited at AAC and found no issues with AAC for these limited scope deficiency surveys. In December 2017, CMS notified OSH the 60 beds that comprise AAC were recertified for federal reimbursements and the hospital would begin to receive partial DSH payments.

**Moratorium.** The Secretary for Aging and Disability Services (Secretary) declared a moratorium on OSH admissions on June 21, 2015, to control census during construction. OSH did not close, nor stop admitting new patients; rather, admission of voluntary patients was halted, the census for involuntary patients was capped at 146, and a waiting list was created. KSA 59-2968 authorizes the Secretary to notify the Kansas Supreme Court and each district court with jurisdiction over all or part of the catchment

area served by a state psychiatric hospital that the census of a particular treatment program of that state psychiatric hospital has reached capacity and no more patients may be admitted. Following notification that a state psychiatric hospital program has reached its capacity and no more patients may be admitted, any district court with jurisdiction over all or part of the catchment area served by that state psychiatric hospital, and any participating mental health center that serves all or part of that same catchment area, may request that patients needing that treatment program be placed on a waiting list maintained by that state psychiatric hospital. Patients are admitted in chronological order. In July 2017, OSH increased its patient census to 158 and at the Legislative Budget Committee (LBC) meeting on October 3, 2018, the Secretary indicated OSH had increased its staffing to accommodate 166 patients. The Secretary informed the LBC that while OSH has the capacity to provide treatment to 166 patients, the patient census had been in the range of 130 for the past fiscal year due in part to regional efforts such as crisis unit beds, and OSH was considering lifting the moratorium on voluntary admissions.

## Larned State Hospital

LSH, located in south-central Kansas, is the largest psychiatric facility in the state and serves the western two-thirds of the state. The hospital serves adults with serious and persistent mental illnesses, most of whom have been deemed a danger to themselves or others. LSH has a Sexual Predator Treatment Program (SPTP) to treat offenders who have completed their prison sentences but have been involuntarily committed because a judge or jury found they were “sexually violent predators,” which means they have a “mental abnormality or personality disorder” that makes it likely they will engage in sexual violence again if not treated. The psychiatric services program at LSH is certified by CMS.

The SPTP, established by statute in 1994, provides for the civil commitment of persons identified by the law as sexually violent predators. KDADS states the program’s two missions are to provide for the safety of Kansas citizens by establishing



a secure environment in which persons identified as sexually violent predators can reside and to offer treatment with the aim of reducing their risk for re-offending while allowing motivated persons who complete treatment to return to society. The program serves adult male patients from the state who have been adjudicated through Kansas sexually violent predator treatment laws and are committed for treatment under civil statutes. In FY 2018, the average daily census for the SPTP program at the LSH campus totaled 236 patients and the average at the reintegration units totaled 26 patients.

**Legislative Post Audits.** The Legislative Division of Post Audit (LPA) completed two performance audits on the SPTP. The first, published in September 2013, looked at whether the program was appropriately managed to ensure the safety and well-being of program staff and offenders. The audit found a significant number of direct care staff positions were vacant; program staff worked a significant amount of overtime to provide safety, security, and treatment; and even with significant overtime, the program failed to meet its internal minimum staffing goals.

In April 2015, the second LPA performance audit report, “Larned State Hospital: Reviewing the Operations of the Sexual Predator Treatment Program, Part 2,” considered how Kansas’ SPTP compared to similar programs in other states and best practices, and what actions could be taken to reduce the number of offenders committed to the SPTP.

The audit found the Kansas program did not adhere to recommended practices for sexual predator programs to emphasize individualized treatment; residents completing the first five phases of the program were not necessarily equipped with the skills to be successful in finding a job or basic life skills; appropriate records and documentation to effectively manage the program were not maintained; and annual reports had not been filed as required by statute.

Additionally, the audit noted an insufficient local labor force will create staffing problems for the SPTP as it grows. The audit considered six options for reducing the resident population.

Copies of the full audit reports and the highlights may be accessed at <http://www.kslpa.org/>.

Overtime All Funds Expenditures for the Kansas State Hospitals FY 2017 and FY 2018				
	FY 2017		FY 2018	
KNI	\$	183,719	\$	328,028
LSH		3,976,643		4,585,740
OSH		1,051,507		1,068,535
PSH		370,620		525,377

**Staffing.** Staffing shortages have persisted at LSH, resulting in an increase of overtime hours worked by existing staff. KDADS reported the hospital has struggled to recruit staff in a rural area with low unemployment. At the April 18, 2016, Robert G. (Bob) Bethell Joint Committee on Home and Community Based Services and KanCare Oversight (KanCare Oversight Committee) meeting, LSH employees discussed staffing problems at the facility. The testimony outlined how mandatory overtime and limited time between shifts were taking a toll on workers and their families. Those testifying spoke as individuals and not as representatives of KDADS or other state agencies ([http://www.kslegislature.org/li\\_2016/b2015\\_16/committees/ctte\\_it\\_robert\\_g\\_bob\\_bethell\\_joint\\_committee\\_1/documents/?date\\_choice=2016-04-18](http://www.kslegislature.org/li_2016/b2015_16/committees/ctte_it_robert_g_bob_bethell_joint_committee_1/documents/?date_choice=2016-04-18)). Then-Interim Secretary Keck said staffing concerns at LSH were valid, and he had been working to improve employee morale since he took over in December 2015. In April 2017, Secretary Keck reported to the KanCare Oversight Committee staffing vacancies were decreasing and overtime was diminishing. However, in August 2018, Secretary Keck reported to the KanCare Oversight Committee that, despite efforts to improve staffing, recruitment and retention continues to be a problem at LSH.

In April 2016, about 60 mental health inmates were moved between state facilities as a means to alleviate staffing shortages at LSH. The plan moved dozens of inmates with mental health issues from LSH units to another facility

on the same campus run by the Department of Corrections. The inmates still received psychiatrist services in the new location. Concern was expressed by a Kansas Organization of State Employees representative that some inmates who need psychiatric care would be moved to facilities where corrections staff do not have mental health training.

**Management.** LSH also has faced management changes in recent years. The superintendent who had been at LSH since 2012 resigned in March 2016. The KDADS Commissioner of Behavioral Health Services served in an interim capacity until an interim superintendent was appointed in April 2016, while a search for a permanent superintendent took place. Bill Rein, former chief counsel for KDADS and most recently KDADS Commissioner of Behavioral Health Services, was named LSH Superintendent in June 2016. In August 2016, the LSH Chief Fiscal Officer (CFO) departed employment with the hospital. The CFO was facing a federal probe related to employment in a previous position. An audit of the hospital's finances was launched.

Additionally, the general counsel who led the legal department at LSH was transferred to the KDADS central office in Topeka in May 2016. A legal assistant position also was moved. KDADS said the move would allow the agency to use its legal staff more efficiently by having an employee previously focused on one state hospital assisting with other KDADS functions. Some OSH legal staff also were moved to the central office.

### **Parsons State Hospital and Training Center**

PSH&TC is one of two residential treatment, training, and care facilities operated by the State of Kansas to serve individuals with intellectual and developmental disabilities whose circumstances require specialized residential service provisions. PSH&TC was originally opened in 1903 and primarily treats adult patients, though approximately 20 youth also receive treatment and reside at the facility.

In May 2018, an annual survey revealed PSH&TC was out of compliance with guidelines on facility staffing for physical therapy. In July 2018, a complaint survey was conducted, and the hospital was cited for issues with treatment of a patient and was placed in immediate jeopardy. The hospital was informed it must submit an acceptable plan of correction, or a recommendation would be made that its Medicare contract be terminated, which would prohibit the hospital from receiving Medicaid or Medicare reimbursements for patient care. PSH&TC submitted plans of correction for both surveys and was informed in October 2018 that the plans had been accepted, and the hospital was no longer in immediate jeopardy of losing federal funding.

### **Recent Legislative Action**

Several bills were considered during the 2017 and 2018 Legislative Sessions.

#### **2017 Policy**

Senate Sub. for HB 2278 was passed by the 2017 Legislature and exempted the state hospitals and other select entities from a general requirement in law that public buildings have adequate security measures in place before the concealed carry of handguns could be prohibited.

Senate Sub. for HB 2002 was enacted in 2017 and authorized a Mental Health Task Force to meet in the fall of 2017 to study certain topics related to the current status of various mental health programs in Kansas and to provide recommendations to the 2018 Legislature. The Mental Health Task Force was facilitated by the Kansas Health Institute and a report was provided to the 2018 Legislature.

#### **2017 Fiscal**

The 2017 Legislature approved \$11.8 million in FY 2017 and \$6.6 million for FY 2018 as additional operating funding for OSH, primarily because the hospital lost federal funding as a result of decertification. The Legislature also added \$4.7 million for both FY 2018 and FY 2019 to open at

least 20 additional beds for patients at OSH or in the community. The Legislature added language requiring KDADS to complete an engineering survey on the buildings at OSH to determine which buildings could be renovated and which buildings should be demolished, and the costs associated with both options. The Legislature also required KDADS to issue a request for proposal (RFP) for the construction of a 100-bed psychiatric care facility at OSH.

The 2017 Legislature added \$6.5 million in FY 2017, FY 2018, and FY 2019 for LSH to replace federal and other funding lost due to a decrease in the number of patients eligible for Medicaid and Medicare reimbursements and cost recoupment by CMS due to reconciliation of past patient categorizations.

### **2018 Policy**

In 2018, House Sub. for SB 109 was enacted reauthorizing the Mental Health Task Force to meet in the fall of 2018 to study the Kansas mental health delivery system and develop a strategic plan addressing the recommendations of the January 8, 2018, Mental Health Task Force report, including ascertaining the location and total number of psychiatric beds needed to most effectively deliver mental health services in Kansas. The Mental Health Task Force is currently meeting over the 2018 Interim.

### **2018 Fiscal**

The 2018 Legislature added \$8.2 million in FY 2018 and \$16.1 million for FY 2019 for additional operating expenditures at OSH. The Legislature added \$2.5 million in FY 2018 and \$4.2 million for FY 2019 for LSH for expansion of the SPTP. Also, the Legislature added \$559,765 for PSH&TC for FY 2019 to provide funding for 12.0 additional support staff positions as a result of the facility experiencing an increased number of patients requiring one-to-one or two-to-one care for extended periods of time.

## **State Hospital Financing**

The state hospitals are primarily funded through three basic sources. The first is the State General Fund, which consists of money collected through various statewide taxes. The second is each hospital's fee fund, which includes collections from Medicare, private payments, Social Security, and insurance. The third source is federal Title XIX funding, also known as Medicaid. The federal Title XIX funding is transferred to the KDADS central pool and is redistributed among the four state hospitals in amounts equal to its approved appropriations.

State developmental disabilities hospitals (KNI and PSH&TC) are Medicaid certified as intermediate care facilities for persons with developmental disabilities, and nearly all of the people living in the facilities are covered by Medicaid. The state developmental disabilities hospitals submit annual cost reports that establish per diem rates they charge to Medicaid for each day a person covered by Medicaid lives in the facility.

The state mental health hospitals (LSH and OSH) establish per diem rates in much the same way as the state developmental disabilities hospitals, but are classified as institutions for mental disease. Due to federal rules, most state mental health hospital patients are not eligible for standard Medicaid match, but these hospitals are eligible for Medicaid payments through the DSH program. This program assists all acute care hospitals that serve a disproportionately high number of indigent persons. Kansas is currently pursuing a waiver to the federal rule prohibiting a Medicaid match for institutions for mental disease. In addition, Congress is currently considering changes to federal laws that may allow funding for short periods in cases where a mental impairment is combined with a opioid use disorder.

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### Judiciary, Corrections, and Juvenile Justice

#### G-1 Adoption

Adoption establishes a legal parent-child relationship between a child and third persons and terminates existing rights and obligations between a child and his or her biological parents. In Kansas, the Adoption and Relinquishment Act (KSA 59-2111 to 59-2144) governs adoptions, including termination of parental rights and the transfer of legal custody to and creation of legal rights in the adoptive parents. Any adult or married couple may adopt.

KSA 59-2112 defines the different methods of adopting: “adult adoption,” “agency adoption,” “independent adoption,” and “stepparent adoption.” This article focuses on adoption of minors. Agency adoptions are handled by a public or private entity lawfully authorized to place children for adoption, consent to the adoption, and care for children until they are adopted or reach majority. Independent adoptions can occur directly with an adoptive family or through an intermediary such as a doctor, lawyer, or friend. Stepparent adoptions involve the adoption of a minor child by the spouse of a biological parent, which requires termination of the parental rights of only one natural parent.

#### Jurisdiction and Venue

In Kansas, district courts may hear adoption petitions; however, the court must have jurisdiction. Generally, Kansas will have jurisdiction if the birth mother and adoptive parents are all Kansas residents. If the child is of Native American heritage, the Indian Child Welfare Act, 25 U.S.C.A. 1901 to 1963, may apply. Further, the parties may need to comply with the Interstate Compact for the Placement of Children, (KSA 38-1201 to 38-1206) if the child is born in Kansas and is to be placed with adoptive parents in another state or is born out of state and an agency will be involved in the adoption in Kansas.

Additional requirements exist for intercountry adoptions. Kansas law provides a foreign adoption decree will have the same force and effect as an adoption filed and finalized in Kansas if the person adopting is a Kansas resident; the adoption was obtained pursuant to the laws of the foreign country; the adoption is evidenced by proof of lawful admission into the United States; and the foreign decree is filed and recorded with any county within the state. The U.S. Department of State outlines procedures for intercountry

adoptions at <https://travel.state.gov/content/travel/en/Intercountry-Adoption.html>.

Legislation enacted in 2018 (SB 284) clarifies jurisdiction over adoption proceedings, including a proceeding to terminate parental rights, is governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (KSA 23-37,101 to 37,405). If at the time the petition is filed a proceeding concerning the custody or adoption of the minor is pending in another state exercising jurisdiction pursuant to the UCCJEA, Kansas may not exercise jurisdiction unless the other state's court stays its proceeding. Similarly, if another state has issued a decree or order concerning custody, Kansas may not exercise jurisdiction unless the court of the state issuing the order does not have continuing jurisdiction, has declined to exercise jurisdiction, or does not have jurisdiction. For more information on the UCCJEA, see Briefing Book article [G-2 Child Custody and Visitation Procedures](#).

## Petition

KSA 59-2128 lists the required contents of the petition and requires the following items be filed with the petition:

- Written consents to adoption;
- Background information for the child's biological parents;
- Accounting for all consideration and disbursements; and
- Any required affidavit concerning venue.

## Consent

In an independent adoption, consent is required from:

- The child's living parents; one of the parents if the other's consent is unnecessary pursuant to Kansas law; the child's legal guardian if both parents are dead or their consents are unnecessary; or the court terminating parental rights under the Revised Code for the Care

of Children (the Child in Need of Care (CINC) Code), KSA 38-2201 to 38-2286;

- Any court having jurisdiction over the child pursuant to the CINC Code if parental rights have not been terminated; and
- Any child older than 14 sought to be adopted who is of sound intellect.

For stepparent adoptions, consent must be given by the living parents of a child; one of the parents if the other's consent is unnecessary; or the judge of any court having jurisdiction over the child pursuant to the CINC Code if parental rights have not been terminated, as well as any child older than 14 sought to be adopted who is of sound intellect.

KSA 59-2114 requires the consent to be in writing and acknowledged before a judge or an officer authorized to take acknowledgments, such as a notary. If acknowledged before a judge, the judge must inform the consenting person of the legal consequences of the consent. The consent is final when executed, "unless the consenting party, prior to final decree of adoption, alleges and proves by clear and convincing evidence that the consent was not freely and voluntarily given." Minority of the parent does not invalidate the parent's consent; however, birth parents younger than 18 must have the advice of independent legal counsel on the consequences of execution of a consent. Unless the minor is otherwise represented, the petitioner or child placement agency must pay for the cost of independent legal counsel. The natural mother cannot give consent until 12 hours after the birth of the child. A father may give consent any time after the birth of a child and may give consent before the birth of the child if he has the advice of independent legal counsel as to the consequences prior to its execution. The attorney providing independent legal advice shall be present at the execution of the consent.

For an agency adoption, once parents relinquish their child to an agency, consent must be given by the authorized representative of the agency and any child older than 14 sought to be adopted who is of sound intellect.

## Relinquishment

Relinquishments to an agency will be deemed sufficient if in substantial compliance with the form created by the Judicial Council. Like consents, the relinquishment must be in writing and acknowledged by a notary or the court. (Again, the judge must inform the person of the legal consequences of the relinquishment.) Similar to consent, the law requires independent counsel for a minor relinquishing a child and provides the natural mother cannot relinquish the child until 12 hours after the birth. A father may relinquish any time after the birth of a child. If the agency accepts the relinquishment, the agency stands *in loco parentis* for the child and has the rights of a parent or legal guardian, including the power to place the child for adoption. If a person relinquishes the child, all parental rights are terminated.

## Termination of Parental Rights

When parents consent to an adoption, they agree to the termination of their parental rights, although the rights are not terminated until the judge makes the final decree of adoption. If a parent does not sign a consent, a court can terminate parental rights pursuant to a CINC proceeding. For more information on CINC proceedings, see Briefing Book article [F-2 Foster Care](#).

Additionally, KSA 59-2136 addresses circumstances where the necessity of a parent's consent or relinquishment is in question. While it frequently refers to fathers, it specifies that insofar as it is practicable, those provisions applicable to fathers also apply to mothers. Absent a father's consent, his parental rights must be terminated. If a father is unknown or his whereabouts are unknown, the court must make an effort to identify the father; appoint an attorney to represent him; and, if no person is identified as the father or possible father or if the father's whereabouts are unknown, order publication notice of the hearing. If identified, he must receive notice of the termination proceedings. If no father is identified or if, after receiving notice, he fails to appear or does not claim custodial rights, the court will terminate his parental

rights. If a father is identified to the court and claims parental rights, the court must determine parentage pursuant to the Kansas Parentage Act (KSA 23-2201 to 23-2225). Further, if the father cannot employ an attorney, the court must appoint one for him. Thereafter, the court may terminate a parent's rights and find the consent or relinquishment unnecessary if it determines by clear and convincing evidence:

- The father abandoned or neglected the child after having knowledge of the child's birth;
- The father is unfit or incapable of giving consent;
- The father has made no reasonable efforts to support or communicate with the child after having knowledge of this child's birth;
- The father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth;
- The father abandoned the mother after having knowledge of the pregnancy;
- The birth of the child was the result of the rape of the mother; or
- The father has failed to assume the duties of a parent for two consecutive years immediately preceding the filing of the petition to adopt.

In determining whether to terminate parental rights, the court must consider all of the relevant surrounding circumstances and may disregard incidental visitations, contacts, communications, or contributions.

## Assessments

Petitioners must obtain an assessment performed by a person authorized by law to do so and file a report of the assessment with the court before the hearing on the petition, including the results of the investigation of the adoptive parents, their home, and their ability to care for the child. The assessment and report are valid only if performed within a year of filing the petition for adoption.

## Temporary Custody Order

In an independent or agency adoption, the court may issue a temporary custody order pending the hearing. If the court places the child in a home not licensed to provide such care, it must first be assessed by a person or agency authorized to make assessments, or the court may “expeditiously” conduct an evidentiary hearing, including testimony by the petitioners prior to making the placement.

## Adoption Hearing and Final Decree

KSA 59-2133 requires the court to set the hearing within 60 days from the date of filing the adoption petition. Additionally, in independent and stepparent adoptions, it requires notice be given to parents or possible parents at least ten calendar days before the hearing unless parental rights have been terminated or waived, and to any person who has physical custody of the child, unless waived. The court may designate others to be notified. In agency adoptions, notice must be served upon the consenting agency, the parents or possible parents, any relinquishing party, and any person who has physical custody of the child at least ten calendar days before the hearing, unless waived. After the hearing of the petition, the court considers the assessment and all evidence and, if the adoption is granted, makes a final decree of adoption.

An adopted child is entitled to the same personal and property rights as a birth child of the adoptive parents, who likewise are entitled to exercise all the rights of a birth parent and are subject to all the liabilities of that relationship. Both KSA 59-2118 and KSA 59-2136 allow children to inherit from their birth parents after parental rights have been terminated, although the birth parents’ right to inherit is severed at that time.

## Recent Legislation

Legislation enacted in 2018, SB 284, creates the Adoption Protection Act, which states, notwithstanding any other provision of state law and to the extent allowed by federal law, no child

placement agency (CPA) shall be required to perform, assist, counsel, recommend, consent to, refer, or otherwise participate in placement of a child for foster care or adoption when the proposed placement of such child violates such CPA’s sincerely held religious beliefs. The bill also prohibits taking the following actions against a CPA, if taken solely because of the CPA’s objection to providing any of the services described above on the grounds of such religious beliefs:

- State agency or political subdivision denial of a license, permit, or other authorization or denial of renewal, revocation, or suspension of the same;
- Denial of participation in a Department for Children and Families (DCF) program in which CPAs are allowed to participate;
- Denial of reimbursement for performing foster care placement or adoption services on behalf of an entity that has a contract with DCF as a case management contractor; or
- Imposition of a civil fine or other adverse administrative action or any claim or cause of action under any state or local law.

The CPA’s sincerely held religious beliefs must be described in the CPA’s organizing documents, written policies, or such other written document approved by the CPA’s governing body. The provisions of the bill do not apply to an entity while the entity has a contract with DCF as a case management contractor.

The bill also makes numerous amendments to the Adoption and Relinquishment Act based on Kansas Judicial Council recommendations.



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### Judiciary, Corrections, and Juvenile Justice

#### G-2 Child Custody and Visitation Procedures

Kansas defines “legal custody” as “the allocation of parenting responsibilities between parents, or any person acting as a parent, including decision-making rights and responsibilities pertaining to matters of child health, education and welfare” (KSA 2018 Supp. 23-3211). Within that context, Kansas law distinguishes between “residency” and “parenting time.” Residency refers to the parent with whom the child lives, while parenting time consists of any time a parent spends with a child. The term “visitation” is reserved for time nonparents are allowed to spend with a child.

#### Initial Determination

The standard for awarding custody, residency, parenting time, and visitation is what is in the “best interests” of the child. Courts can determine these issues when a petition is filed for divorce, paternity, a protection order, guardianship of a minor, or adoption.

To determine custody, a court must have authority under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), KSA 2018 Supp. 23-37,101 to 23-37,405. The first time custody is considered, only a court in the child’s “home state” may make a determination. Exceptions apply when there is no home state, there is a “significant connection” to another state, or there is an emergency, *e.g.*, the child has been abandoned or is in danger of actual or threatened mistreatment or abuse. After a court assumes home state jurisdiction, other states must recognize any orders it issues.

Legal custody can be joint, meaning the parties have equal rights, or sole, when the court finds specific reasons why joint legal custody is not in the child’s best interests (KSA 2018 Supp. 23-3206). After awarding legal custody, the court will determine residency, parenting time, and visitation.

Residency may be awarded to one or both parents, or, if the child is a Child in Need of Care (CINC) and neither parent is found to be fit, to a third party. In determining residency, KSA 2018 Supp. 23-3207 requires parents to prepare either an agreed parenting plan or, if there is a dispute, proposed parenting plans for the court to consider. For more information on parenting plans, see KSA 2018 Supp. 23-3211 to 23-3214. Based on the principle that fit

parents act in the best interests of their children, an agreed parenting plan is presumed to be in a child's best interests. Absent an agreement, however, or if the court finds specific reasons why the parenting plan is not in the child's best interests, it will consider all relevant factors, including those outlined in KSA 2018 Supp. 23-3203.

Though not required, a court may appoint or authorize a lawyer or guardian *ad litem*, especially in contested cases, to ensure a child's interests are being represented. Guardians *ad litem*, regulated by Kansas Supreme Court Rules, serve as advocates for the child's best interests and present cases in the same manner as any other attorney representing a client.

Additionally, in determining child custody, residency, and parenting time, a 2017 amendment to KSA 23-3203 allows courts to order a parent to undergo a domestic violence offender assessment conducted by a certified batterer intervention program and to follow all of the program's recommendations.

## Modification

Courts may modify custody, residency, visitation, and parenting time orders, subject to the provisions of the UCCJEA, when a material change of circumstances is shown (KSA 23-3218). A state that previously exercised jurisdiction will have continuing authority over subsequent motions until it determines the child, child's parents, and any person acting as a parent either:

- No longer have a significant connection with that state and substantial evidence is no longer available in that state concerning the child's care, protection, training, and personal relationships; or
- A court of that state or of another state determines the child, child's parents, and any person acting as a parent do not presently reside in that state.

While a state exercises continuing jurisdiction, no other state may modify the order. If the state loses continuing jurisdiction, another state can modify

an order only if it qualifies as a "home state" (KSA 23-37202; KSA 23-37,203).

To modify a final child custody order, the party filing the motion must list all known factual allegations that constitute the basis for the change of custody. If the court finds the motion establishes a *prima facie* case, it will consider the facts of the situation to determine whether the order should be modified. Otherwise, it must deny the motion. In an alleged emergency situation where the nonmoving party has an attorney, the court must first attempt to have the attorney present before taking up the matter. Next, the court is required to set the matter for review hearing as soon as possible after issuance of the *ex parte* order, but within 15 days after issuance. Third, the court must obtain personal service on the nonmoving party of the order and the review hearing. Finally, the court cannot modify the order without sworn testimony to support a showing of the alleged emergency. Similarly, no *ex parte* order can change residency from a parent exercising sole *de facto* residency of a child to the other parent unless there is sworn testimony to support a showing of extraordinary circumstances (KSA 23-3218; KSA 23-3219).

## Custodial Interference and the Kansas Protection from Abuse Act

KSA 2018 Supp. 21-5409 outlines the crimes of "interference with parental custody" and "aggravated interference with parental custody." "Interference with parental custody" is defined as "taking or enticing away any child under the age of 16 years with the intent to detain or conceal such child from the child's parent, guardian, or other person having the lawful charge of such child." Joint custody is not a defense. This crime is a class A person misdemeanor if the perpetrator is a parent entitled to joint custody of the child; in all other cases, it is a severity level 10 person felony. Certain circumstances raise the crime to "aggravated" interference, a severity level 7 person felony.

If a noncustodial parent believes the child needs protection from the custodial parent, the parent can take action under the Kansas Protection

from Abuse Act, KSA 2018 Supp. 60-3101 to 60-3111, which allows a parent of a minor child to file a petition alleging abuse by another intimate partner or household member. The court must hold a hearing within 21 days of the petition's filing. Prior to this hearing, the parent who originally filed the petition may file a motion for temporary relief, to which the court may grant an *ex parte* temporary order with a finding of good cause shown. The temporary order remains in effect until the hearing on the petition, at which time the parent who filed the petition must prove abuse by a preponderance of the evidence. The other parent also has a right to present evidence. At the hearing, the court can grant a wide variety of protective orders it believes are necessary to protect the child from abuse, including awarding temporary custody.

Typically, the protective order remains in effect for a maximum of one year, but, on motion of the parent who originally filed the petition, may be extended for one additional year. Additionally, KSA 2018 Supp. 60-3107 requires courts to extend protection from abuse orders for at least two years and allows extension up to the lifetime of a defendant if, after the defendant has been personally served with a copy of the motion to extend the order and has had an opportunity to present evidence at a hearing on the motion and cross-examine witnesses, it is determined by a preponderance of the evidence the defendant has either previously violated a valid protection order or been convicted of a person felony or conspiracy, criminal solicitation, or attempt of a person felony, committed against the plaintiff or any member of the plaintiff's household.

Violation of a protection order is a class A person misdemeanor, and violation of an extended protection order is a severity level 6 person felony.

### **Military Child Custody and Visitation**

There are additional legal considerations if either parent is a member of the military. For instance, the Servicemembers Civil Relief Act, 50 USC App. §§ 501-596, a federal law meant to allow deployed service members to adequately defend themselves in civil suits, may apply.

Additionally, if either parent is a service member, KSA 2018 Supp. 23-3213 requires the parenting plan to include provisions for custody and parenting time upon military deployment, mobilization, temporary duty, or an unaccompanied tour. Further, KSA 2018 Supp. 23-3217 specifies that those circumstances do not necessarily constitute a "material change in circumstances," such that a custody or parenting time order can be modified. If an order is modified because of those circumstances, however, it will be considered a temporary order.

When the parent returns and upon a motion of the parent, the court is required to have a hearing within 30 days to determine whether a previous custody order should be reinstated. In the servicemember's absence, the servicemember may delegate parenting time to a family member or members with a close and substantial relationship to the child if it is in the best interests of the child, and requires the nondeploying parent to accommodate the servicemember's leave schedule and facilitate communication between the servicemember and his or her children.

### **Third Party Custody and Visitation**

#### ***Custody***

KSA 2018 Supp. 38-141 recognizes the rights of parents to exercise primary control over the care and upbringing of their children. This stance is consistent with the U.S. Supreme Court's recognition that a parent's fundamental right to establish a home and raise children is protected and will be disturbed only in extraordinary circumstances. *Troxel v. Granville*, 530 U.S. 57 (2000); *Meyer v. Nebraska*, 262 U.S. 390 (1923). As such, parents generally are awarded custody unless they have been determined unfit under the Revised Kansas Code for the Care of Children (CINC Code), KSA 2018 Supp. 38-2201 to 38-2286.

Aside from a proceeding conducted pursuant to the CINC Code, a judge in a divorce case may award temporary residency to a nonparent if the court finds there is probable cause to believe the child is in need of care or neither parent is fit to

have residency. To award residency, the court must find by written order the child is likely to sustain harm if not immediately removed from the home; allowing the child to remain in the home is contrary to the welfare of the child; or immediate placement of the child is in the best interest of the child.

The court also must find reasonable efforts have been made to maintain the family unit and prevent the unnecessary removal of the child from the child's home or an emergency exists that threatens the safety of the child. In awarding custody to a nonparent under these circumstances and to the extent the court finds it is in the child's best interests, the court gives preference first to a relative of the child, whether by blood, marriage, or adoption, and then to a person with whom the child has close emotional ties. The award of temporary residency does not terminate parental rights; rather, the temporary order will last only until a court makes a formal decision of whether the child is in need of care. If the child is found not to be in need of care, the court will enter appropriate custody orders as explained above (KSA 2018 Supp. 23-3207).

If the child is found to be in need of care, custody will be determined pursuant to the CINC Code. For more information on CINC proceedings, see [F-2 Foster Care](#) in this Briefing Book.

### **Visitation**

Courts may grant grandparents and stepparents visitation rights as part of a Dissolution of Marriage proceeding. Further, Kansas law gives grandparents visitation rights during a grandchild's minority if a court finds visitation would be in the child's best interests and a substantial relationship exists between the child and the grandparent (KSA 2018 Supp. 23-3301).

Kansas courts applying these statutes have placed the burden of proof for these two issues on the grandparents and, absent a finding of unreasonableness, weigh grandparents' claims against the presumption that fit parents act in their child's best interests. [See *In re Creach*, 155 P.3d 719, 723 (Kan. App. 2007).]

### **Host Families Act**

The Host Families Act (KSA 2018 Supp. 38-2401, *et seq.*) allows a child placement agency or charitable organization to provide temporary care of children by placing a child with a host family. Host families are subject to screening and background checks and do not receive payment other than reimbursement for actual expenses. The Act also allows the Kansas Department for Children and Families (DCF) to provide information about respite care, voluntary guardianship, and support services, including organizations operating programs under the Act, to families experiencing financial distress, unemployment, homelessness, or other crises and to parents or custodians during a child protective investigation that does not result in an out-of-home placement due to abuse of a child.

Placement must be voluntary and shall not be considered an out-of-home placement, supersede any court order, or preclude any investigation of suspected abuse or neglect. A parent may place a child by executing a power of attorney that delegates to a host family any powers regarding the care and custody of the child, except power to consent to marriage or adoption, performance or inducement of an abortion, or termination of parental rights. The power of attorney may not be executed without the consent of all individuals with legal custody of the child, and execution is not evidence of abandonment, abuse, or neglect.

The power of attorney may not exceed one year but may be renewed for one additional year. The bill includes an exception, however, for parents serving in the military who may delegate powers for a period longer than one year if on active duty service, but no more than the term of active duty service plus 30 days. A parent executing a power of attorney under the Act can revoke or withdraw the power of attorney at any time. Upon such withdrawal or revocation, the child must be returned to the parent as soon as reasonably possible.

**Child Support and Enforcement**

KSA 2018 Supp. 23-3001 and 23-3002 require courts to determine child support in any divorce proceeding using the Kansas Child Support Guidelines, which KSA 2018 Supp. 20-165 requires the Kansas Supreme Court to adopt. Additional information about the Supreme Court guidelines is available at <http://www.kscourts.org/Rules-procedures-forms/Child-Support-Guidelines/>. Courts can order either or both parents to pay child support, regardless of custody. Child support also can be ordered as part of a paternity proceeding. Once established, enforcement of support orders is governed by the Income Withholding Act, KSA 2018 Supp. 23-3101 to 23-3118 and 39-7,135.

DCF has privatized Child Support Services (CSS), contracting with four vendors who began providing services on September 16, 2013.

Contractor information is available at <http://www.dcf.ks.gov/services/CSS/Pages/Contractor-Information.aspx>. CSS's responsibilities include establishing parentage and orders for child and medical support, locating noncustodial parents and their property, enforcing child and medical support orders, and modifying support orders as appropriate. CSS automatically serves families receiving Temporary Assistance for Needy Families (TANF), foster care, medical assistance, and child care assistance. Assistance from CSS is also available to any family who applies for services, regardless of income or residency.

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## Judiciary, Corrections, and Juvenile Justice

### G-3 Civil Asset Forfeiture

Civil asset forfeiture is the process through which a law enforcement agency may seize and take ownership of property used in the commission of a crime. This article provides an overview of the civil forfeiture laws in Kansas.

#### Overview of Kansas Civil Forfeiture Laws

##### *Property and Conduct Subject to Civil Forfeiture*

KSA Chapter 60, Article 41 is titled the Kansas Standard Asset Seizure and Forfeiture Act (SASFA). Under KSA 2018 Supp. 60-4104, certain conduct can lead to civil asset forfeiture even without prosecution or conviction. This conduct includes, but is not limited to, theft, prostitution, human trafficking, and forgery. Under KSA 2018 Supp. 60-4105, every kind of property used during conduct giving rise to forfeiture, or obtained as a result of conduct giving rise to forfeiture, is subject to forfeiture.

There are certain exceptions under KSA 2018 Supp. 60-4106. For example, under KSA 2018 Supp. 60-4106(a)(1), real property or interests in real property cannot be seized unless the conduct leading to forfeiture is a felony. Under KSA 2018 Supp. 60-4106(a)(3), property is not subject to forfeiture if the owner received the property before or during the conduct giving rise to forfeiture and did not know about the conduct or made reasonable efforts to prevent the conduct.

##### **Kansas Forfeiture Procedure**

Law enforcement officers may seize property with a warrant issued by the court, without a warrant if they have probable cause to believe the property is subject to forfeiture under the statutes, or constructively, with notice (KSA 2018 Supp. 60-4107). Under KSA 2018 Supp. 60-4107(d), the seizing agency must make reasonable efforts within 30 days to give notice of the seizure to the owner, interest holder, or person who had possession of the property.

Typically, the county or district attorney, the Attorney General, or an attorney approved by one of the two, will represent the law Kansas enforcement agency in a forfeiture action. KSA 2018

Supp. 60-4107(g)-(j) provides a procedure the law enforcement agency must follow to secure representation in such a proceeding. The 2018 Legislature amended this section to provide in those cases where the county or district attorney approves another attorney to represent a local agency in the forfeiture proceeding, the county or district attorney is prohibited from approving an attorney with whom the county or district attorney has a direct or indirect financial interest. Similarly, for state agencies, the Attorney General is prohibited from approving an attorney with whom the Attorney General has a direct or indirect financial interest. A county or district attorney and the Attorney General are prohibited from requesting or receiving any referral fee or personal financial benefit from any proceeding under SASFA.

Under KSA 2018 Supp. 60-4109(a), a civil forfeiture proceeding commences when the attorney representing the law enforcement agency (the plaintiff's attorney) files a notice of pending forfeiture or a judicial forfeiture action.

If the plaintiff's attorney does not initiate the forfeiture proceeding or the law enforcement agency does not pursue the forfeiture proceeding within 90 days against the property seized, and the property's owner or interest holder (the claimant) files a timely claim, the court must release the property to the owner (on the owner's request) pending further proceedings (KSA 2018 Supp. 60-4109(a)(1)).

Under KSA 2018 Supp. 60-4109(a)(1), the seized property cannot stay in the owner's possession more than 90 days without a court-authorized extension. Under KSA 2018 Supp. 60-4109(a)(2), if the owner files a petition for exemption to forfeiture under KSA 2018 Supp. 60-4110, the plaintiff's attorney can delay filing the judicial forfeiture proceeding for up to 180 days. To delay filing, the plaintiff's attorney must provide notice of exemption to any interest holders who filed petitions to have their interests exempt from forfeiture within 60 days after the effective date of the notice of pending forfeiture.

The plaintiff's attorney is also allowed, under KSA 2018 Supp. 60-4109(b), to file a lien on the

forfeited property to cover necessary court costs, and the lien will constitute notice to any person claiming an interest in the property as long as it contains certain information.

## **Burden of Proof and Court Findings**

Under KSA 2018 Supp. 60-4113(h), in a civil forfeiture proceeding, the plaintiff's attorney has the initial burden of proof and must prove, by a preponderance of the evidence, the property is subject to civil forfeiture. Then the burden of proof shifts to the claimant (the property owner or interest holder) to prove, by a preponderance of the evidence, the claimant's property interest is not subject to forfeiture. If the court finds the property is not subject to forfeiture, the property must be returned to the claimant. If the court finds the property is subject to forfeiture, the property is forfeited to the law enforcement agency that seized the property (KSA 2018 Supp. 60-4113(i)). However, under KSA 2018 Supp. 60-4106(c), the court must restrict the scope of the forfeiture to ensure it is proportionate with the conduct that gave rise to the seizure.

## **Use of Forfeited Property**

When property is forfeited, the law enforcement agency can keep the property, transfer it to any government agency, destroy it, or use it for training purposes (KSA 2018 Supp. 60-4117(a)(1) and (a)(2)). The law enforcement agency also may sell the property. KSA 2018 Supp. 60-4117(a)(3)(A) requires property, other than real property, to be sold at public sale to the highest bidder. Real property may be sold at a public sale or through a real estate company (KSA 2018 Supp. 60-4117(a)(3)(B)).

Under KSA 2018 Supp. 60-4117(c)-(d), after the proceeds have been used to satisfy certain security interests or liens, expenses of the proceedings, reasonable attorney fees, and repayment of certain law enforcement funds, the remaining proceeds will go to the law enforcement agency's state forfeiture fund if the law enforcement agency is a state agency.

The 2018 Legislature amended this section to provide an exclusive list of 12 special, additional law enforcement purposes for which proceeds from forfeiture may be used. Moneys in the funds containing forfeiture proceeds must be separated and accounted for in a manner that allows accurate tracking and reporting of deposits and expenditures of proceeds from forfeiture credited to the fund, proceeds from pending forfeiture actions under SASFA, and proceeds from federal forfeiture actions.

### **Forfeiture Repository and Reporting Requirements**

The Kansas Bureau of Investigation (KBI) is required to establish, on or before July 1, 2019, the Kansas Asset Seizure and Forfeiture Repository, which will gather information concerning each seizure for forfeiture made by a seizing agency pursuant to SASFA. The information gathered will include, but not be limited to:

- The name of the seizing agency or name of the lead agency if part of a multi-jurisdictional task force and any applicable agency or district court case numbers for the seizure;
- The county where and date and time the seizure occurred, a description of the initiating law enforcement activity leading to the seizure, and the specific location where the seizure occurred;
- Descriptions of the type of property and contraband seized and the estimated values of the property and contraband;
- Whether criminal charges were filed for an offense related to the forfeiture and court and case number information of such charges;
- A description of the final disposition of the forfeiture action, including any claim or exemption asserted under SASFA;
- Whether the forfeiture was transferred to the federal government for disposition;
- Total cost of the forfeiture action, including attorney fees; and
- Total amount of proceeds from the forfeiture action, specifying the amount received by the seizing agency and the amount received by any other agency or person.

The KBI will monitor compliance, and agencies not in compliance will be unable to seek forfeiture proceedings. Each year, the KBI must report to the Legislature any agencies not in compliance with the reporting requirements.

### **Recent Kansas Legislation**

#### ***HB 2459 2018***

The 2018 Legislature amended several provisions within SASFA to adjust procedural and timing requirements and created a new section of law that requires the KBI to establish a repository to gather information concerning each seizure for forfeiture made by a seizing agency pursuant to SASFA (detailed previously in this article).

**Background of 2018 HB 2459.** Following a 2016 Legislative Division of Post Audit (LPA) report (detailed later in this article) and the introduction of five House bills and three Senate bills in 2017 on the topic of civil asset forfeiture, the chairpersons of the House and Senate Judiciary Committees requested the Kansas Judicial Council study the topic. Following its study, the Judicial Council issued its report, including a draft of recommended legislation, in December 2017. The report and recommended legislation is available on the Judicial Council website. The bill, based on the Judicial Council's recommended legislation, was introduced by the House Committee on Judiciary at the request of the Judicial Council.

#### ***2013-2016 Legislation***

In 2016, HB 2460 created the crime of violation of a consumer protection order, related to door-to-door sales, and added the crime to conduct giving rise to civil forfeiture. In 2014, Kansas enacted legislation concerning civil forfeiture as it pertains to certain firearms (2014 HB 2578). That bill added language to KSA 2013 Supp. 22-2512

as to how seized firearms could be disposed and specifications for notifying the owner of a seized weapon how to retrieve it if the weapon can be returned. In 2013, the Legislature passed HB 2081, which added certain offenses to the conduct giving rise to civil forfeiture (indecent solicitation of a child, aggravated indecent solicitation of a child, and sexual exploitation of a child). It also added electronic devices to the list of items that could be seized.

## LPA Report

In July 2016, LPA released a report, “Seized and Forfeited Property: Evaluating Compliance with State Law and How Proceeds Are Tracked, Used, and Reported,” which compared Kansas’ forfeiture process with those of four other states and the federal government. It also examined the seizure and forfeiture processes of two statewide and four local law enforcement agencies, finding that the agencies generally complied with major state laws and best practices, with few exceptions.

The report found the agencies generally complied with state laws for liquidating forfeited property, but several agencies were missing important controls. LPA also found the six agencies

lacked important controls for tracking forfeiture proceeds, but appeared to have good processes for appropriate use of forfeiture proceeds. Also, while the state agencies complied with reporting requirements in state law, the local agencies did not. The report noted additional findings, including that broad discretion over the use of forfeiture proceeds could create a risk of use for operating funds, that certain agencies had conflicts of interest or lacked controls for drug buys, and that none of the agencies had complete and written policies and procedures for seized and forfeited property.

The report noted numerous specific recommendations had been made to the various agencies based upon the findings. It recommended the Legislature consider legislation clarifying KSA 2015 Supp. 60-4117(d) (3) and the use of forfeiture funds for operating expenses. The report also recommended the House and Senate Judiciary Committees consider introducing legislation to either create a more centralized reporting structure or consider eliminating the reporting requirement altogether.

The highlights and full report may be found on LPA’s website: [www.kslpa.org](http://www.kslpa.org).

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### Judiciary, Corrections, and Juvenile Justice

#### G-4 Death Penalty in Kansas

##### Background

On June 29, 1972, the U.S. Supreme Court, in *Furman v. Georgia*, 408 U.S. 238 (1972), held the imposition and execution of the death penalty, or capital punishment, in the cases before the court constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the *U.S. Constitution*. Justice Stewart remarked that the death penalty was “cruel and unusual in the same way that being struck by lightning is cruel and unusual.” That case nullified all capital sentences imposed without statutory guidelines.

In the following four years, states enacted new death penalty laws aimed at overcoming the Court’s *de facto moratorium* on the death penalty. Several statutes mandated bifurcated trials, with separate guilt and sentencing phases, and imposed standards to guide the discretion of juries and judges in imposing capital sentences. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court upheld the capital sentencing schemes of Georgia, Florida, and Texas. The Court found these states’ capital sentencing schemes provided objective criteria to direct and limit the sentencing authority’s discretion, provided mandatory appellate review of all death sentences, and allowed the judge or jury to take into account the character and record of an individual defendant.

The death penalty was reenacted in Kansas, effective on July 1, 1994. Governor Finney allowed the bill to become law without her signature.

The Kansas Supreme Court, in *State v. Marsh*, 278 Kan. 520, 534–535 (2004), held that the Kansas death penalty statute was facially unconstitutional. The Court concluded the statute’s weighing equation violated the Eighth and Fourteenth Amendments to the *U.S. Constitution* because, “[i]n the event of equipoise, *i.e.*, the jury’s determination that the balance of any aggravating circumstances and any mitigating circumstances weighed equal, the death penalty would be required” (*Id.*, at 534).

The U.S. Supreme Court reversed the Kansas Supreme Court’s judgment and held the Kansas capital sentencing statute is constitutional. In June 2006, the Court found the death penalty

statute satisfies the constitutional mandates of *Furman* and its progeny because it “rationally narrows the class of death-eligible defendants and permits a jury to consider any mitigating evidence relevant to its sentencing determination. It does not interfere, in a constitutionally significant way, with a jury’s ability to give independent weight to evidence offered in mitigation.”

## Kansas Capital Murder Crimes

In Kansas, the capital murder crimes for which the death penalty may be invoked include the following:

- Intentional and premeditated killing of any person in the commission of kidnapping, or aggravated kidnapping, when the kidnapping or aggravated kidnapping was committed with the intent to hold the person for ransom;
- Intentional and premeditated killing of any person under a contract or agreement to kill that person or being a party to the contract killing;
- Intentional and premeditated killing of any person by an inmate or prisoner confined to a state correctional institution, community correctional institution, or jail, or while in the custody of an officer or employee of a state correctional institution, community correctional institution, or jail;
- Intentional and premeditated killing of the victim of one of the following crimes in the commission of, or subsequent to, the crime of rape, criminal sodomy, or aggravated criminal sodomy, or any attempt thereof;
- Intentional and premeditated killing of a law enforcement officer;
- Intentional and premeditated killing of more than one person as a part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct; or
- Intentional and premeditated killing of a child under the age of 14 in the commission of kidnapping, or aggravated kidnapping, when the kidnapping or aggravated kidnapping was committed with intent to commit a sex offense upon or with the child or with the intent that the child commit or submit to a sex offense.

According to Kansas law, upon conviction of a defendant of capital murder, there will be a separate proceeding to determine whether the defendant shall be sentenced to death. This proceeding will be conducted before the trial jury as soon as practicable. If the jury finds beyond a reasonable doubt that one or more aggravating circumstances exist and that such aggravating circumstances are not outweighed by any mitigating circumstances that are found to exist, then by unanimous vote the defendant will be sentenced to death. The Kansas Supreme Court will automatically review the conviction and sentence of a defendant sentenced to death.

If mitigating circumstances outweigh the aggravating circumstances, a defendant convicted of capital murder will not be given a death sentence but will be sentenced to life without the possibility of parole. A defendant sentenced to life without the possibility of parole is not eligible for parole; probation; assignment to a community correctional services program; conditional release; postrelease supervision; or suspension, modification, or reduction of sentence.

## Costs

Costs in Kansas death penalty cases have been examined in a 2003 Performance Audit by the Legislative Division of Post Audit (LPA) and in 2004 and 2014 reports by the Kansas Judicial Council Death Penalty Advisory Committee. Each of these studies indicates costs for death penalty cases tend to be higher than non-death penalty cases at the trial and appellate stages. For instance, the 2014 Judicial Council report indicated that Kansas Board of Indigents’ Defense Services costs in death penalty trial cases filed between 2004 and 2011 averaged

\$395,762 per case, as compared to \$98,963 per trial case where the death penalty could have been sought but was not. More detail regarding the costs in death penalty cases may be found in the 2003 Performance Audit report and in the 2004 and 2014 Judicial Council reports, which are available on the LPA and Judicial Council websites, respectively.

The Board of Indigents' Defense Services has three units that participate in the defense of capital cases. The approved budget for these units in FY 2019 is \$3,122,507. Actual expenditures for the unit in FY 2018 were \$2,430,626. The agency estimates FY 2019 expenditures of \$3,461,691 for capital defenses.

### Death Penalty and Intellectual Disability

At the national level, the U.S. Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), stated capital punishment of those with "mental retardation" is cruel and unusual punishment under the Eighth Amendment to the *U.S. Constitution*. Various states subsequently attempted to draft legislation that would comply with the Atkins decision. In the Atkins decision, there is no definition of "mentally retarded," but the Court referred to a national consensus regarding mental retardation.

In 2012, the Legislature passed Sub. for SB 397, which replaced statutory references to "mental retardation" and similar terms with "intellectual disability" and directed state agencies to update their terminology accordingly. Thus, the concept of "mental retardation" as addressed by the U.S. Supreme Court in *Atkins* will be discussed here as "intellectual disability."

Kansas law defines "intellectual disability" in the death penalty context to mean a person having significantly subaverage general intellectual functioning to an extent that substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law. [See KSA 21-6622(h).]

In 2016 Senate Sub. for 2049, the Legislature amended the definition of "significantly

subaverage general intellectual functioning." This legislation was introduced in response to the U.S. Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1886 (2014).

Under Kansas law, counsel for a defendant convicted of capital murder, or the warden or sheriff having custody of the defendant, may request the court to determine if the defendant has an intellectual disability. The court shall then conduct proceedings to determine if the defendant has an intellectual disability. If the court determines the defendant has an intellectual disability, no sentence of death, life without the possibility of parole, or mandatory term of imprisonment shall be imposed. [See KSA 21-6622.]

### Death Penalty and Minors

In *Roper v. Simmons*, 543 U.S. 551 (2005), the U.S. Supreme Court invalidated the death penalty for all juvenile offenders. The majority opinion pointed to teenagers' lack of maturity and responsibility, greater vulnerability to negative influences, and incomplete character development, concluding juvenile offenders assume diminished culpability for their crimes.

KSA 21-6618 mandates that, if a defendant in a capital murder case was less than 18 years of age at the time of the commission of the crime, the court shall sentence the defendant as otherwise provided by law, and no sentence of death shall be imposed. Thus, the death penalty or capital punishment cannot be imposed on a minor in Kansas.

### Method of Carrying Out Death Penalty

The method of carrying out a sentence of death in Kansas must be by intravenous injection of a substance or substances in sufficient quantity to cause death in a swift and humane manner, pursuant to KSA 22-4001. No death penalty sentence has been carried out in Kansas since the death penalty was reenacted in 1994.

On November 17, 2004, the death sentence of Stanley Elms of Sedgwick County was vacated

<b>Inmates in Kansas Under Sentence of Death</b>					
<b>Defendant's Name</b>	<b>Race</b>	<b>Date of Birth</b>	<b>Date Capital Penalty Imposed</b>	<b>County</b>	<b>Case Status</b>
Kyle Trevor Flack	White	06/18/85	05/18/16	Franklin	Appeal Pending
Frazier Glen Cross, Jr.	White	11/23/40	11/10/15	Johnson	Appeal Pending
James Kraig Kahler	White	01/15/63	10/11/11	Osage	Sentence upheld; See below
Justin Eugene Thurber	White	03/14/83	03/02/09	Cowley	Conviction upheld; remanded for redetermination of intellectual disability; See below
Scott Dever Cheever	White	08/19/81	01/23/08	Greenwood	Sentence upheld; See below
Sidney John Gleason	Black	04/22/79	08/28/06	Barton	Sentence upheld; See below
John Edward Robinson, Sr.	White	12/27/43	01/21/03	Johnson	Sentence upheld; See below
Jonathan Daniel Carr	Black	03/30/80	11/15/02	Sedgwick	See below
Reginald Dexter Carr, Jr.	Black	11/14/77	11/15/02	Sedgwick	See below
Gary Wayne Kleypas	White	10/08/55	03/11/98	Crawford	Sentence upheld; See below

pursuant to a plea agreement. He was removed from administrative segregation and sentenced to the Hard 40 term, which is life in prison with no possibility of parole for 40 years.

On April 3, 2009, the death sentence of Michael Marsh of Sedgwick County was vacated pursuant to a plea agreement. He was removed from administrative segregation and sentenced to two life sentences, with parole eligibility after 55 years, but with 85 months to serve for additional convictions if paroled.

On March 24, 2010, the death sentence of Gavin Scott of Sedgwick County was vacated pursuant to a plea agreement. He was removed from administrative segregation and sentenced to two life sentences.

In 2010, a Shawnee County district judge granted Phillip D. Cheatham, Jr., who was under sentence of death, a new sentencing hearing. In January 2013, before this hearing was held, the Kansas Supreme Court found Cheatham's trial counsel was ineffective, reversed Cheatham's convictions, and remanded the case for a new trial.

In January 2015, Cheatham legally changed his name to King Phillip Amman Reu-El. During jury selection for his retrial in February 2015, Amman Reu-El pleaded no-contest to capital murder and attempted murder charges. At a sentencing hearing in March 2015, the district court denied Amman Reu-El's request to withdraw his pleas and sentenced Amman Reu-El to the Hard 25 term (life in prison with no possibility of parole



for 25 years) for the capital counts and 13 years, 9 months for the attempted murder count, to be served consecutively. In May 2015, Amman Reuel filed an appeal of the district court's denial of his motion to withdraw his pleas. The Kansas Supreme Court affirmed the district court's denial in May 2017. In September 2015, Amman Reuel filed a pleading in district court claiming he received ineffective assistance of counsel in making his pleas, and repeated these claims in a supporting affidavit and KSA 60-1507 *habeas* motion filed with the district court in August 2017. This motion was denied by the district court in October 2017. As of September 2018, an appeal from this denial was pending in the Kansas Court of Appeals.

In August 2012, the Kansas Supreme Court reversed the capital murder convictions of Scott Dever Cheever and ordered the case remanded for a new trial. Cheever was under sentence of death for the convictions. The State appealed the case to the U.S. Supreme Court, which issued an opinion December 11, 2013, vacating the judgment of the Kansas Supreme Court and remanding the case for further consideration by Kansas courts of possible error under the Fifth Amendment or Kansas evidentiary rules. The Kansas Supreme Court heard further oral argument in September 2014 but stayed release of a decision pending the U.S. Supreme Court's review of the *Gleason* and *Carr* cases (see below). Following the U.S. Supreme Court's release of the decisions in those cases, the Kansas Supreme Court released, in July 2016, a decision upholding Cheever's convictions and death sentence. As in the *Robinson* decision (see below), Justice Johnson was the lone dissenting justice. Cheever's petition for writ of *certiorari* was denied by the U.S. Supreme Court in December 2017. As of September 2018, Cheever was being held in special management at Lansing Correctional Facility. Cheever's direct appeals are now exhausted, but there may be further state or federal court proceedings on collateral issues.

In July 2014, the Kansas Supreme Court vacated death sentences in three cases. The Court vacated Sidney John Gleason's death sentence and remanded for resentencing. In the

appeals of Jonathan Daniel Carr and Reginald Dexter Carr, Jr., the Court reversed all but one of each defendant's capital murder convictions, vacated each defendant's death sentence for the remaining capital murder conviction, and remanded to the district court for further proceedings. However, the U.S. Supreme Court granted the Kansas Attorney General's petition for writ of *certiorari* in all three cases and heard oral argument in the cases in October 2015. In January 2016, the U.S. Supreme Court released decisions in all three cases reversing the Kansas Supreme Court's judgments (thereby reinstating the death sentences) and remanding to the Kansas Supreme Court for further proceedings. In February 2017, the Kansas Supreme Court affirmed Gleason's death sentence. Gleason's direct appeals are now exhausted, but there may be further state or federal court proceedings on collateral issues. As of September 2018, further proceedings are pending before the Kansas Supreme Court on additional issues in the Carr brothers' cases.

In November 2015, the Kansas Supreme Court upheld a capital murder conviction and death sentence of John Edward Robinson, Sr., for one of the counts of capital murder charged against him. This marked the first death sentence upheld by the Court since the reenactment of the death penalty in Kansas. The Court reversed two other murder convictions as multiplicitous and affirmed remaining convictions. The lone dissent from the Court's decision was by Justice Johnson, who disagreed that the State had properly charged and proven the count of capital murder upheld by the Court. The dissent also stated that the death penalty is both "cruel" and "unusual" and therefore violates § 9 of the *Kansas Constitution Bill of Rights*.

The Court subsequently denied Robinson's motion for rehearing and modification of judgment, and Robinson's petition for writ of *certiorari* was denied by the U.S. Supreme Court in October 2016. Robinson's direct appeals are now exhausted, but there may be further state or federal court proceedings on collateral issues.

In October 2016, the Kansas Supreme Court upheld Gary Kleypas' capital murder conviction

and death sentence. It reversed a conviction for attempted rape and remanded the case for resentencing on a conviction of aggravated burglary. Justice Johnson dissented, citing his dissenting opinions in *Robinson* and *Cheever*.

In February 2018, the Kansas Supreme Court upheld James Kahler’s capital murder conviction and death sentence. Justice Johnson dissented, stating he would vacate and remand for resentencing based upon cumulative guilt-phase errors that undermined the jury’s death sentence determination. Citing his *Robinson* dissent, he again stated the death penalty is an unconstitutional cruel or unusual punishment. In April 2018, Kahler filed a notice of intent to file a petition for writ of *certiorari*.

In June 2018, the Kansas Supreme Court upheld Justin Thurber’s convictions for capital murder and aggravated kidnapping, but reversed the district court’s determination that there was not reason to believe Thurber was intellectually disabled such that Thurber could not be sentenced to death. The Supreme Court remanded the issue of the determination of Thurber’s intellectual disability to the district court for reconsideration in light of U.S. Supreme Court decisions and Kansas statutory changes that had occurred while Thurber’s case was on appeal. Justice Rosen dissented, stating he would uphold the district court’s intellectual disability determination

and proceed to other penalty phase issues. In a separate dissent, Justice Johnson stated he would reverse Thurber’s death sentence and resentence to life in prison on the cruel and unusual punishment grounds he has outlined in previous cases or on the basis of the majority’s finding that the intellectual disability statute in effect when Thurber was sentenced was unconstitutionally restrictive.

As of September 2018, ten inmates under a death penalty sentence are being held in administrative segregation because Kansas does not technically have a death row. Inmates under sentence of death (other than Cheever) are held in administrative segregation at the El Dorado Correctional Facility (EDCF).

**State-to-State Comparison**

Kansas is one of 30 states that has a death penalty. The following tables show the states with a death penalty and the 20 states without such penalty. According to the Death Penalty Information Center, as of November 2016, four states with a death penalty (Colorado, Oregon, Pennsylvania, and Washington) also had an existing gubernatorial moratorium on the death penalty. (The Washington Supreme Court subsequently struck down the death penalty in that state.)

Jurisdictions with the Death Penalty				
Alabama	Idaho	Montana	Oregon	Virginia
Arizona	Indiana	Nebraska	Pennsylvania	Wyoming
Arkansas	Kansas*	Nevada	South Carolina	U.S. Government
California	Kentucky	New Hampshire*	South Dakota	U.S. Military*
Colorado	Louisiana	North Carolina	Tennessee	
Florida	Mississippi	Ohio	Texas	
Georgia	Missouri	Oklahoma	Utah	
* Indicates jurisdiction with no executions since 1976.				

<b>Jurisdictions without the Death Penalty (year abolished in parentheses)</b>		
Alaska (1957)	Maryland (2013)	New York (2007)
Connecticut (2012)	Massachusetts (1984)	North Dakota (1973)
Delaware <sup>1</sup> (2016)	Michigan (1846)	Rhode Island (1984)
Hawaii (1948)	Minnesota (1911)	Vermont (1964)
Illinois (2011)	New Jersey (2007)	Washington <sup>3</sup> (2018)
Iowa (1965)	New Mexico <sup>2</sup> (2009)	West Virginia (1965)
Maine (1887)	District of Columbia (1981)	Wisconsin (1853)
<p>1 In August 2016, the Delaware Supreme Court held the state's capital sentencing procedures were unconstitutional and struck down the state's death penalty statute. The Delaware Supreme Court subsequently applied the decision retroactively to the 13 people with active death sentences, who were resentenced to lifetime imprisonment without parole.</p> <p>2 In March 2009, New Mexico repealed the death penalty. The repeal was not retroactive, which left two people on the state's death row.</p> <p>3 In October 2018, the Washington Supreme Court held the state's death penalty was unconstitutional, struck down the state's death penalty statute, and converted the sentences of the eight people with active death sentences to lifetime imprisonment without possibility of release.</p> <p>Source: Death Penalty Information Center.</p>		

## Recent Developments

In March 2009, the Senate Judiciary Committee held a hearing on SB 208 to repeal the death penalty in Kansas. The bill was amended and passed out of the Committee. The Senate Committee of the Whole re-referred the bill to the Senate Judiciary Committee for study by the Judicial Council during the interim. The Judicial Council formed the Death Penalty Advisory Committee to study SB 208 and concluded the bill presented a number of technical problems that could not be resolved by amending the bill. Instead, the Committee drafted a new bill, which was introduced in the 2010 Session as SB 375. SB 375 was passed, as amended, out of the Senate Committee on Judiciary. However, the bill, was killed on final action in the Senate Committee of the Whole.

Bills that would abolish the death penalty were again introduced in both chambers in 2011, 2013, 2015 (House only), 2016, and 2017. With the exception of 2017 HB 2167, which received a hearing in the House Committee on Corrections and Juvenile Justice, no further action was taken on these bills.

The 2012 House Committee on Corrections and Juvenile Justice held an “informational” hearing on the death penalty.

In 2013, HB 2388 was introduced and heard in the House Committee on Corrections and Juvenile Justice. This bill would have amended KSA 21-6619 to limit Kansas Supreme Court review in death penalty cases to properly preserved and asserted errors and allowing the Court to review

unpreserved and unassigned errors only to correct manifest injustice (as defined in the bill). Proponents of the bill indicated it was introduced in response to the Kansas Supreme Court's decision in *State v. Cheever*, 295 Kan. 229 (2012). A motion in the Committee to recommend the bill favorably as amended failed, and no further action was taken on the bill.

The 2013 Legislature passed Senate Sub. for HB 2043, which allows the Attorney General to file notice of intent to seek the death penalty in those cases where the county or district attorney or a court determines a conflict exists.

In 2014, the Senate Judiciary Committee introduced SB 257, which would have amended the procedure for direct appeals in death penalty cases by establishing statutory time limits and appellate brief page limits and limiting the scope of review. The bill would also have imposed

additional requirements and limitations on both KSA 60-1507 motions generally, as well as KSA 60-1507 motions specifically filed by prisoners under sentence of death. The Senate Judiciary Committee slightly modified the language of SB 257 and recommended a substitute bill for HB 2389 containing this language. Senate Sub. for HB 2389 passed the Senate with these provisions, but they were removed by the conference committee and the bill was passed without any specific death penalty-related provisions.

In 2016, the Legislature passed Senate Sub. for 2049, amending the definition of "significantly subaverage general intellectual functioning." This legislation was introduced in response to the U.S. Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014), holding that Florida's threshold requirement for submission of intellectual disability evidence in the context of capital sentencing was unconstitutional.

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### Judiciary, Corrections, and Juvenile Justice

#### G-5 Juvenile Services

The Division of Juvenile Services within the Kansas Department of Corrections (KDOC) oversees juvenile offenders in Kansas. Individuals as young as 10 years of age and as old as 17 years of age may be adjudicated as juvenile offenders. KDOC may retain custody of a juvenile offender in a juvenile correctional facility (JCF) until the age of 22.5 and in the community until the age of 23.

Juvenile Services leads broadly based state and local, public, and private partnerships to provide the State's comprehensive juvenile justice system, including prevention and intervention programs, community-based graduated sanctions, and JCFs.

Juvenile Services' operations consist of two major components:

- **Community-based prevention, immediate interventions, and graduated sanctions programs for nonviolent juvenile offenders.** Juvenile Services also administers grants to local communities for juvenile crime prevention and intervention initiatives. In addition to providing technical assistance and training to local communities, the division is responsible for grant oversight and auditing all juvenile justice programs and services.
- **Juvenile correctional facilities for violent juvenile offenders.** On March 3, 2017, Larned Juvenile Correctional Facility (LJCF) closed. The facility was able to house up to 128 juveniles. LJCF was one of two Kansas JCFs. At present, the only JCF in Kansas is the Kansas Juvenile Correctional Complex (KJCC) located in Topeka. A third facility, Atchison Juvenile Correctional Facility, suspended operations on December 8, 2008, and a fourth facility, Beloit Juvenile Correctional Facility, suspended operations on August 28, 2009.

The 2016 Legislature passed SB 367, which made substantial reforms to the Kansas juvenile justice system in both the community-based services and the JCF operations for which Juvenile Services is responsible. KDOC's Juvenile Services program is tasked with implementing many of the provisions of SB 367, either alone or in conjunction with other partners in the juvenile justice system. The 2017 Legislature passed House Sub. for SB 42, which made further amendments to the system as a follow-up to SB 367.

Further detail regarding SB 367 and House Sub. for SB 42 is provided on the following pages.

### **Kansas Juvenile Justice Authority's (JJA) History and Community Focus**

The juvenile justice reform process implemented in Kansas from 1997 to 2000 focused on prevention, intervention, and community-based services, with the premise that a youth should be placed in a JCF for rehabilitation and reform only as a last resort and that youth are more effectively rehabilitated and served within their own community. Prior to the transition, juvenile justice functions were the responsibility of several state agencies, including the Office of Judicial Administration (OJA); the Department of Social and Rehabilitation Services (SRS), which is now the Department for Children and Families (DCF); and KDOC. Other objectives included separating juvenile offenders from children in need of care in the delivery of services.

Due to the focus on serving youth in their own community, each county or group of cooperating counties is required by statute to make themselves eligible to receive state funding for the development, implementation, operation, and improvement of juvenile community correctional services. Each county, or the designee of a group of counties, is referred to as an administrative county and directly receives funding from the agency for operation of community juvenile justice services.

SB 367 will adjust the focus and funding mechanisms for some of this funding over the next several years.

Pivotal roles of the Community Programs Division include ensuring the community service continuum is efficient and effective in addressing the needs of the youth; building upon established collaborations with local units of government and other key stakeholders; and monitoring programs along the continuum of services from prevention and intervention to rehabilitative service delivery.

### **Juvenile Justice Reform Time Line**

**1993 and 1994.** Research began on the proposed transition with a legislative review of juvenile crime and the creation of the Criminal Justice Coordinating Council, which was charged to study and develop policies and recommendations regarding juvenile justice reform.

**1995.** The Kansas Youth Authority (KYA) and JJA were created with the enactment of 1995 SB 312.

The mission of KYA was to develop policies related to the scope and function of the JJA. Specific areas studied included confinement, diversion, fines, restitution, community service, standard probation, intensive supervision, house arrest programs, electronic monitoring, structured school, day reporting centers, community residential care, treatment centers, and sanctions.

JJA was assigned to:

- Control and manage the operation of the state youth centers (now referred to as JCFs);
- Evaluate the rehabilitation of juveniles committed to JJA and prepare and submit periodic reports to the committing court;
- Consult with the state schools and courts on the development of programs for the reduction and prevention of delinquency and the treatment of juvenile offenders;
- Cooperate with other agencies that deal with the care and treatment of juvenile offenders;
- Advise local, state, and federal officials, public and private agencies, and lay groups on the need for and possible methods of reduction and prevention of delinquency and the treatment of juvenile offenders;
- Assemble and distribute information relating to delinquency and report on studies relating to community conditions that affect the problem of delinquency;

- Assist any community within the state by conducting a comprehensive survey of the community's available public and private resources, and recommend methods of establishing a community program for combating juvenile delinquency and crime; and
- Direct state money to providers of alternative placements in local communities, such as supervised release into the community, out-of-home placement, community services work, or other community-based service; provide assistance to such providers; and evaluate and monitor the performance of such providers relating to the provision of services.

**1996.** HB 2900, known as the Juvenile Justice Reform Act of 1996, outlined the powers and duties of the Commissioner of Juvenile Justice.

The bill also addressed the areas of security measures, intake and assessment, dual sentencing, construction of maximum security facility or facilities, child support and expense reimbursement, criminal expansion, disclosure of information, immediate intervention programs, adult presumption, parental involvement in dispositional options, parental responsibility, school attendance, parental rights, and immunization.

Further, the bill changed the date for the transfer of powers, duties, and functions regarding juvenile offenders from SRS and other state agencies to July 1, 1996. The bill stated KYA must develop a transition plan that included a juvenile placement matrix, aftercare services upon release from a JCF, coordination with SRS to consolidate the functions of juvenile offender and children in need of care intake and assessment services on a 24-hour basis, recommendations on how all juveniles in police custody should be processed, and the transfer from a state-based juvenile justice system to a community-based system according to judicial districts.

**1997.** The Legislature amended the Juvenile Justice Reform Act of 1996 with House Sub. for SB 69, including changes in the administration

of the law. In addition, the amendments dealt with juvenile offender placements in an effort to maximize community-based placements and reserve state institutional placements for the most serious, chronic, and violent juvenile offenders.

Also included in this bill was the creation of the Joint Committee on Corrections and Juvenile Justice and the Kansas Advisory Group on Juvenile Justice and Delinquency Prevention, which took the place of KYA. On July 1, JJA began operations and assumed all the powers, duties, and functions concerning juvenile offenders from SRS.

## Recent Reform Efforts

### 2013

Executive Reorganization Order (ERO) No. 42 abolished the Juvenile Justice Authority (JJA) and transferred the jurisdiction, powers, functions, and duties of the JJA and the Commissioner of Juvenile Justice to KDOC and the Secretary of Corrections, effective July 1, 2013. All officers and employees of the JJA engaged in the exercise of the powers, duties, and functions transferred by the ERO were transferred to the KDOC, unless they were not performing necessary services.

### 2014

Following an informational hearing on juvenile justice reform initiatives, the House Committee on Corrections and Juvenile Justice charged a subcommittee with evaluating reform proposals and recommending legislation on the topic. Various proposals were consolidated and passed by the Legislature in Senate Sub. for HB 2588. The provisions included:

- Requiring a standardized risk assessment tool or instrument be included as part of the pre-sentence investigation and report following an adjudication;
- Prohibiting the prosecution of any juvenile less than 12 years of age as an adult;

- Restructuring the placement matrix to make commitment to a JCF a departure sentence requiring a hearing and substantial and compelling reasons to impose such sentence for certain lower level offense categories;
- Allowing juvenile offenders serving minimum-term placement sentences under the matrix to receive “good time” credit;
- Requiring the Secretary of Corrections to take certain measures to evaluate youth residential centers (YRCs) and develop fee schedules and plans for related services;
- Prohibiting a child alleged or found to be a child in need of care from being placed in a juvenile detention facility unless certain conditions are met; and
- Creating a new alternative adjudication procedure for misdemeanor-level juvenile offenses to be utilized at the discretion of the county or district attorney with jurisdiction over the offense.

## 2015

Additional reform efforts continued with passage of HB 2336, which required the court to administer a risk assessment tool or review a risk assessment tool administered within the past six months before a juvenile offender can be placed in a juvenile detention center, under house arrest, or in the custody of the KDOC or can be committed to a sanctions house or to a JCF.

Further, to examine Kansas’ juvenile justice system, leaders of the executive, judicial, and legislative branches of government established a bipartisan, inter-branch Juvenile Justice Workgroup. In cooperation with the Pew Charitable Trusts’ Public Safety Performance Project, the Workgroup was charged with a comprehensive examination of the system to develop data-driven policies based upon research and built upon consensus among key stakeholders from across the state. The Workgroup recommendations were presented

at its November 17, 2015, meeting. A complete list of the Workgroup’s recommendations can be found at <https://www.doc.ks.gov/juvenile-services/Workgroup/overview>.

## 2016

The recommendations from the 2016 Workgroup were drafted into legislation and introduced as SB 367 in the 2016 Session.

While substantial changes were made to the bill during committee action and the conference committee process, the enacted bill nevertheless represented a comprehensive reform of the Kansas juvenile justice system.

Major provisions of the bill included the following.

**Juveniles in custody.** The bill narrows the persons authorized to take a juvenile into custody and makes delivery of a juvenile to the juvenile’s parent the default in most instances. The bill also requires both release and referral determinations once a juvenile is taken into custody to be made by juvenile intake and assessment workers, who must be trained in evidence-based practices.

**Immediate interventions and community-based programs.** The bill requires KDOC and OJA to develop standards and procedures for an immediate intervention process and programs and alternative means of adjudication. The bill requires KDOC to plan and fund incentives for the development of immediate intervention programs, removes limitations on eligibility for such programs, requires immediate intervention be offered to certain juveniles, and requires juveniles making a first appearance without an attorney to be informed of the right to an immediate intervention.

Further, courts must appoint a multidisciplinary team to review cases when a juvenile does not substantially comply with the development of an immediate intervention plan.

Eligibility for alternative means of adjudication is changed from a juvenile committing a misdemeanor to a juvenile with fewer than two adjudications. The bill establishes overall case



length and probation length limits for all juvenile offenders except those adjudicated of the most serious felonies.

The bill also requires KDOC to consult with the Kansas Supreme Court in adopting rules and regulations for a statewide system of structured, community-based, graduated responses for technical probation violations, conditional release violations, and sentence condition violations, which community supervision officers will use based on the results of a risk and needs assessment. The community supervision officer must develop a case plan with the juvenile and the juvenile's family. Probation revocation may be considered only for a third or subsequent technical violation, subject to additional limitations. KDOC is required to develop an earned-time calculation system for the calculation of sentences. Similarly, the Kansas Supreme Court and KDOC must establish a system of earned discharge for juvenile probationers.

**Criteria for detention and alternatives.** KDOC and OJA are required to develop, implement, and validate a statewide detention risk assessment tool for each youth under consideration for detention.

The criteria for detention are amended to require certain detention risk assessment results or grounds to override such results. Courts must establish a specific term of detention when placing a juvenile in detention, which may not exceed the overall case length limit.

The bill prohibits placement in a juvenile detention center in certain circumstances and removes juvenile detention facilities as a placement option under the Revised Kansas Code for Care of Children, unless the child also is alleged to be a juvenile offender and the placement is authorized under the Juvenile Code. The permissible justifications for extended detention are narrowed, and a detention review hearing is required every 14 days a juvenile is in detention, except for juveniles charged with the most serious offenses.

The bill requires OJA and KDOC to adopt a single, uniform risk and needs assessment to

be administered and used statewide in the post adjudication and predisposition process.

The bill narrows and eliminates some alternatives and amends the alternative allowing commitment to a JCF to allow placement in a JCF or YRC. Effective January 1, 2018, the Secretary of Corrections may contract for up to 50 non-foster home beds in YRCs for placement of juvenile offenders. The bill limits commitment to detention and adds certain short-term placement options if a juvenile has been adjudicated of certain sexual or human trafficking-related offenses. Further, KDOC must develop community integration programs for juveniles ready to transition to independent living.

The bill amends the placement matrix for commitment to a JCF to require a written finding before such placement, remove a departure sentence provision, create a serious offender category, remove two chronic offender categories, and create a rebuttable presumption certain offenders will be placed in a YRC instead of a JCF. The bill also requires a case plan be developed for every juvenile sentenced to a JCF, with input from the juvenile and the juvenile's family.

**Adult prosecution.** The bill limits extended jurisdiction juvenile prosecution to cases involving the most serious offenses and raises the age for adult prosecution from 12 to 14.

**Implementation.** The bill establishes a 19-member Kansas Juvenile Justice Oversight Committee to oversee implementation of reforms in the juvenile justice system and requires annual reports. (*Note:* The Oversight Committee is separate from the Joint Committee on Corrections and Juvenile Justice Oversight, established by KSA 46-2801 and charged in that statute with certain ongoing oversight duties related to the juvenile justice system. Additional members and duties were added to the Oversight Committee by 2017 House Sub. for SB 42, discussed in the following paragraph.) The bill adds a juvenile defense representative member to the previously existing juvenile corrections advisory boards and requires the boards to adhere to the goals of the Juvenile Code and coordinate with the Oversight

Committee. The boards must annually consider the availability of treatment programs, alternative incarceration programs, mental health treatment, and development of risk assessment tools, and report annually to KDOC and the Oversight Committee the costs of programs needed in its judicial district to reduce out-of-home placement and recidivism.

The bill requires KDOC and OJA to provide at least semiannual training on evidence-based programs and practices to individuals who work with juveniles. OJA is required to designate or develop a training protocol for judges, county and district attorneys, and defense attorneys who work in juvenile court. Further, the bill requires the Attorney General to collaborate with the Kansas Law Enforcement Training Center and the State Board of Education (KSBE) to create skill development training for responding effectively to misconduct in school, while minimizing student exposure to the juvenile justice system, and directs KSBE to require school districts to develop and approve memorandums of understanding with guidelines for referral of school-based behaviors to law enforcement or the juvenile justice system.

**Funding.** The bill creates the Kansas Juvenile Justice Improvement Fund (renamed the “Evidence-Based Programs Account of the State General Fund” by 2017 House Sub. for SB 42, discussed below), administered by KDOC, for the development and implementation of evidence-based community programs and practices for juvenile offenders and their families by community supervision offices. Each year, the Secretary of Corrections is required to certify actual or projected cost savings in state agency accounts from decreased reliance on incarceration in a JCF or YRC; and these amounts are then transferred to the fund.

## 2017

The Legislature passed House Sub. for SB 42 during the 2017 Session, which adjusted changes made by 2016 SB 367 and made further modifications to the juvenile justice system. Major provisions of this bill include the following.

**Absconding from supervision.** Among other changes regarding absconding from supervision, the bill allows a court to issue a warrant after reasonable efforts to locate a juvenile who has absconded are unsuccessful and to toll the probation term limits and overall case length limits (established by SB 367) while a juvenile has absconded.

**Immediate intervention programs.** The bill requires KDOC to establish and maintain a statewide searchable database containing information regarding juveniles who participate in an immediate intervention program.

The bill establishes that immediate intervention does not have to be offered to a juvenile charged with a misdemeanor sex offense, a juvenile who has previously participated in immediate intervention, or a juvenile who was originally charged with a felony but had the charge amended to a misdemeanor as a result of a plea agreement.

**Sentencing and placement.** The bill amends the sentencing alternatives and placement matrix to allow a court to commit a juvenile directly to a JCF or YRC placement for a term of 6-18 months, regardless of the risk level of the juvenile, upon a finding that a firearm was used in the commission of a felony offense by the juvenile.

The bill removes a three-month limit on short-term alternative placement allowed when a juvenile is adjudicated of certain sex offenses and certain other conditions are met.

**Juvenile Justice Oversight Committee.** The bill adds two members to the Oversight Committee—a youth member of the Kansas Advisory Group on Juvenile Justice and Delinquency Prevention (appointed by the chairperson of the Group) and a director of a juvenile detention facility (appointed by the Attorney General)—bringing its total membership to 21. The bill also provides two additional duties for the Oversight Committee: 1) study and create a plan to address the disparate treatment of and availability of resources for juveniles with mental health needs in the juvenile justice system, and 2) review portions of juvenile justice reform that require KDOC and OJA to

cooperate and make recommendations when there is no consensus between the two agencies.

## 2018

### *Further Adjustments*

The Legislature passed HB 2454 during the 2018 Session, which made further adjustments to the juvenile justice system as reformed by SB 367. Major provisions of this bill include the following.

**Detention hearings.** The bill amended the statute in the Revised Kansas Juvenile Justice Code (Code) governing detention hearings to expand the permitted use of two-way electronic audio-visual communication between the juvenile and the judge. The bill further amended law related to detention review hearings by adding a provision stating such hearings are not required for a juvenile offender held in detention awaiting case disposition. The bill amended the Code statute governing post-adjudication orders and hearings to require, if a juvenile offender is being held in detention, that a dispositional hearing for sentencing take place within 45 days after the juvenile has been adjudicated.

**Tolling of probation term and case length limits.** The bill amended the statute governing probation term limits and overall case length limits in the Code to clarify that when such limits are tolled due to the offender absconding from supervision while on probation, the limits shall not begin to run again until the offender is located and brought back to the jurisdiction. The bill also clarified, if the juvenile fails to appear for the dispositional hearing, such limits shall not apply until the juvenile is brought before the court for disposition.

**Duties of Oversight Committee.** The bill amended one of the statutory duties of the Kansas Juvenile Justice Oversight Committee (Oversight Committee) to require the Oversight Committee to “monitor,” rather than “calculate,” any state expenditures that have been avoided by reductions in the number of youth placed in out-of-home placements. A corresponding requirement that a summary of such averted

costs be included in the Oversight Committee’s annual report was changed from “calculated by the committee” to “determined.”

### *Juvenile Crisis Intervention Centers*

The 2018 Legislature also passed House Sub. for SB 179, establishing a framework for juvenile crisis intervention centers, which will provide short-term observation, assessment, treatment, and case planning, in addition to referral, for juveniles experiencing a mental health crisis who are likely to cause harm to self or others. The bill provides intervention center requirements in several areas, including access to various services, construction and environmental features, and policies and procedures for operation and staff monitoring of entrances and exits. The bill also outlines circumstances for admission, prohibits admission for more than 30 days, and allows a parent with legal custody or a legal guardian of a juvenile to remove the juvenile from the center at any time.

The bill allows the Secretary of Corrections to enter into a memorandum of agreement with other cabinet agencies to provide funding for juvenile crisis intervention services of up to \$2.0 million annually from the Evidence-Based Programs Account created by SB 367.

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### Judiciary, Corrections, and Juvenile Justice

#### G-6 Kansas Prison Population, Capacity, and Related Facility Issues

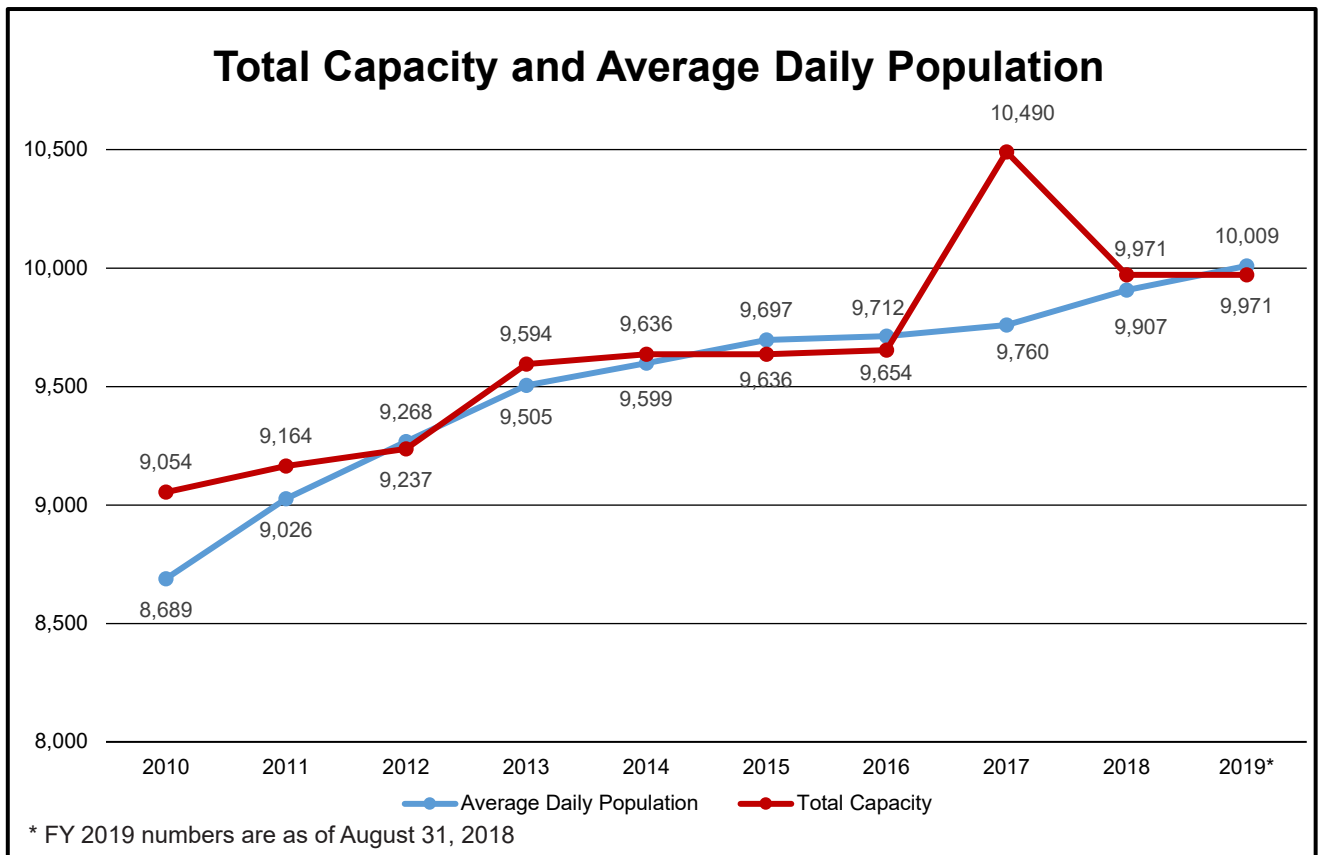
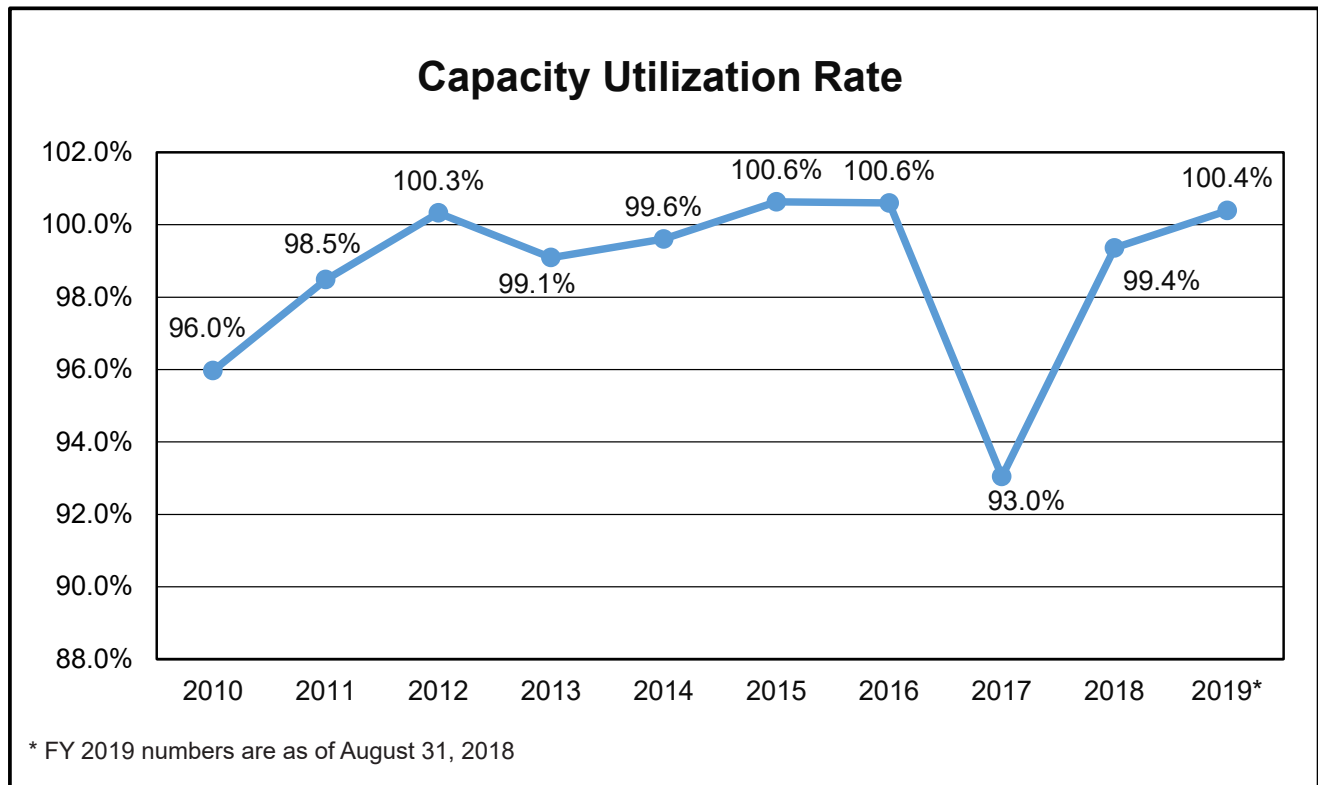
##### Background

Historically, the Kansas Department of Corrections (KDOC) and state policymakers have had to address the issue of providing adequate correctional capacity for steady and prolonged growth in the inmate population. In 1863, the Kansas State Penitentiary, later known as Lansing Correctional Facility, opened as Kansas' first State-run correctional facility under the administration of the Board of Directors of the Penitentiary. Currently, the KDOC administers eight adult correctional facilities identified in the table below.

Correctional Facility	Year Opened	Capacity as of FY 2018
El Dorado CF	1991	1,955
Ellsworth CF	1987	913
Hutchinson CF	1895	1,862
Lansing CF	1863	1,906
Larned CMHF	1996	598
Norton CF	1987	975
Topeka CF	1961	903
Winfield CF	1984	804

The State gained control of its second State-run correctional facility in 1911 when the Board of Penal Institutions took control of the Kansas State Industrial Reformatory, later known as Hutchinson Correctional Facility, which had originally opened in 1895. In 1961, the State opened the Kansas State Reception and Diagnostic Center, followed by the Kansas Correctional Vocational Training Center in 1972. These two facilities were combined in 1990 to create the Topeka Correctional Facility.

In the 1980s, capacity at the correctional facilities did not keep pace with populations, which led to the Legislature establishing Winfield Correctional Facility in 1984 and Ellsworth, Norton, Osawatomie, and Stockton Correctional Facilities in 1987. A 1989 federal court order limited inmate populations at Lansing and Hutchinson and required improved conditions for inmates with mental health issues. The direct result of this order was construction of a new facility that became El Dorado Correctional Facility (EDCF) in 1991. The court



order was terminated in 1996 following numerous changes to the correctional system, including the construction of Larned Correctional Mental Health Facility (LCMHF).

Budget reductions in FY 2009 prompted KDOC to suspend operations at three smaller minimum-custody facilities (Stockton, Osawatomie, and Toronto) and close the men's and women's conservation camps in Labette County. Additionally, the Kansas Department for Aging and Disability Services took control over the Osawatomie facility. Due to the increasing inmate population, the 2010 Legislature included a State General Fund appropriation for FY 2011, which allowed the reopening of Stockton Correctional Facility as a satellite unit of Norton Correctional Facility on September 1, 2010.

LCMHF has traditionally provided mental health services to inmates in need, but in May 2017, KDOC announced its intention to convert LCMHF into a prison for 18- to 25-year-old inmates. KDOC intends to move the inmates receiving mental health services to EDCF in the coming years. On November 1, 2017, the Secretary of Corrections stated 62 high-acuity behavioral beds were open at EDCF, and expressed KDOC's intent to open another 124 high-acuity behavioral health beds in EDCF's Individualized Reintegration Unit.

## Calculating Capacity

KDOC calculates the capacity utilization rate by dividing the average daily population (ADP) by total capacity; in order to analyze the percentage of beds that are in use on an average day during a given fiscal year. In the past ten years, ADP has steadily risen every year, while total capacity has also generally followed that trend. During that time, the capacity utilization rate saw a peak of 100.6 percent in both FY 2015 and FY 2016, which was then followed by its lowest point of 93.0 percent in FY 2017. This 7.6 percent decline was due to the expansion of 800 double-bunked cells at EDCF, LCMHF, and the Norton Correctional Facility during FY 2017. However, the double-bunking did not continue to the end of FY 2018, when the total capacity fell by 519 beds from its highest point in FY 2017. On August 31, 2018,

the ADP in FY 2019 was 10,009 inmates, and the capacity utilization rate was 100.4 percent, which are increases from FY 2018 of 36 inmates and 1.0 percent, respectively.

KDOC has a limited number of prison beds that are not counted in the official capacity, such as infirmary beds, which allows the population to exceed the official capacity. The August 31, 2018, inmate ADP in FY 2019 included 103 inmates held in non-KDOC facilities, which were primarily county jails and Larned State Hospital.

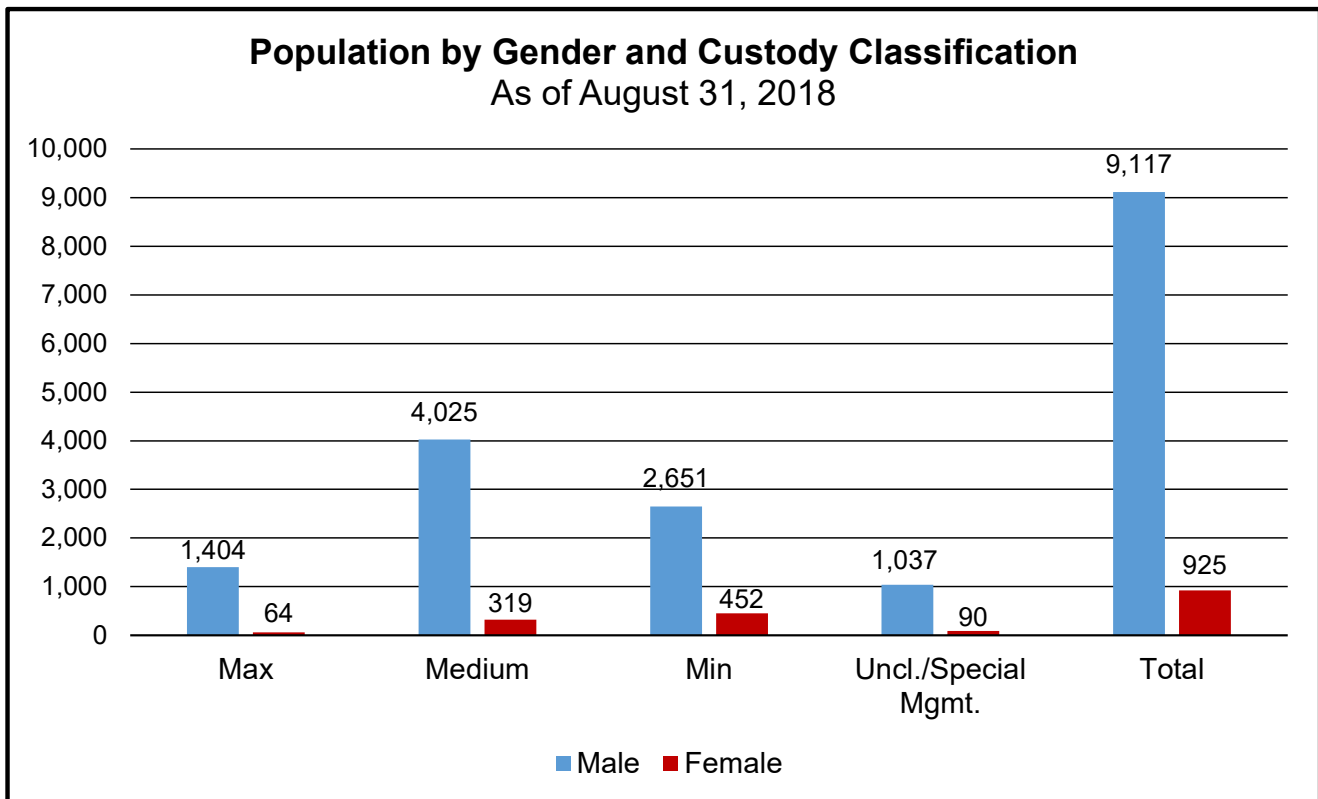
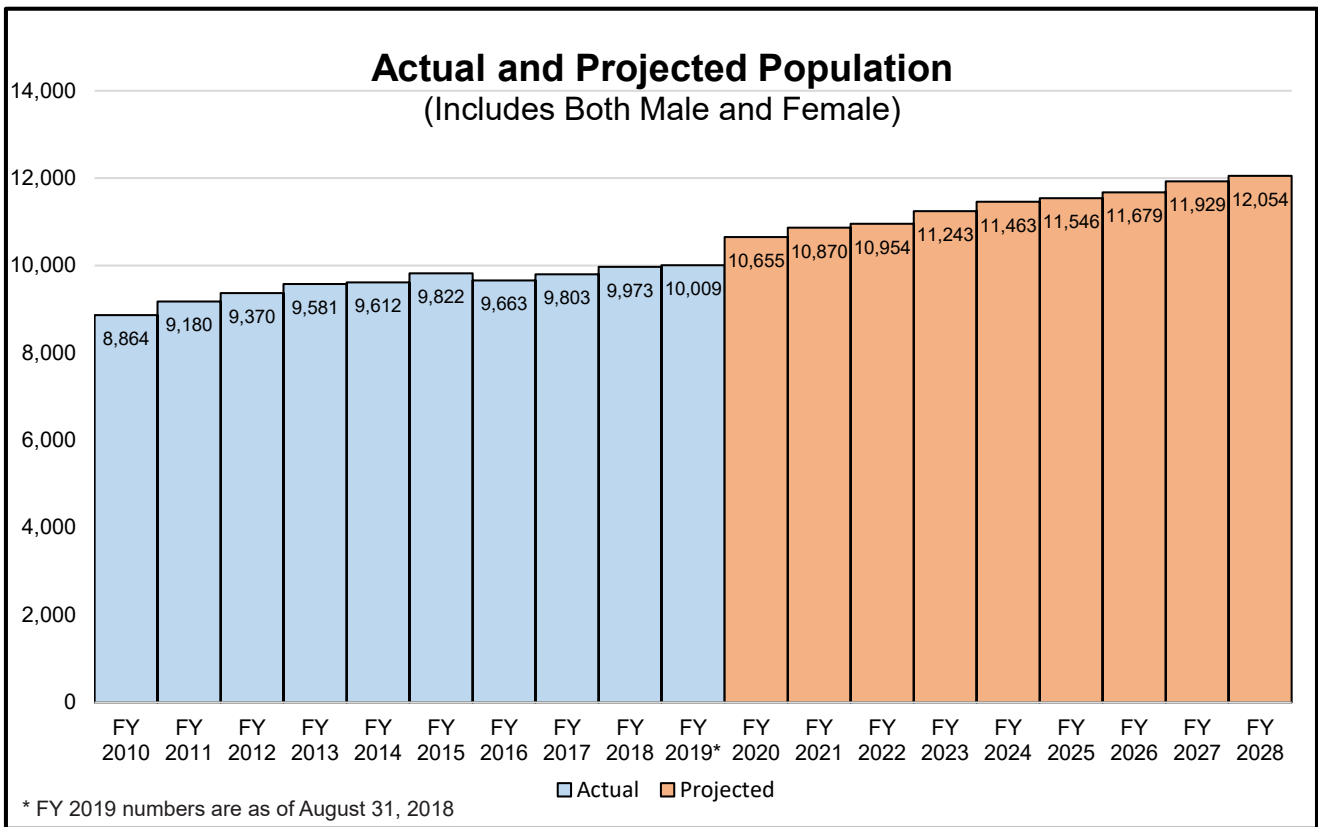
## Actual and Projected Populations

The FY 2019 prison population projections released by the Kansas Sentencing Commission (KSC) anticipate the inmate population will be 327 more than the total capacity by the end of FY 2019 and will exceed capacity by 2,083 inmates by the end of FY 2028.

In addition to total capacity, gender and custody classifications are tracked by KDOC. Issues with inadequate capacity are more common among the higher custody levels of inmates. This is due to the fact that higher custody level inmates cannot be placed in a lower custody level cell (e.g., maximum inmates cannot be placed in medium or minimum cells). That is not the case for the lower custody level inmates, who can be placed in higher custody level cells. In addition, capacity in all-male or all-female facilities are not available for housing inmates of the opposite gender. The Population by Gender and Custody Classification chart on the following page displays the total inmate population by gender and custody classification for FY 2019, as of August 31, 2018.

The FY 2019 prison population projections released by the KSC anticipate the male inmate population will be over capacity by 256 inmates in FY 2019 and will increase for every year in its ten-year projection, when there will be 10,934 inmates, or 1,878 over capacity, in FY 2028.

The FY 2019 prison population projections show the female inmate population exceeding capacity by 63 inmates. The KSC projects that over ten years, the female population will steadily rise to





1,060 in 2021, then stay level until 2027, when the population will rise to 1,126, and finally fall to 1,120, or 205 above capacity, in FY 2028.

Actual and projected populations are detailed in the Actual and Projected Population chart.

### **Consequences of Operating Close to Capacity**

According to KDOC, the following illustrates some of the consequences of operating close to capacity:

- Excessive inmate movement;
- More difficult-to-manage emergencies and separate inmates with conflicts (e.g., gangs, grudges);
- Greater reliance on segregation and contract jail beds; and
- Inability to keep inmates near to their families, which creates more problematic releases.

### **Increasing Capacity through New Construction**

During the 2007 Legislative Session, KDOC received bonding authority totaling \$40.5 million for new construction, including adding cell houses at El Dorado, Stockton, and Ellsworth Correctional Facilities and a new facility in Yates Center. KDOC issued \$1.7 million in bonds for architectural planning at the four proposed sites, but the balance of the bonding authority was rescinded during the 2008 and 2009 Legislative Sessions. KDOC completed planning for expansion of EDCF and beginning in FY 2017, included plans for construction on two new cell houses at EDCF in its five-year capital improvement plan at a total cost of \$24.9 million. Each cell house would contain up to 256 beds depending on the combination of single- and double-occupancy cells.

During the October 4, 2016, meeting of the Joint Committee on State Building Construction, KDOC asked the Committee to recommend that its requests to finance the construction of two

facilities at EDCF, then totaling \$27.2 million all from the State General Fund for FY 2019, be deleted from its five-year capital improvement plan. KDOC anticipates, based on population projections, the construction of the facilities may be needed by FY 2020.

### **Construction on Medium and Maximum Unit at Lansing Correctional Facility**

During the 2017 Legislative Session, KDOC brought plans before the Legislature to demolish an existing medium-security unit at LCF and construct a new facility in its place. KDOC asserts the new facility will reduce the need for staff, generating savings over time.

Provisions in 2017 Senate Sub. for HB 2002 allowed KDOC to enter into a lease-purchase agreement for the demolition, design, and construction of a new facility at LCF or, if more cost effective, allows the agency to bond with the Kansas Development Finance Authority to demolish, design, and construct a correctional institution at LCF, capping expenditures related to the project at \$155.0 million. The provisions also require the Secretary of Corrections to advise and consult the State Building Advisory Commission for the use of an alternative project delivery procurement process and required KDOC to appear before the State Finance Council for approval of the decision.

On January 24, 2018, the State Finance Council approved a lease-to-own plan where a private company would build the 2,432-bed facility, and the State would purchase the facility through a 20-year lease for a total of \$362 million. Ground broke on the new facility in April 2018, with a scheduled completion date of January 2020. In response to the approval of the lease-to-own plan, the 2018 Legislature passed SB 328, which requires prior legislative authorization if any agency wants to outsource the security operations of any State-run correctional facility. The bill further defined security operations as the supervision of inmates at a correctional facility by a correctional officer or warden.

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### Judiciary, Corrections, and Juvenile Justice

#### **G-7 Mental Health and the Criminal Justice System**

Considerations for incarcerated and detained persons with mental health issues have become increasingly common in the criminal justice system in Kansas. An overview of recent legislation and available services, including crisis intervention, mental health courts, and Kansas Department of Corrections (KDOC) mental health services, follows.

#### **Recent Legislation**

##### ***Crisis Intervention Act—2017 Senate Sub. for HB 2053***

The 2017 Legislature passed legislation related to the care and treatment of persons with mental illness and problems with substance abuse through Senate Sub. for HB 2053, also known as the Crisis Intervention Act (Act). The Act outlines requirements for the use of emergency observation and treatment (EOT) in a “crisis intervention center” (center), defined as an entity licensed by the Kansas Department for Aging and Disability Services that is open 24 hours a day, 365 days a year; equipped to serve voluntary and involuntary individuals in crisis due to mental illness, substance abuse, or a co-occurring condition; and uses certified peer specialists. EOT does not mean the person loses any civil right, property right, or legal capacity, except as ordered by a court. Admission alone does not create a presumption that a person is in need of a guardian or conservator, or both.

An individual may be admitted voluntarily or involuntarily based on the belief and factual circumstances supporting the belief that the person needs EOT due to mental illness or substance abuse and he or she is likely to cause harm to self or others if not immediately detained. Law enforcement can transport a person needing EOT to a center, and the center cannot refuse to accept a person for evaluation if the center is within the officer’s jurisdiction.

The person’s need for EOT must be evaluated within 4 hours after admission by the head of the center and no later than 23 hours after admission by a different behavioral health professional. If the head of the center determines the need for EOT exists after 48 hours, the head of the center must file an affidavit to that effect for review in the district court in the county where the center is located. If the head of the center determines the need for EOT

exists after 72 hours, the head of the center must immediately file a petition to find appropriate placement for the person.

The Act outlines the rights of every patient being treated in a center and requires the head of the center to advise any person in custody of his or her rights under the Act.

Senate Sub. for HB 2053 was supported by law enforcement agencies around the state after the agencies encountered frequent issues with the detention and custody of mentally ill persons. Several mental health advocacy groups were also in support of the bill. The bill was the product of a Judicial Council Advisory Committee created to study 2016 HB 2639, a bill which would have enacted the Emergency Observation and Treatment Act.

### ***Juvenile Crisis Intervention Centers—2018 House Sub. for SB 179***

The 2018 Legislature created and amended law to establish juvenile crisis intervention centers and procedures for admission of juveniles to such centers. For more information on 2018 House Sub. for SB 179, see article [G-5 Juvenile Services](#) in this Briefing Book.

### ***Competency to Stand Trial—2018 HB 2549***

The 2018 Legislature amended law related to the competency of a defendant to stand trial, expanding the list of places where a defendant may be committed for evaluation and treatment. The bill provides a court, in both misdemeanor and felony cases, may commit a defendant to the state security hospital or any appropriate state, county, or private institution or facility for a psychiatric or psychological examination and report to the court for determination of competency to stand trial. The bill also provides if a defendant is found incompetent to stand trial, the court must commit the defendant for evaluation and treatment to any appropriate state, county, or private institution or facility.

Under prior law, a defendant charged with a felony could be committed only to a state security

hospital or any county or private institution for examination and report to the court and, if found incompetent to stand trial, could be committed only to a state security hospital or any appropriate county or private institution for evaluation and treatment. Under prior law, a defendant charged with a misdemeanor could be committed only to any appropriate state, county, or private institution for examination and report and, if found incompetent to stand trial, could be admitted only to these same institutions for evaluation and treatment.

The proponents of 2018 HB 2549 expressed the need for more flexibility in conducting competency evaluations to reduce strain on the state security hospital and to reduce incarceration time in county jails.

### **Kansas Department of Corrections Mental Health and Behavioral Health Services**

KDOC facilities provide comprehensive health care through private companies under contract with KDOC. Each facility provides 24-hour mental health care for inmates, including on-site crisis intervention, use of designated hospital rooms or appropriate health facilities, and emergency on call mental health professional services when the emergency health facility is not located nearby. Mental health services are provided to inmates based upon psychiatric assessments. Specific programs and services are outlined below.

#### ***Larned Correctional Mental Health Facility***

Historically, Larned Correctional Mental Health Facility has housed the most severely mentally ill adult male inmates within KDOC, along with a significant number of inmates with behavioral disorders that make them an unacceptable risk for housing in another facility. The Central Unit serves as a transitional unit for inmates who are not able to function in the general population of a traditional correctional institution for mental health reasons, but are not in need of psychiatric hospitalization. Inmates are assigned to this facility by mental health staff at other correctional institutions. In

May 2017, KDOC announced plans to convert the 150-bed maximum-security Central Unit to a medium-security unit to house certain offenders aged 18-25 with high recidivism potential. The 150 mental health inmates previously housed in Central Unit were subsequently transferred to El Dorado Correctional Facility (EDCF) in the summer of 2017. Those inmates will be housed within the behavioral health unit at EDCF (<http://www.hutchnews.com/cedbf438-576e-5a94-afd9-64b04ebc0d9b.html>).

### **Larned State Hospital**

At Larned State Hospital, 115 beds are reserved for KDOC offenders who need a higher level of psychiatric care. There, inmates are provided mental health care and treatment in either the acute care or the residential rehabilitation program (RRP). The purpose of RRP is to provide psychiatric rehabilitation and vocational services to adult males referred from KDOC with the intent of preparing these individuals for successful reintegration into the community or back into KDOC services as determined on an individual basis.

### **El Dorado Correctional Facility**

#### **Fundamental Lessons in Psychology (FLIP).**

Directed at segregation inmates, FLIP consists of various psychological topics including: anger management, anxiety, assertiveness, cognitive self-change, depression, general mental health, grief, loss and forgiveness, men's issues/adjustment and self-esteem.

#### **Behavior Modification Program (BMP).**

BMP is a program designed to deal with transitioning segregation inmates in a stratified behavior modification program based on increased steps of privileges for demonstrated appropriate behavior and program compliance. The nine-month, cognitive-based program integrates inmates in a three-step process that includes portions of Thinking for a Change, Motivation for Change, PAD (Positive Attitude Development), and anger management programs. An additional three months of monitoring under intensive supervision is required under the program.

### **Ellsworth Correctional Facility**

A variety of services are available, including mental health group counseling, intensive groups, individual counseling, psychiatric intervention, crisis intervention, psychological evaluations, activity therapy, discharge planning, and tele-psychiatry, to assist in the management of inmates on psychotropic drugs and on-call services. In addition, mental health professionals provide staff instruction on the assessment and management of the inmate population.

### **Norton Correctional Facility**

The Behavioral Health Department provides individual and group therapy for inmates, including therapy groups for anger management and dialectical behavior therapy, and covering topics such as lifestyle changes, relationships, and parenting.

### **Alternative Sentencing Courts**

Alternative sentencing courts are established as an alternative to incarceration for persons with mental health issues, substance abuse issues, or both, who are convicted of misdemeanors. These courts offer treatment, support, and counseling. Many times, those who suffer from mental health disorders also suffer from addiction to drugs, such as opioids. For some mental health courts, diagnosis of a major mental health disorder is required for participation. However, if the participant is also addicted to drugs, treatment for that addiction will coincide with treatment for the underlying mental health disorder. Kansas has not established a statewide program for drug treatment courts. However, the cities of Kansas City, Lawrence, Topeka, and Wichita have developed their own municipal- or county-level programs.

Wyandotte County sets aside a "care and treatment" docket for those who would benefit from the program. Judges can decide to mandate outpatient treatment or order a trip to Osawatimie State Hospital. In Douglas County, the county commission developed a behavioral health program for its courts, which opened in January

2017. More than \$440,000 was set aside to fund the mental health court in 2016. The mission of the behavioral health court is to connect defendants with community support services and reduce criminal involvement of defendants who suffer from serious mental illness and co-occurring disorders, thereby enhancing public health and safety.

Topeka developed its alternative sentencing court in 2015 with a \$91,000 grant from the U.S. Department of Justice and \$25,000 from

the Kansas Health Foundation. The court provides treatment, rather than jail time, for those charged with misdemeanor offenses and who are mentally ill or addicted to drugs or alcohol. The City of Wichita developed its mental health court in 2009 with a federal grant. The program is said to have improved the quality of life for its graduates, diminished recidivism, and saved taxpayers millions of dollars (<https://www.khi.org/news/article/advocates-of-kansas-mental-health-courts-say-lives-improved-taxpayer-dollar>).

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## Judiciary, Corrections, and Juvenile Justice

### G-8 Sentencing

The Kansas Sentencing Guidelines Act (KSGA) became effective July 1, 1993. Two grids containing the sentencing range for drug crimes and nondrug crimes were developed for use as a tool in sentencing. (Note: The source for the attached sentencing range grid for drug offenses and nondrug offenses is the *Kansas Sentencing Commission Guidelines, Desk Reference Manual, 2018*. These sentencing grids are provided at the end of this article for your convenience.)

The sentencing guidelines grids provide practitioners with an overview of presumptive felony sentences.

The determination of a felony sentence is based on two factors: the current crime of conviction and the offender's prior criminal history. The sentence contained in the grid box at the juncture of the severity level of the crime of conviction and the offender's criminal history category is the presumed sentence. [See KSA 21-6804(c).]

### Off-Grid Crimes

The crimes of capital murder (KSA 2018 Supp. 21-5401), murder in the first degree (KSA 2018 Supp. 21-5402), terrorism (KSA 2018 Supp. 21-5421), illegal use of weapons of mass destruction (KSA 2018 Supp. 21-5422), and treason (KSA 2018 Supp. 21-5901) are designated as off-grid person crimes.

Kansas law provides for the imposition of the death penalty, under certain circumstances, for a conviction of capital murder (KSA 2018 Supp. 21-5401 and KSA 2018 Supp. 21-6617). Where the death penalty is not imposed, a conviction of capital murder carries a life sentence without possibility of parole (KSA 2018 Supp. 21-6620(a)).

The remaining off-grid person crimes require life sentences with varying parole eligibility periods. Persons convicted of premeditated first-degree murder committed prior to July 1, 2014, are eligible for parole after serving 25 years of the life sentence, unless the trier of fact finds there were aggravating circumstances justifying the imposition of the Hard 50 sentence (requiring 50 years to be served before parole eligibility).

Persons convicted of premeditated first-degree murder committed on or after July 1, 2014, are eligible for parole after serving 50 years of the life sentence, unless the sentencing judge, after a review of mitigating circumstances, finds substantial and compelling reasons to impose the Hard 25 sentence instead (KSA 2018 Supp. 21-6620(c)).

Persons convicted of felony murder committed prior to July 1, 2014, are parole eligible after serving 20 years of the life sentence. Persons convicted of felony murder convicted on or after July 1, 2014, are parole eligible after serving 25 years of the life sentence.

Persons convicted of terrorism, illegal use of weapons of mass destruction, or treason are parole eligible after serving 20 years of the life sentence (KSA 2018 Supp. 22-3717(b)(2)).

Also included in the off-grid group are certain sex offenses against victims under the age of 14: aggravated human trafficking (KSA 2018 Supp. 21-5426(b)), rape (KSA 2018 Supp. 21-5503), aggravated indecent liberties (KSA 2018 Supp. 21-5506(b)), aggravated criminal sodomy (KSA 2018 Supp. 21-5504(b)), commercial sexual exploitation of a child (KSA 2018 Supp. 21-6422), and sexual exploitation of a child (KSA 2018 Supp. 21-5510). Offenders sentenced for these off-grid crimes are parole eligible after 25 years in confinement for the first offense, parole eligible after 40 years in confinement for the second offense, or sentenced to life without parole if they have been convicted of two or more of these offenses in the past.

### Drug Grid and Nondrug Grid

The drug grid is used for sentencing on drug crimes described in KSA Chapter 21, Article 57. The nondrug grid is used for sentencing on other felony crimes. In both grids, the criminal history categories make up the horizontal axis and the crime severity levels make up the vertical axis.

Each grid contains nine criminal history categories ([2018 Drug Grid](#); [2018 Nondrug Grid](#)).

The drug grid contains five severity levels; the nondrug grid contains ten severity levels. A thick, black dispositional line cuts across both grids. Above the dispositional line are unshaded grid boxes, which are designated as presumptive prison sentences. Below the dispositional line are shaded grid boxes, which are designated as presumptive probation sentences.

The grids also contain boxes that have a dark shaded color through them, which are referred to as “border boxes.” A border box has a presumptive prison sentence, but the sentencing court may choose to impose an optional nonprison sentence, which will not constitute a departure. The nondrug grid contains three border boxes, in levels 5-H, 5-I, and 6-G. The drug grid contains seven dark-shaded border boxes, in levels 4-E, 4-F, 4-G, 4-H, 4-I, 5-C, and 5-D. [See KSA 2018 Supp. 21-6804 and KSA 2018 Supp. 21-6805.]

### Grid Boxes

Within each grid box are three numbers, which represent months of imprisonment. The three numbers provide the sentencing court with a range for sentencing. The sentencing court has discretion to sentence within the range. The middle number in the grid box is the standard number and is intended to be the appropriate sentence for typical cases. The upper and lower numbers should be used for cases involving aggravating or mitigating factors sufficient to warrant a departure, as explained in the next paragraph. [See KSA 2018 Supp. 21-6804 and KSA 2018 Supp. 21-6805.]

The sentencing court may depart upward to increase the length of a sentence up to double the duration within the grid box. The court also may depart downward to lower the duration of a presumptive sentence. [See KSA 2018 Supp. 21-6815, 21-6816, and 21-6817.] The court also may impose a dispositional departure, from prison to probation or from probation to prison (KSA 2018 Supp. 21-6818).

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), the predecessor to KSA 21-6815 was found to be “unconstitutional on its face” for



the imposition of upward durational departure sentences by a judge and not a jury. In the 2002 Legislative Session, the departure provisions were amended to correct the upward durational departure problem arising from *Gould*. This change became effective on June 6, 2002. The jury now determines all of the aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. The trial court determines if the presentation of evidence regarding the aggravating factors will be presented during the trial of the matter or in a bifurcated jury proceeding following the trial (KSA 2018 Supp. 21-6817).

## Probation

Probation is a procedure by which a convicted defendant is released after sentencing, subject to conditions imposed by the court and supervision by the probation service of the court or community corrections, generally without serving a period of imprisonment (although a felony offender may be sentenced to up to 60 days in county jail as a condition of probation). As noted above, a number of boxes on the sentencing grids are designated “presumptive probation,” which means probation will be granted unless a departure sentence is imposed. An underlying prison sentence is still imposed in felony cases where probation is granted, and if the defendant is subsequently found to have violated a condition of probation, probation may be revoked and the defendant required to serve the underlying prison term. Other possible actions a court may take upon a violation of probation include continuation of probation, modification of probation conditions, or various periods of confinement in a county jail. In some cases, where a defendant has waived the right to a hearing on a probation condition violation, court services or community corrections may impose two- or three-day “quick dip” periods of confinement in a county jail.

Recommended probation terms range from under 12 to 36 months, depending on the severity level of the crime of conviction.

## Sentencing Considerations

The sentencing court should consider all available alternatives in determining the appropriate sentence for each offender. The sentencing guidelines seek to establish equity among like offenders in similar case scenarios. Rehabilitative measures are still an integral part of the corrections process, and criminal justice professionals continue efforts to reestablish offenders within communities. The guidelines do not prohibit sentencing courts from departing from the prescribed sentence in atypical cases. The sentencing court is free to choose an appropriate sentence, or combination of sentences, for each case (KSA 2018 Supp. 21-6604).

## Good Time and Program Credits

While incarcerated, offenders may earn (and forfeit) “good time” credits based upon factors like program and work participation, conduct, and the inmate’s willingness to examine and confront past behavioral patterns that resulted in the commission of crimes. Depending on the severity level of the offender’s crime, the offender may earn up to 15 percent or 20 percent of the prison part of the sentence in good time credits.

Additionally, offenders serving only a sentence for a nondrug severity level 4 or lower crime or a drug severity level 3 or lower crime may earn up to 120 days of credit that may be earned by inmates “for the successful completion of requirements for a general education diploma, a technical or vocational training program, a substance abuse treatment program or any other program designated by the secretary which has been shown to reduce offender’s risk after release.”

With a few exceptions for certain sex-related offenses, any good time or program credits earned and subtracted from an offender’s prison sentence are not added to the postrelease supervision term (KSA 2018 Supp. 21-6821).

## Postrelease Supervision

Once offenders have served the prison portion of a sentence, most must serve a term of postrelease supervision. For certain sex-related offenses, the postrelease supervision term is increased by the amount of any good time or program credits earned and subtracted from the prison portion of the offender's sentence. For crimes committed on or after July 1, 2012, offenders sentenced for drug severity levels 1-3 or nondrug severity levels 1-4 must serve 36 months of postrelease supervision, those sentenced for drug severity level 4 or nondrug severity levels 5-6 must serve 24 months, and those sentenced for drug severity level 5 or nondrug severity levels 7-10 must serve 12 months. These periods may be reduced based on an offender's compliance and performance while on postrelease supervision (KSA 2018 Supp. 22-3717(d)(1)).

While on postrelease supervision, an offender must comply with the conditions of postrelease supervision, which include reporting requirements; compliance with laws; restrictions on possession and use of weapons, drugs, and alcohol; employment and education requirements; restrictions on contact with victims or persons involved in illegal activity; and other conditions. A "technical violation" of the conditions of postrelease supervision (such as failure to report) will result in imprisonment for six months, reduced by up to three months based upon the offender's conduct during the imprisonment. A violation based upon conviction of a new felony or a new misdemeanor will result in a period of confinement as determined by the Prisoner Review Board, up to the remaining balance of the postrelease supervision period (KSA 2018 Supp. 75-5217).

## Recent Notable Sentencing Guidelines Legislation

In 2006, the Kansas sentencing guidelines law dealing with upward departures was amended to add a new aggravating factor when the crime involved two or more participants and the defendant played a major role in the crime

as an organizer, leader, recruiter, manager, or supervisor.

The law was amended further to add a new mitigating factor for defendants who have provided substantial assistance in the investigation or prosecution of another person who is alleged to have committed an offense. In considering this mitigating factor, the court may consider the following:

- The significance and usefulness of the defendant's assistance;
- The truthfulness, completeness, and reliability of any information;
- The nature and extent of the defendant's assistance;
- Any injury suffered or any danger of risk of injury to the defendant or the defendant's family; and
- The timeliness of the assistance.

In 2008, the Kansas sentencing guidelines were amended to provide the following:

- No downward dispositional departure can be imposed for any crime of extreme sexual violence. A downward durational departure can be allowed for any crime of extreme sexual violence to no less than 50 percent of the center of the grid range of the sentence for such crime; and
- A sentencing judge cannot consider social factors as mitigating factors in determining whether substantial and compelling reasons exist for a downward departure.

In 2010, the Kansas Criminal Code, including the sentencing guidelines, was recodified. The recodification took effect July 1, 2011. Citations in this article are to the recodified code.

In 2012, the Legislature passed Senate Sub. for Sub. for HB 2318, which changed the drug grid from a four-level grid to a five-level grid, adding a new level 2 with penalties falling between the existing first and second levels of the grid. The new grid also expanded the presumptive imprisonment boxes and the border boxes.

In June 2013, the U.S. Supreme Court's decision in *Alleyne v. U.S.*, 570 U.S. 2151, 133 S. Ct. 2151, 186 L. Ed. 2D 314 (2013), called the constitutionality of Kansas' Hard 50 sentencing statute (KSA 21-6620) into doubt. Since 1994, in cases where a defendant was convicted of premeditated first-degree murder, the statute had allowed the sentencing court to impose a life sentence without eligibility for parole for 50 years when the judge found one or more aggravating factors were present. The *Alleyne* decision indicated that such determinations must be made by the trier of fact (usually a jury) using a reasonable doubt standard, rather than by the sentencing judge.

In response to the *Alleyne* decision, Kansas Attorney General Derek Schmidt requested Governor Sam Brownback call the Kansas Legislature into Special Session "for the purpose of repairing" the Hard 50 sentence. The Governor subsequently called the Legislature into Special Session starting September 3, 2013, to respond to *Alleyne*.

Before the 2013 Special Session, the Special Committee on Judiciary met to review *Alleyne*, receive testimony, and report preliminary findings to the House and Senate Judiciary Committees at the commencement of the Special Session. The Special Committee recommended language for a bill that would institute a jury procedure for the Hard 50 determination.

At the Special Session, the Legislature considered and passed HB 2002, which was an amended version of the language proposed by the Special Committee. HB 2002 went into effect upon its publication in the *Kansas Register* (September 6, 2013).

In 2014, the Legislature passed HB 2490, which included amendments to the sentencing provisions for premeditated first-degree murder, attempted capital murder, and felony murder.

The bill increased the default sentence for premeditated first-degree murder committed on or after July 1, 2014, from the Hard 25 sentence to the Hard 50 sentence. The sentencing judge may impose the Hard 25 sentence if the judge

reviews mitigating factors and finds substantial and compelling reasons to impose the lesser sentence.

The bill also imposed the Hard 25 sentence for attempted capital murder (previously a severity level 1 felony) and felony murder (previously a Hard 20 sentence).

If a defendant's criminal history when sentenced for any of these crimes would subject the defendant to imprisonment for a term exceeding the Hard 50 or Hard 25 sentence (as applicable), the defendant will be required to serve the mandatory minimum term equal to the sentence established under the sentencing guidelines.

In 2015, the Legislature passed HB 2051, which increased the amount of good time inmates sentenced for post-July 1, 2012, drug severity level 3 crimes may earn, to try to restore the general good time eligibility criteria to a similar state as it existed before the 2012 changes to the drug grid. The bill also increased the amount of time from 60 days to 90 days that may be earned by any eligible inmate for program credits.

In 2016, the Legislature passed three bills related to sentencing: HB 2151, HB 2447, and HB 2463. HB 2151 authorized the Secretary of Corrections to transfer certain low- to moderate-risk offenders to house arrest pursuant to community parenting release if the conditions listed in the bill are met and the Secretary determines the offender's placement in the program is in the child's best interests. The Secretary can return an offender to a correctional facility to serve the remaining sentence if the offender fails to comply with release requirements.

HB 2447 increased the maximum number of days an inmate's sentence may be shortened for earning program credits from 90 days to 120 days.

The bill also permitted the dismissal of parole, conditional release, or postrelease supervision violation charges to be conditioned upon the released inmate agreeing to credit being withheld for the period of time from the date the Secretary

of Corrections issued a warrant to the date the offender was arrested or returned to Kansas.

HB 2463 amended statutes governing the determination of criminal history to add nongrid felonies, nondrug severity level 5 felonies, and any drug severity level 1 through 4 felonies committed by an adult to the list of juvenile adjudications that will decay if the current crime of conviction is committed after the offender reaches age 25. The bill also allowed a court to continue or modify conditions of release for, or impose a 120- or 180-day prison sanction on, an offender who absconds from supervision, without having to first impose a 2- or 3-day jail sanction. Finally, the bill made a violation or an aggravated violation of the Kansas Offender Registration Act a person offense if the underlying crime (for which registration is required) is a person crime. If the underlying crime is a nonperson crime, the registration offense is a nonperson crime. Previously, a violation or aggravated violation of the Kansas Offender Registration Act was a person crime regardless of the designation of the underlying crime.

Legislation passed by the 2017 Legislature involving sentencing included SB 112 and HB 2092. SB 112, among other changes, enacts the Law Enforcement Protection Act. This act creates a special sentencing rule with enhanced penalties if a trier of fact finds beyond a reasonable doubt that an offender committed a nondrug felony offense (or an attempt or conspiracy to commit such offense) against a law enforcement officer while the officer was performing the officer's duty or solely due to the officer's status as a law enforcement officer.

HB 2092, among other changes, amends law related to mandatory minimum sentences. The bill clarifies that mandatory minimum sentences will not apply if, due to criminal history, the offender would be subject to presumptive imprisonment for a severity level 1 crime for a term longer than the mandatory minimum. In such case, the offender would serve a sentence equal to the longer term and would not be eligible for parole until the entire sentence is completed. In addition, the sentence could not be reduced by good time credits.

**SENTENCING RANGE- DRUG OFFENSES**

Categories→ Severity Level ↓	A 3 + Person Felony	B 2 Person Felony	C 1 Person & 1 Nonperson Felony	D 1 Person Felony	E 3 + Nonperson Felony	F 2 Nonperson Felony	G 1 Nonperson Felony	H 2 + Misdemeanors	I 1 Misdemeanor No Record
I	204 194 185	196 186 176	187 178 169	179 170 161	170 162 154	167 158 150	162 154 146	161 150 142	154 146 138
II	144 136 130	137 130 122	130 123 117	124 117 111	116 111 105	113 108 101	110 104 99	108 100 96	103 98 92
III	83 78 74	77 73 68	72 68 65	68 64 60	62 59 55	59 56 52	57 54 51	54 51 49	51 49 46
IV	51 49 46	47 44 41	42 40 37	36 34 32	32 30 28	26 24 23	23 22 20	19 18 17	16 15 14
V	42 40 37	36 34 32	32 30 28	26 24 23	22 20 18	18 17 16	16 15 14	14 13 12	12 11 10
Presumptive Probation									
Border Box									
Presumptive Imprisonment									

• Fines not to exceed \$500,000 (SL 1-SL2), \$300,000 (SL3-SL4), \$100,000 (SL5)

• Severity level of offense increases one level if controlled substance or analog is distributed or possessed w/ intent to distribute on or w/in 1000 ft of any school property.

Levels	Distribute or Possess w/ intent to Distribute			
	Cocaine	Meth & Heroin	Marjuana	Manufacture (all)
I	≥ 1 kg	≥ 100 g	≥ 30 kg	2nd or Meth
II	100 g - 1 kg	3.5 g - 100 g	450 g - 30 kg	1st
III	3.5 g - 100 g	1 g - 3.5 g	25 g - 450 g	
IV	< 3.5 g	< 1 g	< 25 g	
V	Possession	Possession	Possession-3rd offense	

Levels	Cultivate	Dosage Units	Postrelease	Probation	Good Time
50-99 plants	100-999	36	36	15%	
5-49 plants	10-99	36	36	**20%	
<10	<10	24	24	≤18	20%
*≤12		12	12	*≤12	20%

\* ≤ 18 months for 2003 SB123 offenders

\*\*\* Retroactive application for offense committed on or after July 1, 2012

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Appendix E

**SENTENCING RANGE – NONDRUG OFFENSES**

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanor	1 Misdemeanor No Record
I	653 620 592	618 586 554	285 272 258	267 253 240	246 234 221	226 214 203	203 195 184	186 176 166	165 155 147
II	493 467 442	460 438 416	216 205 194	200 190 181	184 174 165	168 160 152	154 146 138	138 131 123	123 117 109
III	247 233 221	228 216 206	107 102 96	100 94 89	92 88 82	83 79 74	77 72 68	71 66 61	61 59 55
IV	172 162 154	162 154 144	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	136 130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	34 32 31
VI	46 43 40	41 39 37	88 86 84	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	28 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

**Probation Terms are:**

- 36 months recommended for felonies classified in Severity Levels 1-5
- 24 months recommended for felonies classified in Severity Levels 6-7
- 18 months (up to) for felonies classified in Severity Level 8
- 12 months (up to) for felonies classified in Severity Levels 9-10

**Postrelease Supervision Terms are:**

- 36 months for felonies classified in Severity Levels 1-4
- 24 months for felonies classified in Severity Levels 5-6
- 12 months for felonies classified in Severity Levels 7-10

- Postrelease for felonies committed before 4/20/95 are:
  - 24 months for felonies classified in Severity Levels 1-6
  - 12 months for felonies classified in Severity Level 7-10

LEGEND
Presumptive Probation
Border Box
Presumptive Imprisonment

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Appendix E

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### Judiciary, Corrections, and Juvenile Justice

#### **G-9 Sex Offenders and Sexually Violent Predators**

In recent years, the Kansas Legislature has made significant amendments to the Kansas Offender Registration Act (Act) (KSA 2018 Supp. 22-4901 to 22-4911 and KSA 2018 Supp. 22-4913) to comply with the federal Adam Walsh Sex Offender Registration and Notification Act (SORNA). The purpose of the federal law is to protect the public, particularly children, from violent sex offenders by using a more comprehensive, nationalized system for registration of sex offenders. It calls for state conformity to various aspects of sex offender registration, including the information that must be collected, duration of registration requirement for classifications of offenders, verification of registry information, access to and sharing of information, and penalties for failure to register as required. Failure of a jurisdiction to comply would result in a 10 percent reduction in Byrne Law Enforcement Assistance grants. Eighteen states, Kansas included, substantially have implemented SORNA. The other states are Alabama, Colorado, Florida, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, and Wyoming.

The Act outlines registration requirements for “offenders,” which is defined to include sex offenders, violent offenders, and drug offenders, in addition to persons required to register in other states or by a Kansas court for a crime that is not otherwise an offense requiring registration. The definitions of sex offenders, violent offenders, and drug offenders are based on the commission and conviction of designated crimes (KSA 2018 Supp. 22-4902). A first conviction of failure to comply with the provisions of the Act is a severity level 6 felony, a second conviction is a level 5 felony, and a third or subsequent conviction is a level 3 felony. Additionally, failure to comply with the Act for more than 180 consecutive days is considered an aggravated violation—a level 3 felony. Lower severity levels apply for violations that consist only of failure to pay the sheriff’s office the required registration fee. Designation of these offenses as person or nonperson crimes depends on the designation of the underlying offense requiring registration (KSA 22-4903).

Several entities collaborate to enforce the provisions of the Act. KSA 2018 Supp. 22-4904 lists the duties of each entity in its own subsection as follows:

- (a) Courts (at the time of conviction or adjudication);
- (b) Staff of a correctional facility;
- (c) Staff of a treatment facility;
- (d) Registering law enforcement agencies;
- (e) Kansas Bureau of Investigation (KBI);
- (f) Attorney General;
- (g) Kansas Department of Education;
- (h) Secretary of Health and Environment; and
- (i) The clerk of any court of record.

### Registration Requirements

KSA 2018 Supp. 22-4905 describes registration requirements. An offender must register in person with the registering law enforcement agency within three business days of coming into any county or location of jurisdiction in which the offender resides or intends to reside, maintains employment or intends to maintain employment, or attends school or intends to attend school. Exceptions exist for anyone physically unable to register in person, at the discretion of the registering law enforcement agency. Additionally, sex offenders must report in person four times a year to the registering law enforcement agency in the county or location of jurisdiction in which the offender resides, maintains employment, or is attending school. Violent offenders and drug offenders, at the discretion of the registering law enforcement agency, are required to report in person three times each year and by certified letter one time each year. An offender must register during the month of the offender's birth, and every third, sixth, and ninth month occurring before and after the offender's birthday. With some exceptions, the offender must pay a \$20 fee each time.

SB 20 (2013) amended this requirement to provide that registration is complete even when the offender does not remit the registration fee, and failure to remit full payment within 15 days of registration is a class A misdemeanor, or, if within 15 days of the most recent registration two

or more full payments have not been remitted, a severity level 9 person felony.

Offenders also must register in person within three business days of commencement, change, or termination of residence, employment status, school attendance, or other information required on the registration form, with the registering law enforcement agency where last registered and provide written notice to the KBI. Similarly, an offender must register within three business days of any name change. Finally, the offender must submit to the taking of an updated photograph when registering or to document any changes in identifying characteristics; renew any driver's license or identification card annually; surrender any driver's licenses or identification cards from other jurisdictions when Kansas is the offender's primary residence (an exception exists for active duty members of the military and their immediate family); and read and sign registration forms indicating whether these requirements have been explained.

Special conditions exist for registration in certain circumstances. If in the custody of a correctional facility, the law requires offenders to register with that facility within three business days of arrival, but does not require them to update their registration until discharged, paroled, furloughed, or released on work or school release from a correctional facility. If the offender is involuntarily committed under the Kansas Sexually Violent Predator Act, the committing court must notify the registering law enforcement agency of the county where the offender resides during the commitment. The offender must register within three business days of arrival of the county of commitment, but is not required to update such registration until placement in a reintegration facility, on transitional release, or on conditional release, at which point the regular responsibility for compliance resumes. If receiving inpatient treatment at any treatment facility, the offender must inform the registering law enforcement agency of the offender's presence at the facility and the expected duration of the treatment.

If an offender is transient, the law requires the offender to report in person to the registering law

enforcement agency of the county or location of jurisdiction within three business days of arrival, and every 30 days thereafter, or more often at the discretion of the registering law enforcement agency. If traveling outside the United States, the offender must report in person to the registering law enforcement agency and the KBI 21 days prior to travel and provide an itinerary including destination, means of transport, and duration of travel. In an emergency, an offender must report within three business days of making arrangements for travel outside of the United States.

### Duration of Registration

Pursuant to the Act, offenders are required to register for 15 or 25 years or for life, depending on the offense. Those crimes requiring registration for 15 years are capital murder; murder in the first degree; murder in the second degree; voluntary manslaughter; involuntary manslaughter; criminal restraint, when the victim is less than 18; promoting the sale of sexual relations; a sexually motivated crime; a person felony where a deadly weapon was used; sexual battery; manufacture or attempted manufacture of a controlled substance; possession of certain drug precursors; distribution of certain controlled substances; any of the following when one of the parties is less than 18—adultery, patronizing a prostitute, or lewd and lascivious behavior; attempt, conspiracy, or criminal solicitation of any of these crimes; and convictions of any person required by court order to register for an offense not otherwise required by the Act.

Those crimes requiring registration for 25 years are criminal sodomy, when one of the parties is less than 18; indecent solicitation of a child; electronic solicitation; aggravated incest; indecent liberties with a child; unlawful sexual relations; sexual exploitation of a child; aggravated sexual battery; promoting prostitution, if the person selling sexual relations is 14 through 17 years of age; or any attempt, conspiracy, or criminal solicitation of any of these crimes.

Those crimes requiring registration for life are second or subsequent convictions of an offense

requiring registration; rape; aggravated indecent solicitation of a child; aggravated indecent liberties with a child; criminal sodomy; aggravated criminal sodomy; aggravated human trafficking; sexual exploitation of a child; promoting prostitution, if the person selling sexual relations is under 14 years of age; kidnapping; aggravated kidnapping; or any attempt, conspiracy, or criminal solicitation of any of these crimes. Additionally, any person declared a sexually violent predator is required to register for life.

Offenders 14 years of age or older who are adjudicated as a juvenile offender for an act that would be considered a sexually violent crime when committed by an adult, and which is a severity level 1 nondrug felony or an off-grid felony, also must register for life.

For offenders 14 years of age or older who are adjudicated as a juvenile offender for an act that would be considered a sexually violent crime when committed by an adult, and which is not a severity level 1 nondrug felony or an off-grid felony, a court may:

- Require registration until the offender reaches the age of 18, 5 years after adjudication or, if confined, 5 years after release from confinement, whichever occurs later;
- Not require registration if it finds on the record substantial and compelling reasons; or
- Require registration, but with the information not open to the public or posted on the Internet. (The offender would be required to provide a copy of such an order to the registering law enforcement agency at the time of registration, which in turn would forward the order to the KBI.) An offender required to register pursuant to the Act cannot expunge any conviction or part of the offender's criminal record while the offender is required to register.

## Public Access to Offender Registration Information and the KBI Registered Offender Website

KSA 2018 Supp. 22-4909 provides that information provided by offenders pursuant to the Act is open to inspection by the public and can be accessed at a registering law enforcement agency, as well as KBI headquarters. Additionally, the KBI maintains a website with this information (<http://www.accesskansas.org/kbi/ro.shtml>), as do some registering law enforcement agencies. One of the provisions of this statute, added by 2012 HB 2568, prohibits disclosure of the address of any place where the offender is an employee or any other information about where the offender works on a website sponsored or created by a registering law enforcement agency or the KBI. While that information is not available online, it remains publicly available and may be obtained by contacting the appropriate registering law enforcement agency or by signing up for community notification through the KBI website.

Additionally, when a court orders expungement of a conviction or adjudication that requires registration, the offender must continue registering, although the registration is not open to inspection by the public or posted on the Internet.

If the offender has an additional conviction or adjudication that requires registration that is not expunged, registration for that conviction or adjudication remains open to the public and may be posted on the Internet, unless the registration is ordered restricted.

## Court Decisions Regarding Offender Registration

In *State v. Myers*, 260 Kan. 669 (1996), the Kansas Supreme Court rejected an *ex post facto* challenge to the registration requirements, holding they did not unconstitutionally increase the punishment for the applicable crimes. However, the *Myers* court did hold that the public disclosure of registrant information would

be punitive and an *ex post facto* violation when imposed retroactively.

Subsequent Kansas appellate court decisions noted that the *Myers* holding that public disclosure applied retroactively is unconstitutional was cast into doubt by the U.S. Supreme Court's decision in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2D 164 (2003). The *Smith* court held that Alaska's offender registration scheme, including public disclosure of registrant information *via* a website, was nonpunitive and its retroactive application not an *ex post facto* violation. (See *State v. Brown*, No. 107,512, unpublished opinion filed May 24, 2013.) A petition for review in *Brown* was filed June 24, 2013, but was placed on hold in January 2014.

In April 2016, the Kansas Supreme Court held in three cases challenging the retroactive application of increased registration periods on *ex post facto* grounds that the 2011 version of the Act was punitive in effect and therefore could not be applied retroactively. (See *Doe v. Thompson*, 304 Kan. 291 (2016); *State v. Buser*, 304 Kan. 181 (2016); and *State v. Redmond*, 304 Kan. 283 (2016).)

However, the same day the Court subsequently released an opinion in a case challenging lifetime postrelease registration for sex offenders under the Act as an unconstitutional cruel or unusual punishment. (See *State v. Petersen-Beard*, 304 Kan. 192 (2016).) Using *Smith* and its progeny as a template for analysis, the *Petersen-Beard* court held that registration did not constitute punishment, the analysis of whether the requirements constitute punishment is identical for all constitutional provisions, and therefore the contrary holdings of *Thompson*, *Buser*, and *Redmond* are overruled. (For a procedural description of how these cases came to be issued and overruled the same day, see Justice Johnson's dissent in *Petersen-Beard*.)

In August 2017, the Kansas Supreme Court explicitly extended the holding of *Petersen-Beard* in a case challenging retroactive application of tolling requirements for sex offender registration under KORA, stating that such retroactive application does not violate the *ex post facto*

clause. (See *State v. Reed*, 306 Kan. 899, 399 P.3d 865 (2017).)

In a decision issued the same day as *Reed*, the court declined to hold that retroactive application of increased registration requirements for drug offenders under KORA violates the *ex post facto* clause. (See *State v. Meredith*, 306 Kan. 906, 399 P.3d 859 (2017).) However, the *Meredith* court stated that its decision, due to an insufficient record on appeal, would not “fully foreclose future *ex post facto* challenges to KORA registration for non-sex offenders,” but that future challenges would have to distinguish the effects of KORA on such offenders from its effect on sex offenders.

### Development of Sex Offender Policy

Consistent with Kansas’ early compliance with SORNA, the Kansas Legislature has been at the forefront of state and federal efforts to deal with the problem of sex offenders and sex predators. In addition to the SORNA amendments, since 1993, the Kansas Legislature has passed the Kansas Offender Registration Act (Act); passed the Civil Commitment of Sexually Violent Predators Act; reinstated the death penalty for various acts of intentional and premeditated murder following the rape or sodomy of the victim or following the kidnapping of the victim; made life without parole the sentence for those persons convicted of a capital murder crime who are not given the sentence of death; nearly quadrupled the length of time more serious offenders, including sex offenders, serve in prison; lengthened the statute of limitations for sex crimes; and required DNA testing.

Legislation enacted in 2006 (SB 506) authorized the creation of the Sex Offender Policy Board (SOPB) under the auspices of the Kansas Criminal Justice Coordinating Council (KCJCC). The bill established the SOPB to consult with and advise the KCJCC on issues and policies relating to the treatment, sentencing, rehabilitation, reintegration, and supervision of sex offenders and to report its findings to the KCJCC, Governor, Attorney General, Chief Justice of the Supreme Court, the Chief Clerk of the House of Representatives, and the Secretary

of the Senate. The SOPB’s first report examined four topics: utilization of electronic monitoring, public notification pertaining to sex offenders, management of juvenile sex offenders, and restrictions on the residence of released sex offenders. The second report addressed the topics of treatment and supervision standards for sexual offenders, suitability of lifetime release supervision, and safety education and prevention strategies for the public.

### Sex Offender Residency Restrictions

Legislation enacted in 2006 (SB 506) also prohibited cities and counties from adopting or enforcing any ordinance, resolution, or regulation establishing residential restrictions for offenders required to register under the Act. This provision was scheduled to expire on June 30, 2008. During the 2006 Interim, the Special Committee on Judiciary was charged by the Legislative Coordinating Council with studying actions by other states and local jurisdictions regarding residency and proximity restrictions for sex offenders to discover any serious unintended consequences of such restriction and identifying actions Kansas might take that actually achieve the intended outcome of increasing public safety. The Committee held a joint hearing with the SOPB to take testimony from experts in the field. The Committee recommended the Legislature wait to receive the report from the SOPB on the topic before any legislative action was taken.

On January 8, 2007, the SOPB issued a report on its findings regarding sex offender residency restrictions, with the following conclusions:

- Although residency restrictions appear to have strong public support, the SOPB found no evidence to support their efficacy. It is imperative that policymakers enact laws that actually will make the public safe and not laws giving the public a false sense of security;
- It is recommended the Legislature make permanent the moratorium on residency restrictions. However, the moratorium should not be intended to interfere with a locality’s ability to regulate through

zoning the location of congregate dwellings for offenders, such as group homes;

- Residency restrictions should be determined based on individually identified risk factors;
- The most effective alternative for protecting children is a comprehensive education program. It is recommended the necessary resources be provided to an agency determined appropriate by the Legislature to educate Kansas parents, children, and communities regarding effective ways to prevent and respond to sexual abuse. Such an education program should include all victims and potential victims of child sexual abuse; and
- In order for an effective model policy to be developed, the issue of sex offender residency restrictions should be referred to the Council of State Governments, the National Governors Association, and similar organizations to prevent states and localities from shifting the population and potential problems of managing sex offenders back and forth among states.

During the 2008 Legislative Session, SB 536 was enacted to:

- Eliminate the sunset provision on the prohibition on cities and counties from adopting or enforcing any ordinance, resolution, or regulation establishing residential restrictions for offenders;
- Add a provision to exempt any city or county residential licensing or zoning program for correctional placement residences that regulates housing for such offenders from the prohibition from adopting or enforcing offender residency restrictions;
- Add a provision that defines “correctional placement residence” to mean a facility that provides residential services for offenders who reside or have been placed in the facility as part of a criminal sentence or for voluntary treatment services for alcohol or drug abuse; and

- Clarify that a correctional placement residence does not include a single or multi-family dwelling or commercial residential building that provides residence to persons other than those placed in the facility as part of a criminal sentence or for voluntary treatment services for alcohol or drug abuse.

During the 2010 Interim, the Joint Committee on Corrections and Juvenile Justice Oversight studied the issue of residency restrictions and concluded that sex offender residency restrictions have no demonstrated efficacy as a means of protecting public safety.

### **Commitment of Sexually Violent Predators in Kansas**

In Kansas, a sexually violent predator is a person who has been convicted of or charged with a “sexually violent offense” and who suffers from a mental abnormality or personality disorder, which makes the person likely to engage in repeat acts of sexual violence and who has serious difficulty in controlling such person’s dangerous behavior. Sexually violent predators are distinct from other sex offenders due to a higher risk to re-offend if their mental abnormality or personality disorder is left untreated. Those crimes considered “sexually violent offenses” are rape, KSA 2018 Supp. 21-5503; indecent liberties with a child and aggravated indecent liberties, KSA 2018 Supp. 21-5506; criminal sodomy and aggravated criminal sodomy, KSA 2018 Supp. 21-5504; indecent solicitation of a child and aggravated indecent solicitation, KSA 2018 Supp. 21-5508; sexual exploitation of a child, KSA 2018 Supp. 21-5510; aggravated sexual battery, KSA 2018 Supp. 21-5505; and aggravated incest, KSA 2018 Supp. 21-5604. “Mental abnormality” is defined as a congenital or acquired condition affecting the emotional or volitional capacity, which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others. “Likely to engage in repeat acts of sexual violence” means the person’s propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health

and safety of others. Pursuant to the Kansas Sexually Violent Predator Act (KSA 59-29a01 *et seq.*), originally enacted in 1994, a sexually violent predator can be involuntarily committed to the Sexual Predator Treatment Program (SPTP) at Larned State Hospital. Civil commitment is different from a criminal conviction. Instead of having a definitive time frame, civil commitment continues until the offender's mental abnormality or personality disorder has changed to the extent that he or she is safe to be released. Commitment can be accomplished only following a civil trial in which the court or a jury finds that a person is a sexually violent predator. A sexually violent predator would be required to complete the three phases of the treatment program, which include two inpatient phases at Larned State Hospital and one outpatient phase at one of the reintegration facilities. There is no time limit for completion of each phase. The offender must meet the predetermined requirements of the phase to progress.

Upon release from the secure facility, a person would go to a transitional release facility. These facilities cannot be located within 2,000 feet of a licensed child care facility, an established place of worship, any residence in which a child under 18 years of age resides, or a school or facility used for extracurricular activities of pupils enrolled in kindergarten through grade 12 (KSA 59-29a11(b)). Additionally, no more than 16 sexually violent predators may be placed in any one county on transitional release.

Once the court determines a person on transitional release may proceed to conditional release, the person must serve a minimum of five years in conditional release with no violations of the person's treatment plan before petitioning for final discharge.

The Secretary for Aging and Disability Services is required to issue an annual report to the Governor and Legislature detailing activities regarding transitional and conditional release of sexually violent predators. Such details include their number and location, the number of those who have been returned to treatment at Larned State Hospital and the reasons for the return,

and any plans for the development of additional transitional or conditional release facilities.

## Recent Legislation and Related Activity

In 2013 and 2015, the Legislative Division of Post Audit (LPA) completed a two-part performance audit of the SPTP that looked at the questions of how the Kansas SPTP compared to similar programs in other states and best practice, what actions could be taken to reduce the number of offenders committed to the SPTP, and whether the SPTP is appropriately managed to ensure the safety and well-being of program staff and offenders. Further information regarding this performance audit, including the reports, may be found on the LPA website: [www.kslpa.org](http://www.kslpa.org).

During the 2015 Session, House Sub. for SB 12 was enacted. This bill created and amended law governing the civil commitment of sexually violent predators and the SPTP. The bill's extensive provisions included the following:

- Named the continuing and new law governing such civil commitment the "Kansas Sexually Violent Predator Act";
- Adjusted the processes for identifying and evaluating persons who may meet the criteria of a sexually violent predator;
- Adjusted the processes for filing the petition alleging a person is a sexually violent predator and conducting the probable cause hearing and trial on such petition;
- Adjusted processes for post-commitment hearings and annual examinations;
- Adjusted standards and processes for transitional release, conditional release, and final discharge;
- Increased the limit on sexually violent predators who may be placed in any one county on transitional or conditional release from 8 to 16;
- Amended the statute setting forth rights and rules of conduct for sexually violent predators;

- Incorporated the Kansas Administrative Procedure Act, Kansas Judicial Review Act, and Office of Administrative Hearings into the procedures for addressing actions taken by the Kansas Department for Aging and Disability Services regarding SPTP residents; and
- Adjusted *habeas corpus* provisions for persons committed under the Act.

During the 2016 Session, SB 407 was enacted, which modified registration requirements for committed offenders and revived a statute in the Sexually Violent Predator Act related

to transitional release that was inadvertently repealed by 2015 House Sub. for SB 12.

During the 2017 Session, HB 2128 was enacted, which amended the procedures for annual review, transitional release, and conditional release for committed offenders.

During the 2018 Session, SB 266 was enacted, which amended various provisions within the Act to, among other things, adjust procedures related to annual review, petition for final discharge, conditional release, and individual person management plans and appeals.

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## Redistricting

### H-1 Introduction to Redistricting

Redistricting is the process of drawing electoral district boundaries in the United States. The Kansas Legislature is primarily responsible for drawing the boundaries of the four congressional districts of the State, the state legislative districts (House and Senate), and the State Board of Education districts.

#### Why Does the Legislature Redistrict?

The *U.S. Constitution* and federal law require a Census be conducted every ten years and congressional districts be reapportioned based on the population information obtained in the Census. (See *U.S. Const.* Art. I, §2, cl. 3 and 2 USC §2a(a).) Similarly, the *Kansas Constitution* requires boundaries for the State's House and Senate districts to be redrawn every ten years in coordination with, and using population information provided by, the federal Census. (See *Kan. Const.* Art. 10, §1.) The *Kansas Constitution* also requires the Legislature to determine the boundaries for the ten State Board of Education (SBOE) districts. SBOE districts are each comprised of four contiguous Senate districts. (See *Kan. Const.* Art. 6, §3(a).)

#### When Does the Legislature Redistrict?

The redistricting process begins with and centers on the Census. Official Census information will be provided to all states by April 1, 2021. However, the Census is an ongoing project, and the groundwork for the 2020 Census began in 2012 after the most recent redistricting process was completed. Preparations for the Census are being made through a program called the 2020 Census Redistricting Data Program (Program). Kansas has participated in the Redistricting Data Program since the mid-1980s and has used the resulting information to build congressional, state legislative, and SBOE districts using election precincts and census blocks. Federal law requires all state participation in the Program be through a nonpartisan liaison. The Kansas Legislative Research Department serves as this nonpartisan liaison for the State of Kansas. The phases and timeline for the Program are outlined as follows.

### **Phase 1: Block Boundary Suggestion Project (BBSP) June 2015 – May 2017**

BBSP was an optional phase of the redistricting process, and the State of Kansas chose to participate in the project. The goal of the BBSP is to allow the State to provide input into and verify where block boundaries are drawn to produce more meaningful and useful information to the State during the 2020 redistricting process. Block boundaries are important in redistricting because blocks are the smallest unit of geography for which the Census collects population and demographic information, rather than providing statistical samples. Blocks are formed by visible features, such as streets, roads, railroads, streams and other bodies of water, and legal boundaries. In urban areas, census blocks frequently align with traditional city blocks, but are often more expansive in rural areas. Voting districts (or precincts) are made up of groups of census blocks. Additionally, district lines cannot break block boundaries when drawing new lines during redistricting, so verifying the location of and population in blocks is important to the redistricting effort.

### **Phase 2: Voting District Project (VTDP) June 2017 – April 2020**

The second phase of the Program is also optional and Kansas again chose to participate. VTDP allows states to provide the U.S. Census Bureau (Bureau) with the location of current voting district (precinct) boundaries by updating precinct boundary information provided to the Bureau during the 2010 redistricting cycle. During the 2010 redistricting cycle, precincts were the basis for legislative and congressional districts proposed by the Kansas Legislature. If Kansas chose not to participate in VTDP, the State would not receive precinct-level population data at any time during the upcoming redistricting cycle.

### **Phase 3: Delivery of 2020 Census Redistricting Data Files and Geographic Products**

The official Census Day is April 1, 2020, while national and state population information is

scheduled to be released to the President by December 31, 2020. Information for all census tabulation areas (state, congressional district, state legislative districts, American Indian areas, counties, cities, towns, census tracts, census block groups, and census blocks) will be provided to the Governor and state legislative leaders of all states by April 1, 2021.

The *Kansas Constitution* requires that the Office of the Secretary of State adjust the population information provided by the Bureau to count members of the military and college students in the following ways:

- Exclude nonresident military personnel and college students residing in Kansas; and
- Count resident military personnel and college students in the state in the district of their permanent residence. (See *Kan. Const. Art. 10, §1.*)

This adjusted data must be certified by the Office of the Secretary of State no later than July 31, 2021. (See KSA 11-304.)

### **Phase 4: Collection of Post-2020 Redistricting Plans**

The Bureau is scheduled to collect final redistricting plans from the states through April of 2022.

### **Phase 5: Evaluation and Recommendations**

The Bureau will provide several opportunities for feedback on and evaluation of the Program. A report discussing the Program is set to be published in 2025.

By the time the Bureau's final report is published, preparation for the 2030 redistricting cycle will be underway. Redistricting is truly an ongoing process.

### **How Does the Legislature Redistrict?**

The process of redistricting in Kansas involves all three branches of state government. The

Legislature proposes maps drawing lines for congressional districts, state legislative districts, and SBOE districts. By passing the bills that contain the maps, the Legislature provides initial approval of those maps. The Governor then signs the bills, vetoes the bills, or allows them to become law without a signature, just like any other bill. Finally, the Kansas Supreme Court reviews the maps and gives them final approval. Each of these steps is discussed in more detail below. For comparison purposes, the processes used during the 2010 redistricting cycle are discussed. However, it must be noted that legislative committees and procedures used during the 2010 cycle will not necessarily be the same during the 2020 cycle.

### **Legislature**

During the 2010 redistricting cycle, the Legislative Coordinating Council created a Redistricting Advisory Group (Group) made up of three senators and three representatives. The Group was formed in 2009 and assisted with preparations for the legislative portion of the redistricting process.

In 2011, the Joint Special Committee on Redistricting held public meetings in 14 different locations across Kansas. The Special Committee was made up of the members of the House Redistricting Committee and Senate Apportionment Committee, and sought public input on what the citizens of Kansas wanted to see from the redistricting process. Public meetings were held in Chanute, Colby, Dodge City, Garden City, Hays, Hutchinson, Kansas City, Lawrence, Leavenworth, Manhattan, Overland Park, Pittsburg, Salina, and Wichita.

As specified in the *Kansas Constitution*, Kansas draws redistricting maps during the legislative session of the year ending in “2,” which for this cycle will be the 2022 Legislative Session. The maps go through the legislative process like any other bill, and are subject to the same rules. During the 2010 redistricting cycle, the Legislature did not successfully pass redistricting bills in both chambers. Redistricting maps were ultimately drawn by the U.S. District Court for the District of Kansas in 2012.

### **Governor**

Just like any other bill, redistricting maps require the approval of the Governor or a vote to override a Governor’s veto to be passed into law and become effective.

### **Kansas Supreme Court**

The *Kansas Constitution* provides a procedure for final approval of state legislative maps by the Kansas Supreme Court.

The redistricting bills are published in the *Kansas Register* immediately upon passage.

The Attorney General must petition the Kansas Supreme Court to determine the maps’ validity within 15 days of the publication of an act reapportioning state legislative districts.

The Kansas Supreme Court has 30 days from the filing of that petition to enter a judgment. (See *Kan. Const. Art. 10, §1.*)

If the Court determines the maps are valid, the redistricting process is complete. If, on the other hand, the Court says the maps are invalid:

- The Attorney General must petition the Court to determine validity of maps enacted in an attempt to conform with the Court’s previous judgment; and
- The Court has ten days from the date of the Attorney General’s filing to enter a judgment.

If the Court says the new maps are valid, redistricting is complete.

If the Court says the new maps are invalid, the Legislature has 15 days to pass new maps.

This repeats until the Legislature presents maps the Court determines are valid. (See *Kan. Const. Art. 10, §1.*)

### **2012 Redistricting**

During the 2012 redistricting process, the Kansas Legislature did not successfully pass redistricting maps into law. As a result, the maps currently in place were drawn by the U.S. District Court for the District of Kansas.

**Additional Resources:**

Kansas Redistricting:

- <http://www.kslegresearch.org/KLRD-web/Redistricting.html>

2020 Federal Census:

- <https://www.census.gov/programs-surveys/decennial-census/2020-census.html>

- <https://www.census.gov/programs-surveys/decennial-census/about/rdo/program-management.html>

Redistricting Data Program, U.S. Census Bureau:

- <http://redistrictingks.com/>

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I-1 Addressing  
Abandoned Property  
Using Legal Tools

I-2 Administrative  
Rule and Regulation  
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I-3 Board of Indigents'  
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I-4 Election Security

I-5 Government  
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I-6 Joint Committee on  
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### State and Local Government

#### I-1 Addressing Abandoned Property Using Legal Tools

Vacant and abandoned property has long been an issue in small and large Kansas communities. According to testimony received on various bills heard by the Kansas Legislature, these properties are a familiar part of the American landscape, and these structures can devastate neighborhoods and undermine neighbors' quality of life. Additionally, these properties diminish the value of nearby properties, resulting in reduced local property tax revenue, and can cost some cities millions for policing, cleaning vacant lots, and demolishing derelict buildings.

Research describes tools that may be used to deal with abandoned and vacant property, with property registration, land banking, and receivership programs receiving the most attention. Researchers caution not all of these tools will work for every market and the approach a municipality takes should be designed with its particular issues in mind.

#### Vacant Property Registration

Vacant property registration is described as the first step a municipality can take to gather more information about the particular abandoned property issues the community is facing, and it may help prevent abandonment altogether. A report from GSBS Richman Consulting (GSBS), prepared for Oklahoma City in 2013, suggests that, at a minimum, a registry should include a maintenance plan for the identified property and a fee structure (<https://www.okc.gov/home/showdocument?id=2518>). Best practices for this tool include:

- Registration of foreclosed properties at the time of notice of default or foreclosure;
- Submission of a maintenance plan at time of registration;
- Purchasing insurance coverage for unoccupied buildings;
- Establishing minimum levels of exterior maintenance;
- Posting owner contact information on the property;
- Frequent inspections by the municipality;
- Installing exterior nighttime lighting; and
- Code enforcement for non-compliance.

According to the U.S. Department of Housing and Urban Development (HUD), these registrations help municipalities track vacancy issues in their jurisdictions. HUD and GSBS also suggest that fees for registration should escalate the longer the property remains vacant to create a disincentive for owners and encourage the return of these properties to productive use. Additionally, the fees for these registrations could be utilized to offset cost associated with vacant properties.

The Unified Government of Wyandotte County and Kansas City, Kansas, adopted a registration ordinance in February 2018. The ordinance requires the owner of any building or structure that becomes vacant to register within 60 days of the first date of vacancy. The registration must be accompanied by a written comprehensive plan of action containing a timeline for corrective action for any code violations, rehabilitation (if required), and maintenance while the building is vacant. The annual fee is \$200. The ordinance also outlines other provisions, such as inspection of the property and notification for change of ownership.

Vacant building registration is not without opponents. In 2013, in response to the GSBS report, Oklahoma City enacted a vacant property registration program. That program included a \$285 registration fee that increased by \$190 every year the property remained vacant. However, in 2014, the Oklahoma Legislature passed legislation preventing such ordinances from being enacted, ending the Oklahoma City program.

## Land Banks

Another tool some municipalities utilize to deal with vacant properties is land banking. HUD's Neighborhood Stabilization Program describes a land bank as a public or community-owned entity created for the purpose of acquiring, managing, maintaining, and re-purposing vacant, abandoned, and foreclosed properties. The Center for Community Progress (CCP) estimated there were 170 land banking programs in the United States as of January 2018. Land banks are most often associated with municipalities that

have large-scale blight and abandonment issues within their jurisdictions.

**Best practices.** Land banks are typically created *via* local ordinances, pursuant to authority provided in state law. Occasionally, they are also created within existing entities, such as redevelopment authorities, housing departments, or planning departments. Their authority varies greatly, depending on how the land bank is created. Typically, they are granted special powers and authority in the state's enabling statute. According to CCP, comprehensive land bank legislation usually grants the following powers:

- The ability to obtain property at low or no cost through the tax foreclosure process;
- The ability to hold land tax-free;
- The ability to obtain clear title, extinguish back taxes, or both;
- The ability to lease properties for temporary uses; and
- The ability to negotiate sales based on the outcome that most closely aligns with a community's needs.

The Lincoln Institute of Land Policy (LILP) identifies Ohio's land bank enabling statute as a possible example of comprehensive land bank legislation. In Ohio, land banks have the following statutory purposes:

- Facilitate the re-utilization of vacant, abandoned, and tax-foreclosed real property;
- Efficiently hold such property pending re-utilization;
- Assist entities to assemble and clear the title of such property; and
- Promote economic and housing development.

Ohio Rev. Code Ann. § 1724.02 established an exhaustive list of powers that may be granted to land banks in the state, many of which align with the examples provided above. These powers include the ability to apply for tax exemption for the property, negotiate the purchase and sale of

property, and lease the property for temporary use.

**Land banks in Kansas.** Kansas cities may establish land banks under the authority of KSA 2018 Supp. 12-5901 *et seq.*, and Wyandotte County is authorized to establish a land bank under the authority of KSA 2018 Supp. 19-26,103 *et seq.* According to CCP, there are eight land banks in the state: Arma, Arkansas City, Hutchinson, Kansas City/Wyandotte County, Lyon, McPherson, Olathe, and Overland Park. Other sources add Junction City to that list.

Kansas law allows property to be transferred to land banks by the city, county, another city, or another taxing subdivision in the county. Land banks can choose to accept any transferred property, and these properties are not subject to any bidding requirements and are exempt from law requiring public sale. They also have the authority to acquire property by purchasing it. The board of directors established pursuant to the law is required to manage its property, keep an inventory of such properties, and sell or otherwise dispose of the property. The board is allowed to sell any property without competitive bidding under terms necessary to assure the effective re-utilization of the property. Land banks in the state are also exempt from property taxes, except for special assessments levied by a municipality, and the county treasurer is required to remove from the tax rolls all taxes and other charges due on the property when it is acquired by the board. Land banks in Kansas are required to operate on a cash basis; however, at the time of establishment, the governing body of the establishing municipality may advance operating funds to the bank to pay for certain expenses. Kansas law also has several transparency and reporting requirements for land banks.

When comparing Kansas land banking law to the referenced best practices, Kansas law incorporates most best practices. The exclusions are the ability to lease properties for temporary use and the clear directive for obtaining a clear title.

**Land banks and tax foreclosure.** Land banks can be used to complement or possibly replace

tax foreclosure sales. Some researchers view tax foreclosure sales as a liquidation-based system composed of the sale of tax liens or public tax auctions wherein government trades its interest in tax-delinquent property to speculators or investors for modest revenue collection. Depending on the real estate market in the area, this could potentially result in real estate speculators holding onto property with little incentive to improve or maintain it. However, land banks typically have a statutory obligation to seek a new use for acquired property and to hold property in careful stewardship until a new purpose can be determined.

## Receivership Programs

Receivership is a legal tool that can be used by a court system to designate a local government or qualified non-governmental entity, such as a nonprofit, as the receiver of a vacant property. According to the LILP, this tool exists in many states, but provisions vary greatly, making them more useful in some states than others.

Generally, a receivership statute allows a municipality or a qualified non-profit entity to apply to a court to be appointed the receiver or be granted possession of the property to restore it to use. Once appointed, a receiver or possessor has control of the property, can borrow and spend money to rehabilitate it, and can place liens against the property for the amount spent. Once the property is rehabilitated, the owner may be able to regain control of the property by making the receiver whole, or the property may be sold by the court or receiver.

The City of Baltimore is considered to have a robust receivership ordinance. The ordinance allows the city or a nonprofit designee to ask a court to appoint a receiver for any property that has an outstanding vacant building violation notice. Any entity with a preexisting interest in the property, such as an owner or mortgagee, must demonstrate the ability to rehabilitate the property without delay to avoid appointment of a receiver. If a receiver is appointed, the receiver's administrative and rehabilitation expenses become a super-priority lien on the property.

Additionally, the ordinance provides notification requirements a court must determine have been met.

Massachusetts, a state the CCP considers to have a strong receivership law, utilizes a statewide abandoned housing initiative (<https://www.mass.gov/service-details/abandoned-housing-initiative>) within the Attorney General's Office (AGO). This program allows municipalities to submit addresses of abandoned residential properties to the AGO to initiate an investigation to identify delinquent owners. Once identified, the AGO attempts to contact the owner and any party with legal interest to reach an agreement to complete necessary repairs. If this is not possible, the state's Sanitary Code (<http://www.mass.gov/ago/doing-business-in-massachusetts/economic-development/abandoned-housing-initiative-ahi/ahi-receivership-manual/sanitary-code-and-receivership-statute/>) contains a provision for receivership that can be utilized to remedy code violations. According to the AGO, the Sanitary Code allows for a priority lien to be placed on the residence. A receivership can last six months to a year; at its conclusion, the owner can reimburse the receiver for the cost to clear the lien. If this is not possible, the receiver may foreclose on the lien in a manner approved by a court.

**Best practices.** A 2016 article in the *Journal of Affordable Housing* examined receivership statutes in 19 states and provided the following best practices:

- Establish formal governmental programs that allow for the appointment of private receivers from a list of qualified entities;
- Allow neighbors and other interested parties to petition to bring attention to properties that may not have received official attention and that affect a more limited group of people;
- Make grants and access to a certified list of potential receivers available to unaffiliated petitioners as resources so the petitioners need not go through the process of establishing receivership qualifications to a court;

- Create clear definitions for qualifying properties to ensure fewer petitions will be rejected;
- Require respondents to post bond to encourage serious effort to challenge a claim;
- Require petitioners to provide the court with a quarterly progress report;
- Enable receivers to rent rehabilitated property after rehabilitation, but before sale, to lessen the amount of their lien;
- Provide strict warnings and action deadlines to respondents (delinquent owners); and
- Provide strict guidance when dealing with a receiver's compensation.

The author also suggested consideration be given to the respondent's right of redemption after the property is sold or rehabilitated, noting the practice creates a larger risk to the project and makes it less attractive to other buyers.

**Kansas receivership law.** Kansas law provides for something similar to a receivership program in the provisions of KSA 2018 Supp. 12-1750 *et seq.*, particularly in KSA 2018 Supp. 12-1756a. These provisions do not use the term "receiver," but do allow for the petition of a district court by a municipality or qualified nonprofit for temporary possession of a property that meets certain requirements, such as the property being tax delinquent for two years, and be determined to meet the definition of "abandoned." Petitioners must notify interested parties 20 to 60 days prior to filing the petition. Other petitioner duties include filing an annual report with the court concerning the rehabilitation of the property, which must include statements of all expenditures made by the organization in possession, including payments for rehabilitation, operation, and maintenance; repairs; real estate taxes; mortgage payments; and lien-holder payments. The prior owner of the property is entitled to regain possession of the property by petitioning a district court. The court must determine compensation to the rehabilitating organization.



It is difficult to determine how many of the best practices can be found in Kansas' receivership law. It appears that Kansas incorporates portions of the recommendations. For instance, Kansas law allows for the establishment of formal programs allowing for the appointment of private receivers, but it would be difficult for neighbors and other interested parties to utilize these programs depending on how a municipality has implemented a program. Additionally, Kansas law contains definitions establishing what property can be considered abandoned, but there can be differences of interpretation regarding the clarity of such a definition. The law also provides action deadlines and requirements for respondents to a petition, but does not require the posting of bond to show an effort to rehabilitate. A court also has the discretion to extend these deadlines. Further, the law requires an annual progress report by a petitioner, whereas best practices suggest reports to the court should be made quarterly in order to keep the court better informed.

Kansas law does not allow for rehabilitated property to be rented before their sale and it does not provide any guidance on a receiver's compensation. It also provides for a redemption period for the prior owner, which the author of the 2016 article notes should be an item of consideration when creating these statutes.

### **Additional Tools**

Aside from the legal tools listed above, communities can also consider options to help slow or prevent properties from becoming

abandoned or vacant, such as foreclosure prevention programs and home repair programs. Below is information on two examples of such programs.

#### ***Homeowners' Emergency Mortgage Assistance Program***

In 1983, Pennsylvania created the Homeowners' Emergency Mortgage Assistance Program (HEMAP). HEMAP is a loan program for homeowners who have shown they have a reasonable prospect of resuming full mortgage payments within a required time frame. The program is funded by a state appropriation. Loans are limited to a maximum of 24 or 36 months from the date of mortgage delinquency or a maximum of \$60,000, whichever comes first. Additionally, all loan recipients must pay up to approximately 35.0 percent or 40.0 percent of their net monthly income towards their total housing expense. To date, the program has helped 46,000 homeowners.

#### ***Basic Systems Repair Program***

Philadelphia offers the Basic Systems Repair Program (BSRP). The program provides free repairs to address electrical, plumbing, heating, and structural and roofing emergencies in eligible owner-occupied homes in the city. Owners are eligible if they have not received BSRP services in the previous three years, own and live in a home that has a qualifying issue, are current under their payment agreements for the property taxes and water bill, and meet the income guidelines.

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# Kansas Legislator Briefing Book 2019

## State and Local Government

### I-2 Administrative Rule and Regulation Legislative Oversight

Since 1939, Kansas statutes have provided for legislative oversight of rules and regulations filed by state officers, boards, departments, and commissions. The 1939 law declared all rules and regulations of a general or statewide character were to be filed with the Revisor of Statutes and would remain in force until and unless the Legislature disapproved or rejected the regulations. It was not until 1974 the Legislature took steps to formalize an oversight process. In that year, all filed rules and regulations were submitted to each chamber. Within 60 days of submission, the Legislature could act to modify and approve or reject any of the regulations submitted. In 1984, the Kansas Supreme Court held that a procedure adopted in 1979, which authorized the use of concurrent resolutions to modify or revoke administrative rules and regulations, violated the doctrine of separation of powers under the *Kansas Constitution*.

The 1975 interim Legislative Budget Committee, under Proposal No. 33, found it “important to maintain and even enhance legislative oversight of all regulations in order to make sure that they conform with legislative intent.” The 1976 Legislature agreed with that finding and enacted several amendments to the Rules and Regulations Filing Act (Act). In that same year, the Legislative Coordinating Council created the Special Committee on Administrative Rules and Regulations to review proposed administrative rules and regulations filed with the Revisor of Statutes. The law was later changed to require proposed agency rules and regulations to be reviewed as outlined below. A 1977 law created the Joint Committee on Administrative Rules and Regulations (Joint Committee).

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

### Rule and Regulation Authority—Examples

Regulations serve to implement or interpret legislation administered by a state agency. The statutory authority for the agency to adopt these rules and regulations is found in enabling legislation, as illustrated in the language found in legislation:

**Kansas Amusement Ride Act (2017 Session)**

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

**Acupuncture Practice Act (2016 Session)**

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

The Rules and Regulations Filing Act (KSA 2018 Supp. 77-415 through 77-438, and amendments thereto) outlines the statutory requirements for the filing of regulations by most executive branch agencies and for the Legislature’s review of the agency regulations.

**The Regulation Adoption Process**

There are two types of administrative rules and regulations: temporary and permanent. A temporary rule and regulation, as defined in KSA 2018 Supp. 77-422, may be utilized by an agency if preservation of the health, safety, welfare, or public peace makes it necessary or desirable to put the regulation into effect before a permanent regulation would take effect. Temporary rules and regulations take effect and remain effective for 120 days, beginning with the date of approval by the State Rules and Regulations Board and filing with the Secretary of State. A state agency, for good cause, may request a temporary rule and regulation be renewed one time for an additional period not to exceed 120 days. A permanent rule and regulation takes effect 15 days after publication in the *Kansas Register*.

KSA 2018 Supp. 77-420 and 77-421 outline the process for the adoption of permanent Kansas

Administrative Regulations (KAR) in the following steps (to be followed in consecutive order):

- Obtain approval of the proposed rules and regulations from the Director of the Budget, who will conduct an independent analysis to determine whether the costs incurred by non-state government entities would be \$3.0 million or less over a two-year period. The Director will approve the proposed rule and regulation for submission to the Secretary of Administration and Attorney General if it is determined the impact is less than or equal to \$3.0 million. If the impact exceeds \$3.0 million, the Director may either disapprove the proposed rule and regulation or approve it, provided the agency had conducted a public hearing prior to submitting the proposed rule and regulation and found the costs have been accurately determined and are necessary for achieving legislative intent;
- Obtain approval of the proposed rules and regulations from the Secretary of Administration;
- Obtain approval of the proposed rules and regulations from the Attorney General, including whether the rule and regulation is within the authority of the state agency;
- Submit the notice of hearing, copies of the proposed rules and regulations as approved, and the economic impact statement to the Secretary of State, and submit a copy of the notice of hearing to the chairperson, vice-chairperson, and ranking minority member of the Joint Committee, and to the Kansas Legislative Research Department (KLRD);
- Review the proposed rules and regulations with the Joint Committee;
- Hold the public hearing and prepare a statement of the principal reason for adopting the rules and regulations;
- Revise the rules and regulations and economic impact statement, as

needed, and again obtain approval of the Director of the Budget, Secretary of Administration, and the Attorney General;

- Adopt the rules and regulations; and
- File the rules and regulations and associated documents with the Secretary of State.

The Secretary of State, as authorized by KSA 2018 Supp. 77-417, endorses each rule and regulation filed, including the time and date of filing; maintains a file of rules and regulations for public inspection; keeps a complete record of all amendments and revocations; indexes the filed rules and regulations; and publishes the rules and regulations. The Office of the Secretary of State publishes the adopted regulations in the KAR Volumes and Supplements and on the Office's website.

In addition, new, amended, or revoked regulations are published in the *Kansas Register* as they are received. The Secretary of State has the authority to return to the state agency or otherwise dispose of any document that had been adopted previously by reference and filed with the Secretary of State.

## Legislative Review

The law dictates that the 12-member Joint Committee review all proposed rules and regulations during the 60-day public comment period prior to the required public hearing on the proposed regulations. Upon completion of its review, the Joint Committee may introduce legislation it deems necessary in the performance of its review functions. Following the review of each proposed rule and regulation, the Joint Committee procedure is to forward comments it deems appropriate to the agency for consideration at the time of its public hearing on the proposed rules and regulations. The report expressing comments by the Joint Committee may include a request that the agency reply to the Joint Committee in writing to respond directly to the comments made, and to detail any amendments in the proposed rules and regulations made after the Joint Committee hearing and any delays in the adoption or the withdrawal of the rules and

regulations. KLRD staff maintains a database of responses to Joint Committee comments and reports on those responses to the Joint Committee. A limited number of rules and regulations are exempt from the review process of the Joint Committee. In addition, certain permanent regulations have a defined statutory review period of 30 days, rather than the 60-day review period.

Each year, KLRD prepares a report on the oversight activities of the Joint Committee; this electronic report is available from KLRD.

As part of its review process, the Joint Committee examines economic impact statements, as required by law, that are prepared by agencies and accompany the proposed rules and regulations. Provisions of 2018 HB 2280 require cost-benefit analyses and analysis of the effect on the Kansas economy, including specific businesses, of each rule and regulation.

The Director of the Budget will review the agency's economic impact statement and prepare a supplemental or revised statement and an independent analysis (2018 HB 2280, sec. 1(c)).

The Legislature is also permitted to adopt a concurrent resolution expressing its concern regarding any permanent or temporary rule and regulation. The resolution may request revocation of the rule and regulation or amendment as specified in the resolution. If the agency does not respond positively in its regulation to the recommendations of the Legislature, the Legislature may take other action through a bill. Recent legislative changes to the Act have not changed this review process.

## 2008 Legislative Action

During the 2008 Legislative Session, SB 579 was enacted. This legislation requires state agencies to consider the impact of proposed rules and regulations on small businesses. (These provisions were expanded in 2018.) The bill defined "small businesses" as any person, firm, corporation, partnership, or association with

50 or fewer employees, the majority of whom are employed in the State of Kansas.

## 2010 Legislative Action

During the 2010 Legislative Session, House Sub. for SB 213 revised the Act by removing obsolete language and allowed for future publication of the KAR in paper or electronic form by the Secretary of State. In addition, the bill made changes in the definitions used in the Act and in the exclusion of certain rules and regulations from the Act. Certain procedures to be followed in the rule-making process and procedures were also revised. One provision requires state agencies to begin new rule-making procedures when the adopted rules and regulations differ in subject matter or effect in a material respect. Under these conditions, the public comment period may be shortened to not less than 30 days.

## 2011 Legislative Action

During the 2011 Legislative Session, HB 2027 amended the Act by deleting definitions of “rule and regulation,” “rule,” and “regulation,” including several provisions exempting specific rules and regulations from formal rule-making under the Act, and replacing them with a simplified definition.

It also expanded the definition of “person” to include individuals and companies or other legal or commercial entities.

The bill gave precedential value to orders issued in an adjudication against a person who was not a party to the original adjudication when the order is:

- Designated by the agency as precedent;
- Not overruled by a court or other adjudication; and
- Disseminated to the public through the agency website or made available to the public in any other manner required by the Secretary of State.

The bill also allowed statements of policy to be treated as binding within the agency when

directed to agency personnel concerning their duties or the internal management or organization of the agency.

The bill provided that agency-issued forms, the contents of which are governed by rule and regulation or statute, and guidance and information the agency provides to the public do not give rise to a legal right or duty and are not treated as authority for any standard, requirement, or policy reflected in the forms, guidance, or information.

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

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

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

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

To act in variance with a guidance document, an agency must provide a reasonable explanation for the variance and, if a person claims to have reasonably relied on the agency’s position, the explanation must include a reasonable

justification for the agency's conclusion that the need for the variance outweighs the affected person's reliance interests. The bill required each state agency to maintain an index of the guidance documents; publish the index on the agency's website; make all guidance documents available to the public; file the index in any other manner required by the Secretary of State; and provide a copy of each guidance document to the Joint Committee (may be provided electronically).

### **2012 Legislative Action**

During the 2012 Legislative Session, SB 252 made several changes to the Act.

The bill changed notice requirements from 30 days to 60 days for new rule-making proceedings when an agency proposes to adopt a final rule and regulation that:

- Differs in subject matter or effect in any material respect from the rule and regulation as originally proposed; and
- Is not a logical outgrowth of the rule and regulation as originally proposed.

In addition, the bill changed the Act by removing language that stated the period for public comment may be shortened to no less than 30 days, as the Act already stated the notice provided by state agencies constitutes a public comment period of 60 days.

### **2013-2014 Legislative Action**

The only legislative action during the 2013 Legislative Session was the passage of HB 2006, which amended the Act to remove "Kansas" from the name of the Act. No amendments were made to the Act during the 2014 Legislative Session.

### **2015-2016 Legislative Action**

The Act was not amended.

### **2017 Legislative Action**

The Act was not amended.

### **2018 Legislative Action**

During the 2018 Legislative Session, HB 2280 made several changes to the Act.

HB 2280 revised the Act pertaining to economic impact statements, granted new authority to the Director of the Budget to review and approve proposed rules and regulations, added a member of the minority party and a representative of an appropriations committee to the State Rules and Regulations Board, added a ranking minority member to the Joint Committee, requires reports to the Legislature from that committee after each meeting, and requires the Legislative Division of Post Audit evaluate the implementation of the new provisions contained in the bill in 2021.

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## State and Local Government

### I-3 Board of Indigents' Defense Services

The *U.S. Constitution* grants certain rights and protections to criminal defendants, including the right to be represented by an attorney. This right has been interpreted by the U.S. Supreme Court and the Kansas Supreme Court to require the State to pay for attorneys to represent indigent defendants at most key stages in the criminal justice process.

In Kansas, this requirement is met by the Board of Indigents' Defense Services (BIDS). BIDS provides criminal defense services through:

- Public defender offices in certain parts of the state;
- Contract attorneys (attorneys in private practice contracted by BIDS); and
- Assigned counsel (court-appointed attorneys compensated by BIDS).

In addition to providing trial-level public defenders and assigned counsel, BIDS operates offices tasked with handling defense of capital cases, cases in which conflicts of interest prevent local public defenders from representing a particular defendant, and post-conviction appeals. BIDS is also responsible for paying the other costs associated with criminal defense, such as for expert witnesses and transcription fees. Finally, Legal Services for Prisoners, Inc., a non-profit corporation, is statutorily authorized to submit its annual rating budget to BIDS and provides legal assistance to indigent inmates in Kansas correctional institutions.

### Public Defender Offices

BIDS operates nine trial-level public defender offices throughout the state:

- 3rd Judicial District Public Defender (Topeka);
- Junction City Public Defender;
- Sedgwick County Regional Public Defender;
- Reno County Regional Public Defender;
- Salina Public Defender;
- 10th Judicial District Public Defender (Olathe);
- Western Kansas Regional Public Defender (Garden City);
- Southeast Kansas Public Defender (Chanute); and

- Southeast Kansas Public Defender Satellite Office (Independence).

*Note:* The Western Regional Public Defender Office closed a satellite branch in Liberal on September 1, 2009, after determining it was no longer cost effective. That caseload is now handled by assigned counsel.

BIDS also operates the following offices in Topeka:

- Appellate Defender;
- Death Penalty Defense Unit;
- Capital Appeals;
- Capital Appeals and Conflicts;
- Northeast Kansas Conflict Office; and
- State *Habeas* Office.

Finally, BIDS operates two other special offices outside of Topeka:

- Wichita Conflicts Office; and
- Death Penalty Defense Unit—Sedgwick County Satellite Office.

BIDS officials report it monitors cost per case for each of its offices quarterly to determine the most cost-effective system to deliver constitutionally required defense services and makes changes as needed to maintain its cost effectiveness.

### Assigned and Contract Counsel

It is not possible for state public defender offices to represent all criminal defendants who need services. For example, if two individuals are co-defendants in a particular matter, it would present a conflict of interest for a single public defender's office to represent both individuals. Additionally, BIDS has determined it is not cost effective to operate public defender offices in all parts of the state, based on factors such as cost per case and caseload in these particular areas. Instead, BIDS contracts with private attorneys in those areas to provide these services and compensates willing attorneys appointed as assigned counsel by local judges.

BIDS has been directed to monitor assigned counsel expenditures and to open additional public defender offices where it would be cost effective to do so.

Effective January 18, 2010, assigned counsel were compensated at a rate of \$62 per hour as the result of a BIDS effort to reduce costs and respond to budget cuts. For FY 2016, the rate was increased to \$65 per hour, and for FY 2017, the rate was increased to \$70 per hour. During the summer of 2018, BIDS voted to increase the rate for FY 2019 to \$75 per hour.

Total fees for defense in felony cases are capped at various levels depending on the classification of the felony and the disposition of the case. However, if there is a judicial finding that a case is "exceptional" and requires the assigned attorney to work more hours than the cap allows, BIDS is required to exceed these caps. These exceptional fees are included in BIDS' overall budget for assigned counsel payments.

The 2007 Legislature changed the language of the assigned counsel compensation statute to allow BIDS to negotiate rates below the mandated (at that time) \$80-per-hour rate as an alternative cost-savings strategy. BIDS conducted public hearings in 11 counties where it was determined that it was not cost effective to utilize assigned counsel at \$80 per hour. BIDS responded to local requests to maintain the assigned counsel system in these counties by negotiating reduced compensation rates. The negotiation was successful, and rates of \$62 per hour and \$69 per hour were implemented. BIDS has determined these rates are more cost effective than opening additional public defender offices.

The 2006 Legislature approved an increase in compensation rates from \$50 per hour to \$80 per hour for assigned counsel beginning in FY 2007. This rate had previously been raised from \$30 per hour to \$50 per hour by 1988 legislation in response to a Kansas Supreme Court ruling.

Prior to FY 2006, BIDS paid assigned counsel expenditures from the operating expenditures account in its State General Fund appropriation. All professional services were treated as

assigned counsel costs, including attorney fees, transcription fees, and expert witness fees. The FY 2006 budget added a separate line item for these other expenditures to more accurately account for assigned counsel costs.

## Other Costs Affecting BIDS

### ***Expert Witness and Transcription Fees***

BIDS is required to pay the fees for expert witnesses and transcription. Most experts utilized by the agency have agreements to work at a reduced rate. However, the agency reported these costs have risen steadily since FY 2008 due to higher transcription costs mandated by the Kansas Supreme Court, new legal requirements for expert testimony, and the expansion of what is effective assistance of defense counsel and defense services.

### ***Death Penalty Cases***

Kansas reinstated the death penalty in 1994, following the end of a national moratorium imposed by the U.S. Supreme Court. (More information about the death penalty in Kansas is available in [G-4 Death Penalty in Kansas](#) in this Briefing Book).

The Death Penalty Defense Unit was subsequently established to handle the defense of cases in which the death penalty could be sought. As with all cases handled by public defenders, conflicts of interest and other circumstances raise the possibility that outside counsel will have to be contracted to represent defendants.

Capital cases are more costly than other matters handled by BIDS. Not only do these cases take more time for trial, but they also require defense counsel to be qualified to handle the complexities and special rules of death penalty litigation. According to a report issued by the Kansas Judicial Council Death Penalty Advisory Committee (Advisory Committee) in 2004, a “capital case requires more lawyers (on both prosecution and defense sides), more experts

on both sides, more pre-trial motions, longer jury selection time, and a longer trial.”

The Legislative Division of Post Audit (LPA) issued a Performance Audit in December 2003 called “Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections.”

This report noted several findings and recommendations related to the cost of death penalty cases in Kansas:

- BIDS usually bore the cost of defending capital murder cases;
- Contracted attorneys for such cases were paid \$100 per hour, with no fee cap; and
- It recommended BIDS ensure it had qualified attorneys in its Death Penalty Defense Unit and consider establishing a conflicts office (which it later did).

A follow-up study, also conducted by the Advisory Committee, was released on February 13, 2014, and updated cost data for the costs first reported in LPA’s 2003 report. The Advisory Committee found BIDS spent an average of \$395,762 on capital cases that went to trial and where prosecutors sought the death penalty, compared to an average of \$98,963 on other death penalty-eligible cases that went to trial without the prosecutor seeking the death penalty.

## **List of Other Offices Administered by BIDS**

### ***Appellate Defender Office***

The Appellate Defender Office is located in Topeka and provides representation to indigent felony defendants with cases on appeal.

### ***Northeast Kansas Conflict Office***

The Northeast Kansas Conflict Office, located in Topeka, was established to deal with a large number of conflict cases in Shawnee County. The office also handles off-grid homicide cases in Lyon County.

### **Sedgwick County Conflict Office**

The Sedgwick County Conflict Office was established to defend conflict cases that cannot be handled by the Sedgwick County Public Defender Office, and is located in Wichita.

### **Death Penalty Defense Unit**

The Death Penalty Defense Unit was established after the reinstatement of the death penalty. BIDS determined it was more cost effective to establish an office with attorneys specially qualified to handle defense in capital cases rather than relying on contract or assigned counsel.

### **Capital Appeals and Conflicts Office**

The primary function of the Capital Appeals and Conflicts Office is to handle representation throughout the long and complex appellate process that follows the imposition of a death sentence. The Office also handles some cases from the Appellate Defenders Office, as time allows.

### **Capital Appeals Office**

The Capital Appeals Office was established in 2003 to handle additional capital appeals.

Specifically, the office was created to handle the appeals of Reginald and Jonathan Carr, who were both convicted of murder in Sedgwick County and sentenced to death. Due to conflict of interest rules, the existing Capital Appeals and Conflicts Office could only represent one of the two men. The establishment of the Capital Appeals Office resolved that conflict and doubled BIDS' capacity for handling death penalty appeals.

### **State Habeas Office**

The State *Habeas* Office was established in FY 2015 to handle death penalty defense after a death sentence is upheld by the Kansas Supreme Court and petition for a writ of *certiorari* has been unsuccessful for the defense.

### **Legal Services for Prisoners**

Legal Services for Prisoners, Inc., provides legal services to inmates in Kansas correctional facilities. The goal of the program is to ensure that prisoners' right to access the courts and pursue non-frivolous claims is met. Legal Services for Prisoners submits its annual budget to BIDS. Although Legal Services for Prisoners is not a state agency, its funding is administered through BIDS.

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**I-1 Addressing  
Abandoned Property  
Using Legal Tools**

**I-2 Administrative  
Rule and Regulation  
Legislative Oversight**

**I-3 Board of Indigents'  
Defense Services**

**I-4 Election Security**

**I-5 Government  
Transparency**

**I-6 Joint Committee on  
Special Claims Against  
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**I-7 Kansas Open  
Meetings Act**

**I-8 Kansas Open  
Records Act**

**I-9 KPERS' Retirement  
Plans and History**

**I-10 Post-election Audits**

**I-11 Senate  
Confirmation Process**

**I-12 State Employee  
Issues**

**I-13 Voter Registration  
and Identification**

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### State and Local Government

#### I-4 Election Security

As further information has been released related to the scope of the attempted interference in the U.S. election process, election security has become an increasingly important policy topic at all levels of government. This article will examine the major election vulnerabilities and summarize election security activities being undertaken at the federal level as well as in Kansas and other selected states.

Recent reports, including the following examples, illustrate needed election security:

- In January 2017, the Office of the Director of National Intelligence released a declassified version of its report on interference in the 2016 election. The report states Russian intelligence obtained and maintained access to multiple U.S. state and local election boards. The Department of Homeland Security (DHS) stated the types of systems Russian actors targeted or compromised were not involved in vote tallying;
- In September 2017, DHS informed election officials in 21<sup>1</sup> states that hackers had targeted their voting system and sent more than 100 phishing e-mails to local election officials across the country before the 2016 election;
- In May 2018, hackers successfully shut down the Knox County, Tennessee, website and gained access to the server on that county's primary election day. The hackers shut down the website for an hour, but did not affect the outcome of the election;
- In July 2018, the U.S. Department of Justice (DOJ) announced indictments against 12 members of the Main Intelligence Directorate of the Russian General Staff (known as GRU). The indictment alleges that 11 members conspired to hack into computers and steal and release documents in an effort to interfere with the 2016 election, while 1 conspired to infiltrate computers of organizations responsible for administering elections; and
- In July 2018, the Federal Bureau of Investigation (FBI) informed Maryland officials that in 2015, without the State's knowledge, a Russian investor had purchased ByteGrid LLC, a software vendor that maintains part of the Maryland State Board of Elections' voter registration system.

## Tools Used in Elections

There are many tools and resources used to increase the efficiency and security of elections. Since a majority of election tools are electronic, cybersecurity and tampering are major issues concerning election security. The tools and resources examined in this article include: online voter registration systems, electronic poll books, election personnel, voting devices, storage and tallying of ballots, transmission of vote tallies, and post-election audits.

**Online voter registration systems.** As with any online system, there are benefits and risks. Online voter registration can expedite new voter registration, updates to existing voter registrations, and finding other relevant information, such as locating polling places. However, online voter registration systems are at risk of a multitude of cyberattacks, as was seen when hackers targeted voting systems, including voter registration systems, in 21 states. While Arizona and Illinois were the only states with confirmed breaches of their voter registration systems, an NBC News article indicated five other states' voter registration systems were compromised with varying levels of severity. To date, no evidence has been found that any voter information was altered or deleted. However, the August 2018 Defcon conference (one of the world's largest hacking conventions), an 11-year-old was able to hack a replica of the Florida Secretary of State website and change election results in 10 minutes.

According to the United States Computer Emergency Readiness Team (US-CERT), potential cyberattacks on voter registration systems could include: phishing<sup>2</sup> attempts, injection flaws,<sup>3</sup> cross-site scripting vulnerabilities,<sup>4</sup> denial-of-service (DoS) attacks,<sup>5</sup> server vulnerabilities, and ransomware.<sup>6</sup>

US-CERT outlines several ways to protect voter registration systems, including patching applications and operating systems, application whitelisting,<sup>7</sup> restricting administrative privileges, input validation,<sup>8</sup> using firewalls, backing up voter registration data and storing it offline, conducting risk analysis, training staff on cybersecurity, having an incident response and business continuity

plan in place and tested, and penetration testing.<sup>9</sup> The National Conference of State Legislatures (NCSL) also cited several approaches used to ensure security, including registrants' providing their driver's license number or last four digits of their Social Security number; automatic "time outs" after a certain period of inactivity; "captcha" boxes, where registrants must decode images that a computer cannot decode; data encryption; highlighting unusual activity; and multi-screen systems, which offer one question on a screen.

**Electronic poll books.** In January 2014, the Presidential Commission on Election Administration recommended jurisdictions transition to electronic poll books (EPBs). As of March 2017, NCSL noted 30 states, including Kansas, permit the use of EPBs in some form. EPBs replace paper poll books and allow poll workers to access the list of eligible voters, check in voters more efficiently, and prevent voters from checking in more than once. EPBs are electronically connected to a central registration database. However, the Brennan Center for Justice (Brennan Center) notes there are no accepted technical standards and there are concerns about security and fraud prevention, especially for those connected to remote computers *via* the Internet. EPBs are vulnerable to many of the same risks as other computer tablets. The Center for Internet Security (CIS) identifies six major risks associated with EPBs: risks associated with established (whether persistent or intermittent) Internet connectivity; network connections with other internal systems, some of which may be owned or operated by other organizations or authorities, including private networks for EPBs; security weaknesses in the underlying commercial off-the-shelf product, whether hardware or software; security weaknesses in the dedicated components, whether hardware or software; errors in properly managing authentication and access control for authorized users, including permissions for connecting to networks and attaching removable media; and difficulties associated with finding and rolling back improper changes found after the fact.

The Election Assistance Commission (EAC) provides regulations created by Indiana, Ohio,

Pennsylvania, and Virginia. Based on regulations and guidance from these states, some ways in which EPBs can be secured include the use of secure sockets layer security,<sup>10</sup> use of a virtual private network,<sup>11</sup> and proper security training for staff.

**Election personnel.** One of the largest cybersecurity risks is human error. Potential security issues associated with election personnel include phishing e-mails; malware disguised as system patches; or the creation of unintentional gaps in cybersecurity, physical security, or both. One group of election personnel with a direct and important role on Election Day is poll workers. Poll workers are election officials, usually volunteers, responsible for ensuring proper and orderly voting at polling stations. Depending on the state, election officials may be identified as members of a political party or nonpartisan. Their duties can include issuing ballots to registered voters, registering voters, monitoring the voting equipment, explaining how to mark a ballot or use voting equipment, or counting votes.

An EAC 50-state survey of requirements for poll workers states that in all states and territories, poll workers must be at least 18 years old (with some exceptions); be registered to vote in that state; and be a resident of the county or district in which they will work, though some states have broader restrictions. A majority of states, including Kansas, require poll workers to be trained, but the type, frequency, intensity, and requirements for who is trained varies greatly. Most states, including Kansas, and many precincts do not require poll workers and other election personnel to be subject to background checks, which could allow “bad actors” unrestrained access to voting equipment and data.

**Voting devices.** In response to issues arising from the 2000 presidential election, Congress passed the 2002 Help America Vote Act (HAVA). The law provided almost \$3.3 billion to help states replace voting systems and improve election administration. Voluntary technical standards for computer-based voting devices were first developed in the 1980s, but HAVA codified the development and required regular updating of voting device standards by the EAC. While

the EAC guidelines are voluntary, most states, including Kansas, require their voting devices conform to EAC guidelines. On September 12, 2017, the EAC released a draft of new guidelines, which would require voting devices to produce a paper record that can be verified and audited. The new guidelines are expected to be approved in 2018. Below are descriptions of the two main types of voting devices in use today.

According to the Brennan Center, during the 2018 mid-term elections, 43 states and Washington D.C. were to use voting devices that are no longer manufactured; 13 states were to use paperless voting devices in some counties and towns; and 5 states were to use paperless voting devices statewide.

In July 2018, one of the top voting equipment manufacturers and software vendors, Election Systems & Software (ES&S), admitted to a Congressman that ES&S installed remote-access software<sup>12</sup> on its voting devices between 2000 and 2006. In 2006, the source code for ES&S’ remote-access software was stolen, which would allow hackers to examine the code and find vulnerabilities to exploit. Once discovered, ES&S informed customers; however, it was the customers’ responsibility to remove the software. At least 60.0 percent of ballots cast in 2006 were tabulated on ES&S systems. However, ES&S announced in August 2018 it had formed new partnerships with multiple DHS offices to help conduct cyber-hygiene scans of ES&S public-facing Internet presence, monitor and share cyber-threat information, detect and report indicators of compromise, develop and distribute election security best practices, and raise election security awareness. ES&S also has installed ALBERT network security sensors<sup>13</sup> in its voter registration environments. The company has become a member of two Information Sharing and Analysis Centers (ISAC), including the Elections Infrastructure ISAC and the Information Technology ISAC, organizations that aim to improve cyber-threat information sharing between the private and public sectors.

*Optical scan device.* The most widely used device is the optical scan device, which is used in at least some polling places in every state. Voters

mark choices on paper ballots by hand or use an electronic ballot marking device and the ballots are read by an electronic counting device. Optical scan devices are regarded as more secure than direct recording electronic devices due to the fact the devices create a voter verifiable paper audit trail (VVPAT), meaning votes can be verified and cannot be altered electronically. However, as optical scan devices typically use electronic mechanisms to count ballots, vote counts are still vulnerable to cyberattacks, though an audit of the paper ballots is likely to catch any irregularities.

*Direct recording electronic device.* The second most utilized option is the direct recording electronic device (DRE), where voters mark choices *via* a computer interface and those choices are recorded directly to an electronic memory. Delaware, Georgia, Louisiana, New Jersey, and South Carolina all exclusively used DREs with no VVPAT in the 2016 election. However, all five states are currently either in the process of replacing their DREs or considering legislation to require such a change. DREs pose a unique concern because there is no way to verify the choice a voter intended to make is the same as the choice recorded in the device's memory. To solve this problem, many states configured DREs to produce a verifiable paper record of the voter's ballot. However, a voter must still review this ballot before casting it to verify it is correct. In November 2016, a former Central Intelligence Agency (CIA) Director noted DRE voting devices as a key vulnerability.

*Limited life cycles.* The average life span of electronic voting devices is less than ten years, and most of the devices currently in use have surpassed this age. Out-of-date devices and systems are not only more susceptible to technical issues, but also to cyberattacks and other means of tampering. The Institute for Critical Infrastructure Technology (ICIT) noted many voting devices have not been patched for almost a decade and use antiquated software that is unsupported by the manufacturer. The Brennan Center estimates the initial cost of replacing voting equipment throughout the United States could exceed \$1.0 billion. However, many jurisdictions do not have the funds to replace outdated technology. Kansas statutes place

financial and maintenance responsibilities for voting devices with the counties.

*Storage of voting devices.* ICIT found that many voting devices are stored in locations with minimal security, allowing election personnel relatively easy and unregulated access to alter or manipulate devices, either intentionally or unintentionally.

**Storage and tallying of ballots.** While paper ballots are stored in physical ballot boxes, electronic ballots are stored on device smart cards, a device's random-access memory, or other electronic tools. Security measures, such as passwords, specific access cards, encryption, and tamper-resistant tape, limit access to stored ballots. However, there are ways to circumvent these measures.

Manipulation can also occur after the ballot storage has been removed from the device to be tallied. Ballots may be tallied at the polling place or at a central location. Paper ballots are tallied by hand or by a scanner that produces a printout of the votes. Voting devices that do not utilize paper ballots tally votes internally and produce either a printed or digital tally. It is estimated only 5.0 percent of ballots in the United States are tallied by hand; the other 95.0 percent are tallied either by voting devices or scanners. Voting devices and scanners can create issues, such as not calculating the votes correctly, not reading a ballot, or producing multiple readings of the same ballot. Tallying by hand carries the lowest risk for manipulation as it would be difficult to alter, switch, or destroy ballots without being caught. However, there is still the possibility of human error.

**Transmission of vote tallies.** After the votes have been tallied, the totals must be sent to a central location to determine the total vote tally of that race. Vote tallies are typically transmitted in one of the following ways: spoken over the phone to someone at election headquarters, who will input that data into a spreadsheet; some voting machines are equipped with modems that connect to a telephone line rather than the Internet, and can be transmitted electronically; or memory cards or sticks physically delivered



to voting headquarters, where it is turned over to election officials who will put the data storage device in their machines and download the actual results. Each of these methods has benefits and risks. Some of the risks could include “bad actors” providing altered or incorrect information; hackers infiltrating the systems used to transmit the tallies and altering or deleting the tallies; or simple human error.

**Post-election audits.** Currently, 32 states and the District of Columbia conduct some form of a post-election audit. NCSL has divided post-election audits into two categories:

- Traditional post-election audit: usually conducted manually by hand counting a portion of the paper records and comparing them to the electronic results produced by an electronic voting machine; and
- Risk-limiting audit: an audit protocol that makes use of statistical principles and methods and is designed to limit the risk of certifying an incorrect election outcome.

Twenty-nine states<sup>14</sup> and the District of Columbia require a traditional post-election audit, and Colorado, Rhode Island, and Virginia statutorily require risk-limiting audits. Kansas, North Dakota, and Wyoming conduct a repeat of the pre-election logic and accuracy test after the election to ensure voting machines are still tabulating accurately.

**Other notable election security resources.** States utilize a myriad of resources to protect their election infrastructure from outside attacks. These resources may include cyber-liability insurance,<sup>15</sup> white-hat hackers,<sup>16</sup> participation in interstate information sharing programs,<sup>17</sup> and cybersecurity services provided by private entities.<sup>18</sup>

### Federal Government Current Activities

The DHS National Cybersecurity and Communications Integration Center (NCCIC) helps stakeholders in federal departments and agencies, state and local governments, and the

private sector manage their cybersecurity risks. The NCCIC works with the Multi-State Information Sharing and Analysis Center (MS-ISAC) to provide threat and vulnerability information to state and local officials; all states are members. The MS-ISAC composition is restricted to state and local government entities. It has representatives co-located with the NCCIC to enable collaboration and access to information and services for state chief information officers.

During the 2016 election cycle, the National Protection and Programs Directorate (NPPD) within DHS offered voluntary assistance to state and local election officials and authorities from NCCIC, which helped stakeholders in federal departments and agencies, state and local governments, and the private sector manage their cybersecurity risks. The then-Homeland Security Secretary told a Senate hearing that 18 states accepted DHS’ offer to help improve cybersecurity of their election systems prior to the 2016 election. Eleven states, including Kansas, chose not to accept DHS’ offer, citing concerns with federal intrusion on state elections.

On January 6, 2017, the Secretary of DHS determined that election infrastructure should be designated as a critical infrastructure sub-sector. Participation in the sub-sector is voluntary and does not grant federal regulatory authority. Elections continue to be governed by state and local officials, but with additional effort by the federal government to provide security assistance. DHS is also attempting to obtain security clearances for the top election official in each state so they will have access to classified intelligence about cybersecurity threats. As of March 2018, less than 12 states’ election officials received their security clearance from DHS to receive information on election-related threats. Only 19 states have signed up for the risk assessments DHS is offering, and 14 are getting their “cyber-hygiene” scans. In July 2018, DHS announced the creation of the National Risk Management Center (Center), which will focus on evaluating threats and defending critical infrastructure against hacking. The Center will run simulations, tests, and cross-sector exercises to evaluate critical infrastructure weaknesses and threats.

In Fall 2017, the FBI established the Foreign Influence Task Force to identify and counteract the full range of foreign influence operations targeting U.S. democratic institutions. The Task Force works with personnel in all 56 FBI field offices and brings together the FBI's expertise in counterintelligence, cyber, criminal and counterterrorism, to root out and respond to foreign influence operations.

On February 20, 2018, the U.S. Attorney General ordered the creation of the DOJ Cyber-Digital Task Force, which will canvass the many ways the DOJ is combating the global cyber threat, and will also identify how federal law enforcement can more effectively accomplish its mission in this area. Among other areas, the Attorney General has asked the Task Force to prioritize its study of efforts to interfere with our elections. The Task Force released a report on July 19, 2018. The DOJ also issued a statement indicating the agency plans to alert American companies, private organizations, and individuals that they are being covertly attacked by foreign actors attempting to affect elections or the political process.

In early July 2018, the Director of the National Security Agency (NSA) directed the NSA and the Department of Defense's (DOD) Cyber Command to coordinate actions to counter potential Russian government-sanctioned interference in the 2018 midterm elections. The joint program is also working with the FBI, CIA, and DHS.

In August 2018, DHS, EAC, DOD, National Institute of Standards and Technology, NSA, Office of the Director of National Intelligence, U.S. Cyber Command, DOJ, the FBI, 44 states (including Kansas), the District of Columbia, and numerous counties participated in the Tabletop the Vote 2018, DHS' National Election Cyber Exercise which is a simulation that tested the ability of state and federal officials to work together to stop data breaches, disinformation, and other voting-related security issues.

**EAC current activities.** The EAC adopted the Voluntary Voting Systems Guidelines (VVSG) Version 2.0 in September 2017. The VVSG Version 2.0 states a voting device must produce a VVPAT and the software or hardware cannot

produce errors that could lead to undetectable changes in tallies.

**New HAVA funding.** On March 23, 2018, the Consolidated Appropriations Act of 2018 (Act) was signed into law. The Act included \$380.0 million in grants, which were made available to states to improve the administration of elections, including to enhance technology and make election security improvements. The majority of the funds will be used to improve election cybersecurity and to purchase new voting equipment.

### **Kansas Election Security Activities<sup>19</sup>**

In February 2018, the Center for American Progress (CAP) released an analysis of election security in all 50 states. Kansas was ranked F/D, one of five states<sup>20</sup> that received an unsatisfactory ranking. The State received fair marks for voting machine certification requirements, pre-election logic and accuracy testing, and adherence to a number of minimum cybersecurity best practices. Kansas received unsatisfactory marks for the lack of a VVPAT from all voting devices and post-election audits; the State's ballot accounting and reconciliation procedures; and for allowing voters stationed or living overseas to return voted ballots electronically. [Note: At the time of the CAP report's publication, 2018 HB 2539 had not yet been passed.] Kansas received an incomplete mark for minimum cybersecurity for voter registration systems as CAP did not receive information on these topics from state officials.

**Online voter registration system.** Kansas is one of 37 states, and the District of Columbia, that offer online voter registration. The State's online voter registration system is about ten years old. The Kansas Director of Elections (Director) with the Office of the Secretary of State (Office) indicated in July of 2018 there was a firewall in place to protect the voter registration system, which was continuously updated, and that Office staff had been trained on cybersecurity best practices. The Secretary of State previously had stated in 2016 the voter registration system had logging capabilities to track modifications to the database.

**Electronic poll books.** As of April 2016, at least 16 Kansas counties, including Johnson, Sedgwick, Shawnee, and Wyandotte, were using EPBs, though neither state statutes nor rules and regulations provide guidance on their use, security, or maintenance. According to the Director, EPBs in Kansas are not connected to the voter registration system *via* a network. Counties are responsible for providing training on EPBs to election personnel.

**Election personnel.** Kansas poll workers must be residents of the area in which they will serve; normally at least 18 years of age, though they may be as young as 16 years old if they meet certain other requirements; not a candidate in the current election; and a registered voter in the area in which they will work. In Kansas, there are no requirements for poll workers to submit to and pass background checks. KSA 25-2806 requires county election officers to provide instruction concerning elections generally, voting devices, ballots, and duties for poll workers before each election. The curriculum specifics and training duration is left to the discretion of the county election officer.

**Voting devices.** In the 2016 election, data from Verified Voting showed that 70 Kansas counties used paper ballots; 15 used both paper ballot and DREs without VVPAT; 15 used DREs without VVPAT; and 5 used DREs with VVPAT. As of March 2018, about 20 counties had replaced some or all of their voting devices or were in the process of purchasing new voting devices.

Johnson County (County) was one locality to update voting devices. In May 2018, the County contracted with ES&S for the purchase of 2,100 voting devices for \$10.5 million. During the August 2018 primary election, there were issues obtaining data from the computer thumb drives where votes are stored. There were also issues with poll-worker preparedness in the event of device malfunction and insufficient paper ballots as a backup.

Statutes concerning electronic voting devices can be found in KSA 25-4401 through KSA 25-4416, also known as the Electronic and Electromechanical Voting Systems Act. KSA 25-

4406(k) requires voting devices to be compliant with HAVA voting system standards. Logic and accuracy testing must be conducted on all voting devices five days before an election, per KSA 25-4411. County commissioners and county election officers may select the type of voting device utilized in their voting locations, as long as it has been approved by the Secretary of State.

During the 2018 Legislative Session, the Legislature passed HB 2539, which required any electronic or electromechanical voting system purchased, leased, or rented by a board of county commissioners after the effective date of the bill to provide a paper record of each vote cast at the time the vote is cast. The bill also required voting systems to have the ability to be tested before an election and prior to the canvass date.

**Storage and tallying of votes.** The majority of Kansas counties use some form of paper ballot and use electronic scanners to tally the votes. These paper ballots are stored in locked boxes with authorized access. Counties that use DREs without a VVPAT store votes on removable memory cards.

**Transmitting of vote tallies.** Vote tallies provided *via* memory cards are transported by the county election officer. KAR 7-21-2 states results are only to be sent by fax, phone, handdelivery, or encrypted electronic transfer. According to the Office, officials typically call in or e-mail results, and there is no Internet uploading of results.

**Post-election audits.** During the 2018 Legislative Session, the Legislature passed HB 2539, which required county election officers to conduct a manual audit or tally of each vote cast in 1.0 percent of all precincts, with a minimum of one precinct located within the county. The audit requirements apply to all counties for elections occurring after January 1, 2019. The requirement for audit or tally applies regardless of the method of voting used. The bill specified these contested races will be audited:

- In presidential election years: one federal race, one state legislative race, and one county race;

- In even-numbered, non-presidential election years: one federal race, one statewide race, one state legislative race, and one county race; and
- In odd-numbered election years: two local races, selected randomly after the election.

**Other election security resources.** Kansas also uses participation in interstate information sharing programs and cybersecurity services provided by private entities to safeguard elections.

**Kansas election funding.** Kansas received \$26.4 million in total 2002 HAVA funds and has \$2.9 million remaining as of early 2018. Under the Consolidated Appropriations Act of 2018, Kansas received about \$4.4 million in new HAVA funds, with a state match of \$219,180. Kansas submitted a budget in August 2018 with the majority of funds going to local jurisdictions, purchase of new equipment, and training. The Office budget totals \$4.5 million for FY 2018 and \$4.6 million for FY 2019, all from special revenue funds. The Office budgeted \$548,977 for elections and legislative matters for FY 2018 and \$551,359 for FY 2019.

- 1 Those states were Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Illinois, Iowa, Maryland, Minnesota, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, Washington, and Wisconsin.
- 2 Phishing includes forged e-mails, texts, and other messages used to manipulate users into clicking on malicious links or downloading malicious file attachments.
- 3 Injection flaw is a broad web application attack technique that attempts to send commands to a browser, database, or other system, allowing for a regular user to control behavior.
- 4 Cross-site scripting vulnerability allows threat actors to insert and execute unauthorized code in web applications
- 5 Denial-of-service attack prevents legitimate users from accessing information or services.
- 6 Ransomware is a type of malicious software that infects a computer system and restricts users' access to system resources or data until a ransom is paid to unlock it.
- 7 Application whitelisting allows only specified programs to run while blocking all others, including malicious software.
- 8 Input validation is a method of sanitizing untrusted user input provided by users of a web application.
- 9 Penetration testing is an authorized simulated attack on a computer system, performed to evaluate the security of the system.
- 10 Secure sockets layer security is the standard security technology for establishing an encrypted link between a web server and a browser. This link ensures that all data passed between the web server and browsers remain private and integral.
- 11 Virtual private network creates a safe and encrypted connection over a less secure network.
- 12 Remote-access software allows someone to access a computer or a network from a remote distance.
- 13 ALBERT is a unique network monitoring solution that provides automated alerts on both traditional and advanced network threats, allowing organizations to respond quickly when their data may be at risk.
- 14 These states are Alaska, Arizona, California, Connecticut, Florida, Hawaii, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin.
- 15 Cyber-liability insurance is coverage for financial consequences of electronic security incidents and data breaches.
- 16 White-hat hacker is a computer security specialist who breaks into protected systems and networks to test their security.
- 17 Interstate information sharing programs include the Multi-State Information Sharing & Analysis Center and the Election Infrastructure Information Sharing & Analysis Center, which collect, analyze, and disseminate threat information to members and provide tools to mitigate risks and enhance

resiliency.

18 Cybersecurity services provided by private entities include The Athenian Project and Project Shield.

19 *Note:* More detailed information on election security in Kansas can be found in the KLRD memorandum titled “Status of Election Security in Kansas,” located at <http://www.kslegresearch.org/KLRD-web/Publications/StateLocalGovt/2018-08-08-ElectionSecurityKansas.pdf>.

20 The other states include Arkansas, Florida, Indiana, and Tennessee.

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### State and Local Government

#### I-5 Government Transparency

##### Transparency Legislation in 2018

This article provides information about legislation related to transparency in elections, campaign finance, and elected officials in Kansas, other states, and in Congress. In 2017 and 2018, legislatures in several states and Congress introduced bills, resolutions, and constitutional amendments that concerned transparency in campaign finance, contribution limits, finance disclosure, lobbying, ethics, or limits on elected officials. (For information on election transparency and post-election audits, please see [I-4 Election Security](#) in this Briefing Book.)

##### Comprehensive Transparency Legislation

###### *Kansas*

The 2018 Kansas Legislature passed SB 394, effective July 1, 2018, which made changes to lobbying activities and requirements in Kansas.

The bill amended the definition of “lobbyist” to include independent contractors compensated by an executive agency for the purpose of evaluation, management, consulting, or acting as a liaison for the executive agency and who engages in lobbying. The bill includes in the definition of “lobbying” promoting or opposing any action or inaction of any executive agency on any executive administrative matter or judicial agency on any judicial administrative matter. Certain activities are exempted from the definition of “lobbying,” including communications between and among members of the Legislature or executive or judicial officials or employees and communications regarding a contract, lease, or agreement of \$5,000 or less.

The bill also amended the restrictions of gifts and meals provided by a lobbyist. The bill extends to members, member elects, and employees of the judicial branch the limitation that hospitality in the form of recreation having an aggregate value of \$40 or more or in the form of food and beverages shall not be given to influence the performance of official duties pertaining to a judicial administrative member. The bill extended to these judicial officials and employees the presumption that hospitality in the form of food and beverages

is not given to influence an official matter. The bill also increased the value of a meal that may be accepted by members of the Executive Branch from \$25 to \$40 per occurrence.

The bill also requires lobbyists to register and report certain activities. Lobbyists must register and provide the name of each executive and judicial agency and office as well as any agency, division, unit, department, institution, office, commission, board, or bureau they lobby. The lobbyist must also note if they will lobby the Legislative Branch. The bill also extended the requirement that lobbyists must disclose the aggregate value of gifts, entertainment, or hospitality provided when the lobbyist expends \$100 or more and the date the gift, entertainment, or hospitality was provided to legislators, members of the Judicial Branch, or legislative or judicial employees. The bill requires the lobbyist to disclose the full name of the legislator, Judicial Branch member, or legislative or judicial employee. This requirement extends to state officers, state officers-elect, state employees, members-elect of the Judicial Branch, and legislators-elect. Previously, lobbyists were only required to disclose when they expended \$100 or more for gifts, entertainment, or hospitality in any reporting period.

### **Missouri**

By means of an initiative petition, Missouri voters voted in the November 2018 general election on a ballot initiative that would amend the legislative process and legislator activities; the measure was adopted. Amendment 1, known as “Clean Missouri,” would amend the *Missouri Constitution*, as follows:

- Prohibit state legislators and their employees from serving or registering as a paid lobbyist or solicit prospective employees or clients to represent as paid lobbyists for two calendar years after the conclusion of the session the legislator or employee last served;
- Limit the value of gifts, service, or things of value that state legislators and their

employees may accept to no more than \$5 per occurrence;

- Reduce the amount of contribution that candidates for the state legislature may accept from any person in any one election to:
  - \$2,500 for candidates for the state Senate; and
  - \$2,000 for candidates for the state House of Representatives;
- Create the nonpartisan position of “Non-Partisan State Demographer” to develop procedures in preparation of the drawing of legislative redistricting maps on the basis of the federal census and present such information to the House Apportionment Commission and the Senatorial Apportionment Commission, and change the criteria for redrawing state legislative districts;
- Require legislative records to be public records and allow public access to these records and require that legislative proceedings (including committee proceedings) to be public meetings subject to recording by citizens, so long as these recordings do not materially disrupt the meetings; and
- Prohibit political fundraising activities and political fundraising events by any state legislators or candidates for state legislature on Missouri state property.

The Clean Missouri ballot initiative was challenged on constitutional grounds. Opponents to the initiative argued Clean Missouri violates the *Missouri Constitution* because it would amend more than one section of the *Missouri Constitution*. Attorneys representing Clean Missouri argued the initiative is constitutional because all provisions touch the Missouri General Assembly.

In September 2018, Cole County Circuit Judge Daniel Green ordered the Missouri Secretary of State to rescind Clean Missouri’s certification, removing it from the November 2018 ballot. The Western District of the Missouri Court of Appeals heard an appeal brought by attorneys



representing Clean Missouri on September 20, 2018. The Court of Appeals ruled the Circuit Court erred when it removed Clean Missouri from the ballot. By overturning the Circuit Court's decision, the Court of Appeals put Clean Missouri back on the November 2018 ballot. The Missouri Supreme Court denied an appeal.

## Transparency in Presidential Campaigns

In recent years, California, Delaware, Maryland, and Massachusetts have all introduced legislation relating to transparency in national presidential elections.

California S 149 (2017), Delaware S 28 (2017), Maryland S 256 (2018), Maryland H 662 (2018) and Massachusetts S 365 (2017) would require the disclosure of the federal income tax returns of candidates for President of the United States.

The Massachusetts legislation would require the presidential candidate to disclose federal tax returns for the three most recent available years. Legislation in California, Delaware, and Maryland would require the candidate to disclose federal tax returns for the five most recent available years.

The legislation proposed in Delaware, Maryland, and Massachusetts would also require candidates for Vice President of the United States to disclose federal tax returns for a specified number of most recent available years.

Each bill would prevent the candidate for president's name from appearing on the ballot if the candidate does not submit their federal tax returns in a specified time before the election. California's bill would prevent the candidate's name from appearing on the primary election ballot, and Delaware, Maryland, and Massachusetts's bills would prevent the candidate's name from appearing on the general election ballot.

Of the bills introduced, only Delaware S 28 is still active. The bills in California, Maryland, and Massachusetts all either failed or were vetoed.

## Transparency in Campaign Contributions and Political Advertisements

During the 2018 session, bills were introduced in the states of Connecticut, Delaware, Georgia, Kansas, Maine, Massachusetts, New York, and Washington; the District of Columbia; and the U.S. Congress relating to campaign finance transparency. Of the 20 bills and resolutions dealing with campaign finance, 8 were enacted or adopted in 2018.

### *District of Columbia*

In 2018, the District of Columbia passed five emergency bills (DC B 155, DC B 486, DC B 487, DC B 862, and DC B 863) and one resolution (DC R 160) temporarily amending campaign finance law. Currently pending DC B 8, known as the "Campaign Finance Transparency and Accountability Amendment Act of 2017," would establish the changes made in the previous bills and resolution to create permanent law.

Among other things, the bill would require political action committees (PACs) to direct their contributions through regulated accounts designated for that purpose, clarify expenditures coordinated with a candidate or campaign are considered contributions to that candidate or campaign, require PACs and independent expenditure committees to certify the donations they have received have not been coordinated with any candidate or campaign, enhance disclosure of independent contributions, and prohibit unlimited contributions to a PAC in a year when the committee is not supporting candidates.

### *Maine*

In 2018, Maine enacted HP 1301, which, among other things, created reporting requirements for certain campaign contributions. The bill requires that contributions aggregating in excess of \$100,000 for the purpose of influencing a campaign for a *Maine Constitution* people's veto referendum or a direct initiative must be reported within five days of receipt. Such a report must disclose the name and purpose of the organization making the contribution, the amount and date

of each contribution, the five largest sources of income in the year prior to filing the report, and other information about the organization.

## **Transparency in Digital Information and Social Media**

Recently, both Congress and individual states have considered legislation regarding the use of digital technology in government. Of the legislation introduced, many bills and resolutions specifically include social media as a digital resource for elections and campaign finance. Introduced legislation also includes online resources as a way to connect lawmakers with the public.

### ***U.S. Congress***

During the 115th Congress (2017-2018), S. 1989 was introduced. Known as the “Honest Ads Act,” the purpose of the bill is to enhance transparency and accountability for online political advertisements by requiring those who purchase and publish these advertisements to disclose information about the advertisements to the public. The bill’s intent is to provide the public with the sources of funding for political advertisements so they can both make informed political choices and hold elected officials accountable. The bill touches on other campaign finance laws, including the prohibition on campaign spending by foreign nationals. The bill would require disclosure of sources of funding of political advertising, including certain Internet or digital communication.

Also during the 115th Congress, H. 4504 was introduced. Known as the “Transparency in Government Act of 2017,” the bill, if enacted, would

amend several acts relating to transparency, including the Ethics in Government Act and the Lobbying Disclosure Act. The bill would require committees to post online all public hearings, including transcripts and audio and video recordings.

### ***Maryland***

In 2018, Maryland enacted HB 981. Known as the “Online Electioneering Transparency and Accountability Act,” the bill amends campaign law to include digital information. The bill amends the definition of “campaign material” to include certain material disseminated and certain qualifying paid digital communications. The bill also alters the definition of “public communication” to include certain qualifying paid digital communications, which requires a person making independent expenditures of a certain amount to file an independent expenditure report with the State Board of Elections. The bill requires online platforms to retain a digital copy of each online political advertisement it distributes or transmits and maintain accounting records that include the name and address of each person who purchased an online political advertisement and the cost and method of payment for that online political advertisement.

### ***Michigan***

In 2018, Michigan introduced SR 135, a Senate Resolution urging Congress to regulate political advertisements on the Internet to encourage transparency. The resolution seeks to include in the current federal regulation of political advertisements those advertisements promoting political campaigns that are circulated on digital and social media pages.

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### State and Local Government

#### I-6 Joint Committee on Special Claims Against the State

The Kansas Tort Claims Act, enacted in 1979, allows state agencies to accept a limited amount of liability. The Tort Claims Fund, established in the Office of the Attorney General, offers recourse for other actions brought against the State. The State does assume certain responsibility for its actions under the tort claims statutes; however, there are certain areas under those statutes where the State has no liability.

The fact that state agencies are immune under statute does not mean a citizen cannot be injured by some action of the State. A potential claimant may have no remedy other than filing a claim with the Joint Committee on Special Claims Against the State (Joint Committee).

The purpose of the Joint Committee is to consider and evaluate claims against the State that cannot be lawfully paid by the State or state agency, except by an appropriation act of the Legislature. The claims that come to the Joint Committee involve an issue of equity and do not always involve the issue of negligence on the part of the State or a state employee.

#### Joint Committee Membership

The Joint Committee has seven members, consisting of three members of the Senate and four members of the House of Representatives. At least one representative must be a member of the House Committee on Appropriations and at least one senator must be a member of the Senate Committee on Ways and Means.

The chairperson of the Joint Committee alternates between the House and Senate members at the start of each biennium. The members appointed from each chamber must include minority party representation. Any four members of the Joint Committee constitutes a quorum. Action of the Joint Committee may be taken by an affirmative vote of a majority of the members present, if a quorum is present. In 2017, enactment of SB 50 removed the requirement that at least one House of Representatives member and one Senate member must be an attorney licensed to practice law in Kansas (KSA 2018 Supp. 46-912).

## Claims Process

The claimant starts the claims process by completing and submitting a claim form pursuant to KSA 2018 Supp. 46-913. The claim form is available on the Internet through both the Legislature's website and the Kansas Legislative Research Department (KLRD)'s website (<http://www.kslegresearch.org/KLRD-web/Publications/Resources/Documents/ClaimsAgainstState/FillableClaimsForm.pdf>), or it may be requested in hard copy by contacting KLRD.

The claimant indicates on the claim form whether he or she wishes to appear in person for the hearing. In-person hearings for claimants who currently are incarcerated are conducted *via* telephone conference.

Claimants who request to appear in person for their hearing are notified 15 days in advance of the hearing *via* certified mail, as prescribed in KSA 46-914. Additionally, the claim form must be notarized prior to consideration of the claim.

KSA 46-914 also requires notification to the state agency involved within 15 days in advance of the hearing *via* certified mail. State agencies and employees are charged with providing the Joint Committee with information and assistance as the Joint Committee deems necessary.

The rules of evidence do not apply to the Joint Committee. However, the Joint Committee is authorized by KSA 46-917 to adopt procedural guidelines as may be necessary for orderly procedure in the filing, investigation, hearing, and disposition of claims before it. The Joint Committee has adopted 12 guidelines (Joint Committee rules) to assist in the process. These guidelines are available on the Internet through both the Legislature's website and KLRD's website, or can be requested in hard copy by contacting KLRD.

The Joint Committee traditionally holds hearings during the interim. The Joint Committee is mandated by statute (KSA 46-918) to hear all claims filed by November 1st during that interim.

The Joint Committee can meet during the legislative session only if both the President of the Senate and the Speaker of the House of Representatives authorize the meetings, pursuant to KSA 46-918.

## Joint Committee Recommendations

The Joint Committee makes recommendations regarding the resolution of the claims. The Joint Committee is required by KSA 46-915 to notify the claimants of its recommendation regarding the claim within 20 days after the hearing.

The Joint Committee submits its recommendations for payment of claims it has heard in the form of a bill presented to the Legislature at the start of each legislative session.

## Claims Payments

Payment for claims that are appropriated by the Legislature and signed into law by the Governor are paid by the Division of Accounts and Reports.

Prior to receiving payment, claimants are required to sign a release. A claimant's acceptance of any payment is final and conclusive and constitutes a complete release of any claim against the State (KSA 2018 Supp. 46-924).

When an inmate owes an outstanding unpaid amount of restitution ordered by a court, money received by the inmate from a claim settlement is withdrawn from the inmate's trust account as a set-off, pursuant to KSA 2018 Supp. 46-920.

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### State and Local Government

#### I-7 Kansas Open Meetings Act

##### Purpose

The Kansas Open Meetings Act (KOMA), KSA 2018 Supp. 75-4317, *et seq.*, recognizes “that a representative government is dependent upon an informed electorate” and declares that the policy of the State of Kansas is one where “meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.” [KSA 2018 Supp. 75-4317.]

The Kansas Supreme Court has recognized KOMA is to be “interpreted liberally and exceptions narrowly construed” to carry out the purpose of the law. [*Mem'l Hosp. Ass'n v. Knutson*, 239 Kan. 663, 669 (Kan. 1986).]

##### State and Local Public Bodies Covered by KOMA

- State agencies;
- Political and taxing subdivisions of the state;
- Legislative bodies of the state or its subdivisions;
- Administrative bodies of the state or its subdivisions;
- Boards, commissions, authorities, councils, committees, and subcommittees of the state or its subdivisions, or of legislative or administrative bodies thereof; and
- Other subordinate groups of any of the above entities that receive or expend and are supported in whole or in part by public funds. [KSA 2018 Supp. 75-4318.]

##### State Bodies Covered by KOMA

- The Legislature, its legislative committees, and subcommittees unless rules provide otherwise;
- State administrative bodies, boards, and commissions;
- State Board of Regents;
- State Board of Education;
- Kansas Turnpike Authority;
- Supreme Court Nominating Commission (added by 2016 SB 128); and
- Other state bodies.

## Local Governments Covered by KOMA

The following local governments are covered by KOMA:

- Cities;
- Drainage districts;
- Counties;
- Conservation districts;
- School districts;
- Irrigation districts;
- Townships;
- Groundwater management districts;
- Water districts;
- Watershed districts;
- Fire districts;
- Municipal energy agencies;
- Sewer districts;
- District judicial nominating commissions (Added by 2016 SB 128); and
- Other special district governments.

## Public Bodies Excluded from KOMA

Certain state and local bodies or entities are excluded from the requirements of KOMA, including the following:

- The Judicial Branch (except for judicial nominating commissions); and
- State or local bodies when exercising quasi-judicial powers (examples include teacher due process hearings, civil service board hearings for a specific employee, or zoning amendment hearings for a specific property).

## Meetings: What are They?

KOMA covers meetings, defined in KSA 2018 Supp. 75-4317a, as a gathering or assembly with the following characteristics:

- Occurs in person or through the use of a telephone or any other medium for

“interactive” communication (See the following “Serial Meetings” section);

- Involves a majority of the membership of an agency or body; and
- Is for the purpose of discussing the business or affairs of the body.

The Kansas Court of Appeals has held that informal discussions before, after, or during recesses of a public meeting are subject to the requirements of the open meetings law. [*Coggins v. Pub. Emp. Relations Bd*, 2 Kan. App. 2d 416 (Kan. Ct. App. 1978).] Calling a gathering a “work session” does not exempt the event from the law if the three requirements of a meeting are met.

Social gatherings are not subject to KOMA as long as there is not a majority of the membership present or there is no discussion of business of the public body between a majority of the membership.

**Serial meetings.** The Attorney General has said serial communications among a majority of a quorum of a public body constitute a meeting if the purpose is to discuss a common topic of business or affairs of that body by the members. Such a meeting may occur through calling trees, e-mail, or the use of an agent (staff member) of the body. [Att’y. Gen. Op. 98-26 and 98-49.] The use of instant messaging also would qualify as a meeting. KSA 2018 Supp. 75-4318(f) now deems interactive communications in a series to be subject to open meetings requirements if the communications:

- Collectively involve a majority of the membership of the body or agency;
- Share a common topic of discussion concerning the business or affairs of the body or agency; and
- Are intended by any or all of the participants to reach agreement on a matter that would require binding action to be taken by the body or agency.

## Is Binding Action the Trigger?

In regard to discussing “the business or affairs of the body,” binding action or voting is not

necessary. It is the discussion itself that triggers the requirements of KOMA (KSA 2018 Supp. 75-4317a).

### **Notice of Meetings, Agendas, Minutes, Conduct of Meeting, and Cameras**

**Notice required only when requested.** KOMA does not require notice of meetings to be published. According to KSA 2018 Supp. 75-4318(b), notice must be given to any person or organization requesting it. Notice requests may expire at the end of a fiscal year, but the public body has a duty to notify the person of the pending expiration before terminating notice. The presiding officer has the duty to provide notice, but that duty may be delegated. No time limit is imposed for receipt of notice prior to the meeting.

Notice may be given in writing or orally, but it must be made individually to the person requesting it. Posting or publication in a newspaper is insufficient. A single notice can suffice for regularly scheduled meetings. There is also a duty to notify of any special meetings. No fee for notice may be charged.

Petitions for notice may be submitted by groups of people, but notice need be provided only to one person on the list, that person being designated as required by law. All members of an employee organization or trade association are deemed to have received a notice if one is furnished to the executive officer of the organization.

**Agenda not required.** KSA 2018 Supp. 75-4318(d) states: "Prior to any meeting. . . , any

agenda relating to the business to be transacted at such meeting shall be made available to any person requesting the agenda." In *Stevens v. City of Hutchinson*, 11 Kan. App. 2d 290 (Kan. Ct. App. 1986), the court concluded that while the law does not require an agenda be created, if a body chooses to create an agenda, the agenda should include topics planned for discussion.

**Minimal requirements for minutes.** The only KOMA requirement for minutes pertains to closed or executive sessions. KSA 2018 Supp. 75-4319(a) requires that any motion to recess for a closed or executive meeting be recorded in the meeting minutes. (See "Executive Sessions: Procedure and Subjects Allowed" on the following page for additional information on executive sessions.)

**Conduct of meetings.** Any person may attend open meetings, but the law does not require that the public be allowed to speak or have an item placed on the agenda. KOMA does not dictate the location of a meeting, the size of the room used (or even that a room must be used) or other accommodation-type considerations. The court has determined (see *Stevens*) a meeting is "open" if it is accessible to the public.

KSA 2018 Supp. 75-4318(a) prohibits the use of secret ballots for any binding action. The public must be able to ascertain how each member voted.

**Use of cameras.** Subject to reasonable rules, cameras and recording devices must be allowed at open meetings (KSA 2018 Supp. 75-4318(e)).

### Subject Matter Justifying Executive Session

Pursuant to KSA 2018 Supp. 75-4319, only a limited number of subjects may be discussed in executive session. Some of these are listed below.

**Personnel matters of non-elected personnel.** The purpose of this exception is to protect the privacy interests of individuals. Discussions of consolidation of departments or overall salary structure are not proper topics for executive session. This personnel exemption applies only to employees of the public agency. The Attorney General has opined the personnel exemption does not apply to appointments to boards or committees, or nomination of public officers, nor does it apply to independent contractors. [Att'y. Gen. Op. 2016-03.]

**Consultation with an attorney.** For the body or agency to be deemed privileged in the attorney-client relationship, all elements of privilege must be present:

- The body's attorney must be present;
- The communication must be privileged; and
- No other third parties may be present.

**Additional justification for executive session are as follows:**

- Employer-employee negotiations to discuss conduct or status of negotiations, with or without the authorized representative who actually is doing the bargaining;
- Confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships;
- Sensitive financial information contained within personal financial records of a judicial nomination candidate;
- Official background check of a judicial nomination candidate;
- Case reviews conducted by the Governor's Domestic Violence Fatality Review Board;
- Matters affecting an individual student, patient, or resident of a public institution;
- Preliminary discussions relating to acquisition (not sale) of real property;
- Security of a public body or agency, public building or facility, or the information system of a public body or agency, if open discussion would jeopardize security;
- Matters relating to information acquired and records of the Child Death Review Board;
- Matters relating to parimutuel racing;
- Matters relating to the care of children;
- Matters relating to patients and providers;
- Matters relating to maternity centers and child care facilities; and
- Matters relating to the Office of Inspector General.

### Executive Session: Procedure and Subjects Allowed

Requirements and restrictions on closed or executive sessions are contained in KSA 2018 Supp. 75-4319. Executive sessions are permitted only for the purposes specified. First, the public body must convene an open meeting and then recess into an executive session. Binding action may not be taken in executive session. Reaching a consensus in executive session is not in itself a violation of KOMA. [*O’Hair v. United Sch. Dist. No. 300*, 15 Kan. App. 2d 52 (Kan. Ct. App. 1991).] A “consensus,” however, may constitute binding action and violate the law if a body fails to follow up with a formal open vote on a decision that normally would require a vote. The law does not require an executive session; the decision to hold an executive session is discretionary.

Generally, only the members of a public body may attend an executive session. The Attorney General indicates a public body may designate certain persons with essential information to assist in executive session deliberations. Inclusion of general observers means the meeting should be open to all members of the public.

Procedures for going into executive session include the following:

- Formal motion, seconded, and carried;
- Motion must contain a statement providing:
  - A statement describing the subjects to be discussed;
  - Justification for closure; and
  - Time and place open meeting will resume; and
- Executive session motions must be recorded in minutes. The law does not require other information to be recorded. Other minutes for open or executive sessions are discretionary, unless some other law requires them.

### Enforcement of KOMA

The law requires the Attorney General to provide and coordinate KORA and KOMA training throughout the state, including coordination with appropriate organizations. Further, the law gives the Attorney General or county or district attorney various subpoena and examination powers in KORA and KOMA investigations.

Among other enforcement provisions, the legislation allows the Attorney General or a county or district attorney to accept a consent judgment with respect to a KORA or KOMA violation, in lieu of filing an action in district court, and allows the

Attorney General to enter into a consent order with a public agency or issue a finding of violation to the public agency upon discovery of a KORA or KOMA violation.

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### State and Local Government

#### I-8 Kansas Open Records Act

##### Purpose

The Kansas Open Records Act (KORA) declares it is the public policy of Kansas that “public records shall be open for inspection by any person unless otherwise provided” (KSA 45-216). The burden of proving an exemption from disclosure is on the agency not disclosing the information (*SRS v. Public Employee Relations Board*, 249 Kan. 163 (1991)).

##### Who Is Covered by KORA?

KORA applies only to those entities considered a “public agency” under the law (KSA 2018 Supp. 45-217).

Included in this definition are:

- The state;
- Any political or taxing subdivision of the state or any office, agency, or instrumentality thereof; and
- Any other entity receiving or expending and supported in whole or in part by public funds that are appropriated by the state or its political and taxing subdivisions.

The definition covers all state agencies, cities, counties, townships, school districts, and other special district governments, as well as any agencies or instrumentalities of these entities, and officers of the above public entities in connection with their official duties.

In addition, although not included in KORA itself, KSA 2018 Supp. 45-240 requires nonprofit entities, except health care providers, that receive public funds of at least \$350 per year to adhere to certain open records requirements. The 2005 Legislature added this provision to require such nonprofit entities to document the receipt and expenditure of public funds and make this information available to the public. Like public agencies, nonprofit entities may charge a reasonable fee to provide this information.

##### Exclusions from Open Records Requirement

Certain entities and individuals are expressly excluded from the definition of “public agency” (KSA 2018 Supp. 45-217(f)(2)):

- Entities included only because they are paid for property, goods, or services with public funds<sup>1</sup>; and
- Any municipal, district, or appellate judge or justice.

## What Is a Public Record?

“Public record” is defined broadly under KORA to mean “any recorded information, regardless of form, characteristics or location, which is made, maintained or kept by or is in the possession of any public agency; or . . . any officer or employee of a public agency pursuant to the officer’s or employee’s official duties and which is related to the functions, activities, programs or operations of any public agency” (KSA 2018 Supp. 45-217(g) (1)). Specifically excluded from the definition of “public record” are:

- Records owned by a private person or entity that are not related to functions, activities, programs, or operations funded by public funds, but “private person” shall not include an officer or employee of a public agency who is acting pursuant to the officer’s or employee’s official duties;
- Records kept by individual legislators or members of governing bodies of political and taxing subdivisions; or
- Employers’ records related to certain individually identifiable employee records (KSA 2018 Supp. 45-217(g)(2) and (3)).

The Attorney General opined in 2015 (Op. Atty. Gen. 2015-010) that under certain specific conditions and the law in effect at the time, an e-mail sent by a state employee from his or her private e-mail account related to work funded by public funds is not within the meaning of “public record.” However, in 2016, the definition of and exclusions from “public record” were amended to broaden the definition of “public record” and apply it more specifically to state officers and employees, regardless of location of the record (KSA 2018 Supp. 45-217 (g)(1)). Additionally, audio and video recordings made and retained by law enforcement using a body camera or vehicle

camera were added to the definition of a criminal investigation record (open only under specific circumstances) (KSA 2018 Supp. 45-254).

## Right of Public to Inspect and Make or Obtain Copies of Records

All public records are open for inspection unless closed pursuant to specific legal authority (KSA 45-218(a) and (b)). Members of the public have the right to inspect public records during regular office hours and any established additional hours; the agency may require a written request but shall not require a request to be made in a particular form (KSA 2018 Supp. 45-220(a) and (b)). If the agency has business days on which it does not have regular office hours, it must establish reasonable hours when persons may inspect records and may not require a notice of desire to inspect more than 24 hours in advance of the hours established for inspection and obtaining copies; the agency also may not require the notice to be in writing (KSA 2018 Supp. 45-220(d)).

Any person may make abstracts or obtain copies of a public record. If copies cannot be made in the place where the records are kept, the records custodian must allow the use of other copying facilities (KSA 2018 Supp. 45-219(b)). Members of the public cannot remove a record without written permission of the custodian (KSA 45-218(a)).

SB 336 (L. 2018, ch. 87) requires that any document or record that contains any portion of an individual’s Social Security number be redacted before it is made available for public inspection or copying. This does not apply to documents recorded in the official records of any county recorder of deeds or in the official records of the courts. An agency also is required to give notice, offer credit monitoring service at no cost, and provide certain information to individuals if the agency becomes aware of the unauthorized disclosure of their personal information.

Computerized information can meet the definition of a public record and must be provided in the form requested if the public agency has the capability of producing it in that form. The agency is not



required to acquire or design a special program to produce information in a desired form, but it has discretion to allow an individual who requests such information to design or provide a computer program to obtain the information in the desired form. (Op. Atty. Gen. 1988-152 [voter registration lists]; Op. Atty. Gen. 1989-106; and Op. Atty. Gen. 1987-137).

However, KORA explicitly states a public agency is not required to allow a person to obtain the electronic copies by attaching a personal device to the agency's computer equipment (KSA 2018 Supp. 45-219(g)).

A public agency is not required to provide copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, or illustrations unless the items were shown or played at a public meeting. Regardless, the agency is not required to provide items copyrighted by someone other than the public agency (KSA 2018 Supp. 45-219(a)).

### Duties of Public Agencies

Under KORA, public agencies are required to:

- Appoint a freedom of information officer to assist the public with open records requests and disputes. That officer is to provide information on the open records law, including a brochure stating the public's basic rights under the law (KSA 45-226 and KSA 45-227);
- Adopt procedures to be followed to request and obtain documents (KSA 2018 Supp. 45-220(a));
- Respond to requests where it is possible to determine the records to which the requester desires access (KSA 2018 Supp. 45-220(b)); and
- Provide, upon request, office hours, name of custodian of record, fees, and procedures for obtaining records (KSA 2018 Supp. 45-220(f)).

### Rights of Public Agencies

The public agency may:

- Require written certification that the requester will not use names or addresses obtained from the records to solicit sales to those persons whose names or addresses are contained in the list (KSA 2018 Supp. 45-220(c));
- Deny access if the request places an unreasonable burden in producing the record or is intended to disrupt essential functions of the agency (KSA 45-218(e)); and
- Require payment of allowed fees in advance. Fees may include costs of any computer services and staff time but may not exceed costs (KSA 45-218(f); KSA 2018 Supp. 45-219(c)). (*Note: Executive Order 18-05 waives any charge or fee for the copying of documents, up to and including the first 100 pages, for all executive branch departments, agencies, boards, and commissions under the jurisdiction of the Office of the Governor in response to a KORA request made by any resident of Kansas.*)

### Prohibited Uses of Lists of Names and Addresses

With some specified exceptions, a list of names and addresses cannot be obtained from public records for the purpose of selling or offering for sale any property or service to the persons listed (KSA 2018 Supp. 45-220(c)(2) and KSA 2018 Supp. 45-230). This provision does not prohibit commercial use generally; it just applies to use of the names to sell or offer to sell property or a service. This provision does not prohibit the agency from using names and addresses in its public records for a purpose related to that agency's services or programs (Op. Atty. Gen. 2006-026).

Any person, including the records custodian, who knowingly violates this provision of the law and gives or receives records for this purpose can be

penalized with a civil fine not to exceed \$500 in an action brought by the Attorney General or a county or district attorney (KSA 2018 Supp. 45-230).

### Records That Must Be Closed

Some public records are required to be closed by federal law, state statute, or Supreme Court rule. These types of public records must be closed and are broadly referenced in KSA 2018 Supp. 45-221(a)(1). Approximately 280 different statutes require closure of certain public records. A few examples include:

- Child in need of care records and reports, including certain juvenile intake and assessment reports (KSA 2018 Supp. 38-2209);
- Unexecuted search or arrest warrants (KSA 2018 Supp. 21-5906);
- Grand jury proceedings records (KSA 2018 Supp. 22-3012);
- Health care provider peer review records (KSA 2018 Supp. 65-4915(b)); and
- Certain records associated with the Kansas Department of Health and Environment's investigation of maternal death cases (2018 HB 2600).

### Records That May Be Closed

KSA 2018 Supp. 45-221(a)(1) to (55) lists other types of public records that are not required to be disclosed. The public agency has discretion to decide whether to make these types of records available. However, the burden of showing that a record fits within an exception rests with the party intending to prevent disclosure. The types of records that may be closed include these:

- Records of a public agency with legislative powers, when the records pertain to proposed legislation or amendments. This exemption does not apply when such records are:
  - Publicly cited or identified in an open meeting or in an agenda of an open meeting; or

- Distributed to a majority of a quorum of any body with the authority to take action or make recommendations to the public agency with regard to the matters to which these records pertain;
- Records of a public legislative agency, when the records pertain to research prepared for one or more members of the agency. Again, this exemption does not apply (*i.e.*, the records would be open) when such records are:
  - Publicly cited or identified in an open meeting or in an agenda of an open meeting; or
  - Distributed to a majority of a quorum of any body that has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain;
- Records that are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure;
- Medical, psychiatric, psychological, and alcohol or drug treatment records that pertain to identifiable individuals;
- Personnel records, performance ratings, or individually identifiable records pertaining to employees or applicants for employment in public agencies;
- Letters of reference or recommendation pertaining to the character or qualification of an identifiable individual and not related to the appointment of persons to fill a vacancy in an elected office;
- Information that would reveal the identity of any undercover agent or any informant reporting a specific violation of law;
- Criminal investigation records;
- Records of emergency or security information or procedures of a public agency; plans, drawings, specifications, or related information for any building or facility used for purposes requiring security measures in or around the building or facility; or for the generation or transmission of power, water, fuels,

or communications, if disclosure would jeopardize security of the public agency, building, or facility;

- Attorney work product;
- Records of public agencies that identify home addresses of certain public officials such as judges, certain officers of the courts, and county and city attorneys; and
- Public records containing information of a personal nature when public disclosure would constitute a clearly unwarranted invasion of personal privacy.

### Limited Disclosure Provisions

Some statutes provide for disclosure of limited information in response to KORA requests, rather than disclosure of the complete record requested. Recently created limited disclosure provisions include those concerning body-worn and vehicle camera recordings and certain records of the Department for Children and Families (DCF) regarding child fatalities.

#### ***Body-worn and Vehicle Camera Recordings***

Every audio or video recording made and retained by law enforcement using a body camera or vehicle camera must be considered a “criminal investigation record,” as defined in KORA, thereby bringing such recordings within the exception to disclosure for criminal investigation records. This provision will expire July 21, 2021, unless reviewed and reenacted prior to that date (KSA 2018 Supp. 45-254).

In addition to any disclosures generally authorized for such recordings as criminal investigation records under KORA, the law allows certain persons to request to listen to an audio recording or to view a video recording. The law enforcement agency must allow access to these certain persons, within 20 days of the request, subject to a reasonable fee. The persons who may make such a request include the subject of the recording; any parent or legal guardian of a person under the age of 18 years who is a subject

of the recording; an heir-at-law of a deceased subject of a recording; or an attorney for any of the previous persons listed (KSA 2018 Supp. 45-254(c)).

#### ***Child Fatality Information***

House Sub. for SB 336 (2018), among other provisions, added a requirement that the Secretary for Children and Families (Secretary), as allowed by applicable law, release within seven days the following information when child abuse or neglect results in a child fatality and a request is made under KORA: age and sex of the child; date of the fatality; a summary of any previous reports of abuse or neglect received by the Secretary involving the child, along with the findings of such reports; and any service recommended by DCF and provided to the child (KSA 2018 Supp. 2212(f)(3)).

The bill added a similar provision requiring the Secretary, as allowed by applicable law, to release the following information within seven days when a child fatality occurs while the child was in the custody of the Secretary and a request is made under KORA: age and sex of the child; date of the fatality; and a summary of the facts surrounding the death of the child (KSA 2018 Supp. 38-2212(f)(4)).

#### ***Sunset of Exceptions***

A sunset provision for all exceptions added in 2000 required review of any exception within five years, or the exception would expire. It also required any exceptions continued after legislative review to be reviewed again five years later (KSA 2018 Supp. 45-229).

In 2013, the Legislature modified the review requirement in KSA 2018 Supp. 45-229 so that exceptions will no longer be subject to review and expiration if the Legislature has twice reviewed and continued the exemption or reviews and continues the exemption during the 2013 Session or thereafter (2013 HB 2012; L. 2013, ch. 50).

In 2018, SB 336 (L. 2018 ch. 87) continued eight exemptions present in five statutes. Topics

included certain reports prepared by the State Bank Commissioner, results of drug screening test under the cash assistance program, utility and public service records with customer information, concealed handguns records with identifiable information, cybersecurity attacks, protected health information, and certain security plans. Additionally, the bill removed the exception preventing the disclosure of the name of any voter who has cast a ballot from the time the ballot is cast until the final canvass of the election by the county board of canvassers.

### Enforcement of the Open Records Law

HB 2256 (L. 2015, ch. 68) significantly changed enforcement of both KORA and KOMA. The law requires the Attorney General to provide and coordinate KORA and KOMA training throughout the state, including through coordination with appropriate organizations (KSA 2018 Supp. 75-761). Further, the bill gives the Attorney General or a county or district attorney various subpoena

and examination powers in KORA and KOMA investigations (KSA 2018 Supp. 45-228; KSA 2018 Supp. 75-4320b)

Among other enforcement provisions, the bill allows the Attorney General or a county or district attorney to accept a consent judgment with respect to a KORA or KOMA violation, in lieu of filing an action in district court, and allows the Attorney General to enter into a consent order with a public agency or issue a finding of violation to the public agency upon discovery of a KORA or KOMA violation (KSA 2018 Supp. 75-4320d; KSA 2018 Supp. 45-4320f).

### Criminal Penalty for Altering Public Record

Altering, destroying, defacing, removing, or concealing any public record is a class A nonperson misdemeanor (KSA 2018 Supp. 21-5920).

- 1 See Ted Frederickson, *Letting the Sunshine In: An Analysis of the 1984 Kansas Open Records Act*, 33 Kan. L. Rev. 216-7. This analysis was utilized as recently as the 2017 Kansas Court of Appeals decision in *State v. Great Plains of Kiowa County, Inc.* (53 Kan. App. 2D 609, 389 P3d 984).

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**I-1 Addressing  
Abandoned Property  
Using Legal Tools**

**I-2 Administrative  
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Legislative Oversight**

**I-3 Board of Indigents'  
Defense Services**

**I-4 Election Security**

**I-5 Government  
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**I-6 Joint Committee on  
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**I-7 Kansas Open  
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**I-8 Kansas Open  
Records Act**

**I-9 KPERS' Retirement  
Plans and History**

**I-10 Post-election Audits**

**I-11 Senate  
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**I-12 State Employee  
Issues**

**I-13 Voter Registration  
and Identification**

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### State and Local Government

#### I-9 Kansas Public Employees Retirement System's Retirement Plans and History

##### KPERS Overview—Brief History of State Retirement and Other Employee Benefit Plans

The Kansas Public Employees Retirement System (known generally as KPERS and referenced in this article as the Retirement System) administers three statewide plans. The largest plan, usually referred to as the regular KPERS plan, or simply as KPERS, has within it three tiers that include state, school, and local groups composed of regular state and local public employees; school district, vocational school, and community college employees; Regents' classified employees and certain Regents unclassified staff with pre-1962 service; and state correctional officers. A second plan is known as the Kansas Police and Firemen's (KP&F) Retirement System for certain designated state and local public safety employees. A third plan is known as the Kansas Retirement System for Judges that includes the state judicial system's judges and justices.

All coverage groups are defined benefit, contributory retirement plans and have as members most public employees in Kansas. Tier 1 of the KPERS plan is closed to new membership and Tier 2 closed to most new membership on December 31, 2014; certain state correctional personnel are eligible for membership. Tier 3 of the KPERS plan became effective for new employees hired after January 1, 2015. The cash balance plan is a defined benefit, contributory plan according to the Internal Revenue Service (IRS).

The primary purpose of the Retirement System is to accumulate sufficient resources to pay benefits. Retirement and death benefits paid by the Retirement System are considered off-budget expenses.

Starting in FY 2000, retirement benefit payments, as proposed by the Governor and approved by the Legislature, were classified as off-budget, non-reportable expenditures. As the retirement benefit payments represent a substantial amount of money distributed annually to retirees and their beneficiaries, the historical growth in payments is tracked for informational purposes. KPERS estimates that \$1.817 billion will be paid in annual retirement and death benefits in calendar year 2019 for all three plans.

The Retirement System also administers several other employee benefit and retirement plans: a public employee death and long-term disability benefits plan; an optional term life insurance plan; a voluntary deferred compensation plan; and a legislative session-only employee's retirement plan. The Legislature has assigned other duties to the agency in managing investments of moneys from three state funds: the Kansas Endowment for Youth Fund, the Senior Services Trust Fund, and the Treasurer's Unclaimed Property Fund.

The Retirement System is governed by a nine-member Board of Trustees (Board). Four members are appointed by the Governor and confirmed by the Senate; one member is appointed by the President of the Senate; one is appointed by the Speaker of the House; two are elected by Retirement System members; and one member is the State Treasurer. The Board appoints the Executive Director, who administers the agency operations for the Board.

The Retirement System manages assets in excess of \$19.2 billion in actuarial value. Annually, the Retirement System pays out more in benefits than it collects in employer and employee contributions. The gap between current expenditures and current revenues is made up with funding from investments and earnings. The financial health of the Retirement System may be measured by its funded ratio, which is the relationship between the promised benefits and the resources available to pay those promised benefits. In the most recent actuarial valuation on December 31, 2017, the funded ratio for the Retirement System was 68.4 percent, and the unfunded actuarial liability (UAL) was \$8.907 billion. This is the amount of financing shortfall when comparing the Retirement System assets with promised retirement benefits.

The Legislature in 2015 passed SB 228, authorizing the issuance of \$1.0 billion in taxable bonds. In August 2015, the Kansas Development Finance Authority issued the bonds with an effective interest rate of 4.69 percent. The bonds, with interest paid semi-annually over a 30-year period, will be paid off in 2045. The bonds' proceeds became part of the Retirement System's valuation on December 31, 2015, which will be

used to determine the participating employer contribution rates for FY 2019 and subsequent fiscal years. Debt service for the bonds is subject to appropriation and not an obligation of KPERS.

### **Brief History of KPERS**

KPERS was created under law passed by the 1961 Legislature, with an effective date of January 1, 1962. Membership in the original KPERS retirement plan (now referred to as KPERS Tier 1) was offered to state and local public employees qualified under the new law and whose participating employers chose to affiliate with KPERS. Another KPERS tier was created in 2007 for state, school, and local public employees becoming members on and after July 1, 2009. KPERS Tier 2 has many characteristics of the original plan, but with certain modifications to ensure that employees and employers will share in the total cost of providing benefits. A third tier was implemented January 1, 2015, for all new employees. The second and third KPERS tiers are described in the last section of this article.

School districts generally were not authorized to affiliate with KPERS until the 1970s, but there were three affiliating in 1963 as the first exceptions to the general rule. Two more school districts affiliated in 1966. Later in 1966, four of the five school districts that had affiliated with KPERS were dissolved by the Legislature as of July 1, 1966. No other school districts became affiliated with KPERS until 1971, when a general law brought the old State School Retirement System (SSRS) and its individual members into KPERS.

The 1970 Legislature authorized affiliation with KPERS on January 1, 1971, for any public school district, area vocational-technical school, community college, and state agency that employed teachers. Other public officials and officers not addressed in the original 1961 legislation had been authorized, beginning in 1963, to participate in KPERS as the result of a series of statutory amendments to KSA 74-4910, *et seq.*, that broadened participation to include groups defined as public rather than exclusively governmental. Amendments to KSA 74-4901 also

broadened the definition of which governmental officials and officers were eligible for KPERS membership.

### **Calculation of Retirement Benefits and Eligibility for KPERS**

KPERS Tier 1 and Tier 2 retirement benefits are calculated by a formula based on years of credited service multiplied by a statutory percentage for the type of service credit multiplied by final average salary.

For credited service, two categories were defined in the 1961 KPERS legislation: participating service, which was equal to 1.0 percent of defined salary for each year, and prior service equal to 0.5 percent of defined salary for each year. In 1965, the Legislature raised the prior service multiplier to 0.75 percent. In 1968, the prior service multiplier was raised to 1.0 percent, and the participating service multiplier was increased to 1.25 percent for all years of service.

In 1970, legislation set the participating service for school employees to be the same as other regular KPERS members, which was 1.25 percent at that time. The prior service multiplier for education employees was set at 1.0 percent for years under the SSRS and 0.75 percent for years of school service not credited under the SSRS. In 1982, legislation increased the participating service credit for state, school, and local KPERS members from 1.25 percent to 1.40 percent of final average salary for all participating service credited after July 1, 1982.

In 1993, legislation raised the multiplier to 1.75 percent for all years participating service for members who retired on or after July 1, 1993.

Three different qualifications for normal retirement were established: age 65, age 62 with 10 years of service, and 85 points (any combination of age plus years of service).

Legislation enacted in 2012, as subsequently clarified during the 2013 Legislative Session, applied a multiplier of 1.85 percent to Tier 2 members retiring under early retirement

provisions, as well as to those retiring at the normal retirement dates.

### **Contribution Rates for KPERS**

KPERS Tiers 1, 2, and 3 are participatory plans in which both the employee and employer make contributions. In 1961, employee contributions were statutorily set at 4.0 percent for the first \$10,000 of total annual compensation. The \$10,000 cap was eliminated by 1967 legislation. Tier 2 employee contribution rates were set at 6.0 percent by statute beginning July 1, 2009. Tier 1 employee contribution rates increased from 4.0 to 5.0 percent in 2014, and to 6.0 percent on January 1, 2015.

In 1961, initial employer contributions were set at 4.35 percent (3.75 percent for retirement benefits and 0.60 percent for death and disability benefits) of total compensation of employees for the first year, with future employer contribution rates to be set by the Board, assisted by an actuary and following statutory guidelines.

In 1970, the employer contribution rate for public education employers was set at 5.05 percent from January 1, 1971, to June 30, 1972, with subsequent employer contribution rates to be set by the Board. In 1981, the Legislature reset the 40-year amortization period for KPERS until December 31, 2022, and accelerated a reduction in the employer contribution rates in FY 1982 to 4.30 percent for state and local units of government (KPERS non-school) and to 3.30 percent for education units of government (KPERS school).

Actuarially recommended employer contribution amounts for the state and school group are determined by assessing the UAL of both groups and combining the separate amounts to determine one.

During the 1980s, the Legislature capped the actuarial contribution rates for employers on numerous occasions in statutory provisions. In 1988, the Legislature established two employer contribution rates: one for the state and schools and one for the local units of government.

Previously, the state and local employer rate had been combined as the KPERS non-school group.

The amortization period for the combined state and school group was extended from 15 to 24 years, with employer contribution rates set at 3.1 percent for the state and 2.0 percent for the local employers in FY 1990.

In 1993, legislation introduced the statutory budget caps that would limit the amount of annual increase for employer contributions and provided a 25.0 percent increase in retirement benefits for those who retired on and after July 1, 1993, and an average 15.0 percent increase in retirement benefits for those who retired before July 1, 1993.

In order to finance the increased benefits, the Legislature anticipated phasing in higher employer contributions by originally setting a 0.1 percent annual cap on budget increases. The gap between the statutory rates and the actuarial rates that began in the FY 1995 budget year has never been closed.

The Legislature reduced the statutory rate for participating employer contributions for FY 2016 and FY 2017 to 10.91 percent and 10.81 percent, respectively. In FY 2018 and subsequent fiscal years, the contribution rate may increase by no more than 1.20 percent above the previous year's contribution rate. According to the most recent actuarial analysis provided to KPERS, the statutory rate for the state-school group equaled the actuarial contribution rate in FY 2018 at 12.01 percent. In calendar year 2026, the funded ratio is estimated to reach 80.0 percent, which is the minimum ratio for which pension plans are considered by retirement experts to be adequately funded. The "legacy" UAL, which is estimated to be \$6.364 billion, is projected to be eliminated in calendar year 2034.

The failure of KPERS participating employers to contribute at the actuarial rate since 1993 has contributed to the long-term funding problem.

The long-term solvency can also be affected by market performance, changes to benefits, and actuarial assumptions, especially the assumed rate of return. Historically, the assumed rate of

investment return was 8.0 percent; in 2017, the Board reduced the rate to 7.75 percent, resulting in an increase in the UAL of approximately \$500.0 million.

## Retirement Benefits and Adjustments

The original 1961 KPERS legislation provided for the non-alienation of benefits. The KPERS Act stated: "No alteration, amendment, or repeal of this act shall affect the then existing rights of members and beneficiaries, but shall be effective only as to rights which would otherwise accrue hereunder as a result of services rendered by an employee after such alteration, amendment, or repeal." This provision is found in KSA 74-4923.

The 1961 legislation exempted the KPERS retirement benefits from all state and local taxation. In other words, no taxes shall be assessed, and no retroactive reduction of promised benefits may be enacted. Any change in benefits must be prospective, unless it involves a benefit increase, which may be retroactive in application, as in the case of increasing the multiplier for all years of service credit.

An automatic cost-of-living adjustment (COLA) was not included in the original 1961 legislation.

Over the years, the Legislature provided additional *ad hoc* post-retirement benefit adjustments for retirees and their beneficiaries.

## KPERS Tier 2 and Tier 3 for Certain New Members

Legislation in 2007 established a Tier 2 for KPERS state, school, and local employees effective July 1, 2009, and made the existing KPERS members a "frozen" group in Tier 1 that no new members could join. The employee contribution rate for the "frozen" KPERS Tier 1 remained 4.0 percent, until 2014 when it increased from 4.0 percent to 5.0 percent, and in 2015 when it increased from 5.0 percent to 6.0 percent. The contribution rate remains at 6.0 percent today.



The Tier 2 for employees hired on or after July 1, 2009, continued the 1.75 percent multiplier; allowed normal retirement at age 65 with 5 years of service, or at age 60 with at least 30 years of service; provided for early retirement at age 55 with at least 10 years of service and an actuarial reduction in benefits; included an automatic, annual 2.0 percent COLA at age 65 and older; and required an employee contribution rate of 6.0 percent.

Legislation in 2012 established a Tier 3 for KPERS state, school, and local employees effective January 1, 2015, and made the existing KPERS members, hired between July 1, 2009, and December 31, 2014, a “frozen” group in Tier 2 that no new members could join, except for certain state correctional personnel. The employee contribution rate for the “frozen” KPERS Tier 2 remained set at 6.0 percent, but the COLA was eliminated and a new, higher multiplier of 1.85 percent was authorized to be applied retroactively for all years of credited service and for future years of service.

Effective January 1, 2015, the KPERS Tier 3 has the following plan design components:

- Normal retirement age—age 65 and 5 years of service, or age 60 and 30 years of service;
- Minimum interest crediting rate during active years—4.0 percent;
- Discretionary Tier 3 dividends—modified formula based on KPERS funded ratio for awarding discretionary credits and capped for early years;
- Employee contribution—6.0 percent;
- Employer service credit—3.0 percent for less than 5 years of service; 4.0 percent for at least 5, but less than 12, years of service; 5.0 percent for at least 12, but less than 24, years of service; and 6.0 percent for 24 or more years of service;
- Vesting—5 years;
- Termination before vesting—interest would be paid for the first 2 years if employee contributions are not withdrawn;
- Termination after vesting—option to leave contributions and draw retirement benefits when eligible, or withdraw employee contributions and interest but forfeit all employer credits and service;
- Death prior to retirement—5-year service requirement and if spouse had been named primary beneficiary, provide retirement benefit for spouse when eligible;
- Tier 3 early retirement—age 55 with 10 years of service;
- Default form of retirement distribution—single life with 10-year certain;
- Annuity conversion factor—2.0 percent less than the actuarial assumed investment rate of return;
- Benefits option—partial lump sum paid in any percentage or dollar amount up to 30.0 percent maximum;
- Post-retirement benefit—COLA may be self-funded for cost-of-living adjustments;
- Electronic and written statements—the Board shall provide information specified. Certain quarterly reporting would be required;
- Powers reserved to adjust plan design—the Legislature may prospectively change interest credits, employer credits, and annuity interest rates. The Board may prospectively change mortality rates;
- Actuarial cost of any legislation—fiscal impact assessment by KPERS actuary required before and after any legislative enactments;
- Divorce after retirement—allows a retirant, if divorced after retirement, and if the retirant had named the retirant’s ex-spouse as a joint annuitant, to cancel the joint annuitant’s benefit option in accordance with a court order;
- If a member becomes disabled while actively working, the member will be given participating service credit for the entire period of the member’s disability.

The member's account will be credited with both the employee contribution and the employer credit until the earliest of (i) death; (ii) attainment of normal retirement age; or (iii) the date the member is no longer entitled to receive disability benefits;

- A benefit of \$4,000 is payable upon a retired member's death; and
- Employer credits and the guaranteed interest crediting are to be reported quarterly.

That 2012 legislation also further modified the KPERS Tier 1 plan design components and the participating employer funding requirements for contributions. Several other provisions enhanced supplemental funding for KPERS, first by providing that 80.0 percent from sales of state property would be transferred to the KPERS Trust Fund and, second, by providing for annual transfers of up to 50.0 percent of the balance from the Expanded Lottery Act Revenues Fund to the KPERS Trust Fund after other statutory expenses have been met.

### **Other Recent Revisions**

With regard to substantive policy, the Legislature enacted a new working-after-retirement provision, which took effect on January 1, 2018. For retirees under the age of 62, there is a 180-day waiting period before returning to work. If the retiree is 62 or older, the current 60-day waiting period applies. There must be no prearranged employment agreement between the retiree and the public employer that is affiliated with KPERS. For covered positions, the employer pays the statutory contribution rate on the first \$25,000 of compensation and for that portion of compensation greater than \$25,000, the contribution rate is equal to 30.0 percent. Covered positions for non-school employees are those that are not seasonal or temporary and whose employment requires at least 1,000 hours of work per year; covered positions for school employees are those that are not seasonal or temporary and whose employment requires at least 630 hours of work per year or at least 3.5 hours a day for at least 180 days. For non-covered positions, the

employer makes no contributions. None of the above provisions sunset.

Starting on January 1, 2018, all retirees who had retired prior to that date in state, local, and licensed or unlicensed school positions are not subject to an earnings limitation. Employers will pay the statutory contribution rate on the first \$25,000 of compensation and for that portion of compensation greater than \$25,000, the contribution rate will be equal to 30.0 percent for retirees employed in covered positions.

With regard to fiscal policy, the aforementioned 2012 legislation also modified the rate of increase in the annual caps on participating employer contributions. The 0.6 percent cap would increase to 0.9 percent in FY 2014, 1.0 percent in FY 2015, 1.1 percent in FY 2016, and 1.2 percent in subsequent fiscal years until the UAL of the state and school group reaches an 80.0 percent funded ratio.

Legislation in 2016 provided the Governor with enhanced allotment authority and specifically allowed for the reduction of FY 2016 employer contributions to KPERS. In total, \$97.4 million in previously approved FY 2016 employer contributions to the state-school group were delayed.

Legislation in 2017 froze FY 2017 employer contributions at FY 2016 levels, reducing approximately \$64.4 million in approved contributions. FY 2018 employer contributions remain at their statutory level and FY 2019 employer contributions were reduced by approximately \$194.0 million from their statutory amount. Repayment of the FY 2017 and FY 2019 reductions were approved *via* layered amortization of a level dollar amount for 20 years.

Legislation in 2018 transferred \$82.0 million from the State General Fund to the KPERS Trust Fund for FY 2019. In FY 2018, an additional \$56.0 million was transferred from the State General Fund to the KPERS Trust Fund, and in FY 2019, up to \$56.0 million, dependent on the amount actual State General Fund receipts exceed projected receipts, will be transferred.

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## State and Local Government

### I-10 Post-election Audits

According to the National Conference of State Legislatures, 33 states and the District of Columbia currently have some form of a post-election audit in place.

#### What is a Post-election Audit?

A post-election audit (audit) verifies the equipment and procedures used to count votes during an election worked properly and the election yielded the correct outcome. Most audits look at a fixed percentage of voting districts or voting machines and compare the paper record to the results produced by the voting system.

In states that conduct post-election audits, most have included audit requirements and processes in statute.

#### Post-election Audit vs. Recount

Audits differ from recounts in that they are conducted regardless of the margins of victory, though audits can lead to a recount if errors are detected. A recount is a repeat tabulation of votes cast in an election that is used to determine the correctness of an initial count. Recounts will often take place in the event the initial vote tally during an election is extremely close.

#### What is Audited?

Paper records used in an audit may include voter-marked paper ballots, voter-verified paper audit trails produced by direct-recording electronic voting machines (DREs), or paper ballot records produced by ballot-marking devices.

#### Types of Post-election Audits

There are three main types of audits implemented by states: traditional audits, risk-limiting audits, and procedural audits. (See the chart at the end of this article for information on the type of audit each state has implemented.)

### **Traditional Post-election Audits**

Thirty states and the District of Columbia conduct traditional audits. This type of audit is usually conducted manually by hand counting a portion of the paper records and comparing them to the electronic results produced by electronic voting machines. Some states, however, have a process where all or part of the audit can be conducted electronically. Some states that implemented traditional audits use a tiered system, which means a different number of ballots are reviewed, depending on the margin of victory.

### **Risk-limiting Audits**

Three states require risk-limiting audits and two states provide counties with the option to utilize risk-limiting audits if they so chose. A risk-limiting audit makes use of statistical principles and methods and is designed to limit the risk of certifying an incorrect election outcome. If the margin is larger, fewer ballots need to be counted. If the race is tighter, more ballots are audited.

### **Procedural Audits**

A procedural audit is a process for ensuring the correct processes and procedures were followed during the course of the election and may be conducted instead of, or in addition to, a post-election audit. Procedural audits vary in their scope and comprehensiveness, but almost always include a ballot accounting and reconciliation process.

### **Post-election Audits under Certain Circumstances**

Some states do not require a post-election audit to be conducted after every election, but only require them in certain circumstances. For example:

- Idaho conducts a post-election audit only when a recount is required (IC §34-2313); and
- Indiana requires a procedural audit if the total number of votes cast and the

total number of voters in a precinct's poll book differ by five or more. A county chairman for a major political party may also request an audit for confirmation of votes cast (IC §3-11-13-37 *et seq.*, §3-12-3.5-8).

### **Post-election Audits in Kansas**

During the 2018 Legislative Session, the Legislature passed HB 2539, which requires county election officers to conduct a manual audit or tally of each vote cast in 1.0 percent of all precincts, with a minimum of one precinct located within the county. The audit requirements apply to all counties for elections occurring after January 1, 2019. The requirement for audit or tally applies regardless of the method of voting used. The bill specifies these contested races will be audited:

- In presidential election years: one federal race, one state legislative race, and one county race;
- In even-numbered, non-presidential election years: one federal race, one statewide race, one state legislative race, and one county race; and
- In odd-numbered election years: two local races, selected randomly after the election.

### **States with No Post-election Audits**

Ten states do not conduct any type of audit. These states are: Alabama, Arkansas, Delaware, Georgia, Louisiana, Maine, Mississippi, New Hampshire, Oklahoma, and South Dakota.

### Table of Post-election Audits by State

*Note:* Table only contains information on states that conduct post-election audits.

State	Audit Type	Statutes
Alaska	Traditional	AS § 15.15.420 - § 15.15.450
Arizona	Traditional	ARS § 16-602; State of Arizona Elections Procedures Manual
California	Traditional	CEC § 336.5; § 15360
Colorado	Risk-limiting	CRSA § 1-7-515; Colorado Secretary of State Election Rule 25
Connecticut	Traditional	CGSA § 9-320f
Florida	Traditional	FSA § 101.591
Hawaii	Traditional	HRS § 16-42, Hawaii Administrative Rules § 3-172-102
Idaho	Other	IC § 34-2313
Illinois	Traditional	10 ILCS § 5/24A-15; § 5/24C-15
Indiana	Other	IC § 3-12-3.5-8; § 3-11-13-37 <i>et seq.</i>
Iowa	Traditional	ICA § 50.51
Kansas <sup>a</sup>	Traditional	KSA § 25-3009
Kentucky	Traditional	KRS § 117.305; § 117.383
Maryland	Traditional	MD Code, Election Law § 11-3093; Code of Maryland Regulations § 33.08.05.00 <i>et seq.</i>
Massachusetts	Traditional	MGLA 54 § 109A
Michigan	Procedural	MCLA § 168.31a; Post-election Audit Manual
Minnesota	Traditional	MSA § 206.89
Missouri	Traditional	15 CSR § 30-10.090; § 30-10.110
Montana	Traditional	MCA § 13-17-501 - § 13-17-509
Nebraska <sup>b</sup>	Other	Nebraska Secretary of State's Office
Nevada	Traditional	NRS § 293.247; NAC 293.255
New Jersey <sup>c</sup>	Traditional	NJSA § 19:61-9
New Mexico	Traditional, with a tiered system based on the margin of victory	NMSA § 1-14-13.2 <i>et seq.</i> ; NMAC 1.10.23
New York	Traditional	NY Elect. § 9-211; 9 NYCRR 6210.18
North Carolina	Traditional	NCGSA § 163A-1166
North Dakota	Procedural	NDCC § 16.1-06-15
Ohio	Traditional, with risk-limiting audits recommended	OH ST § 3506.14; Secretary of State Directive 2017-14
Oregon	Traditional, with a tiered system based on the margin of victory	ORS § 254.529
Pennsylvania	Traditional	25 PS § 3031.17
Rhode Island	Risk-limiting	RI ST § 17-19-37.4
South Carolina	Procedural	South Carolina Election Commission – Description of Election Audits in South Carolina
Tennessee	Traditional	TCA § 2-20-103
Texas	Traditional	VTCA § 127.201; Election Advisory No. 2012-03(3d)
Utah	Traditional	Election Policy Directive from the Office of the Lieutenant Governor (Sect. 6)
Vermont	Traditional	17 VSA § 2493; § 2582 - § 2588
Virginia	Risk-limiting	VCA § 24.2-671.1
Washington	Traditional, with option of conducting a risk-limiting audit	RCW § 29A.60.170; § 29A.60.185; WAC 434-262-105
West Virginia	Traditional	WVC § 3-4A-28
Wisconsin	Traditional	WSA § 7.08(6); Wisconsin Elections Commission Voting Equipment Audits
Wyoming	Procedural	WS 22-11-104; Wyoming Administrative Rules Secretary of State Election Procedures, Chapter 25
District of Columbia	Traditional	DC ST § 1-1001.09a

<sup>a</sup> *Note:* These provisions apply to Kansas elections held after January 1, 2019.

<sup>b</sup> *Note:* Nebraska does not have a statutory requirement or rules and regulations for post-election audits, but they may be conducted by the Office of the Secretary of State.

<sup>c</sup> *Note:* New Jersey currently does not have machines that produce a paper record and therefore cannot yet conduct an audit.

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### State and Local Government

#### I-11 Senate Confirmation Process

State law in Kansas requires that certain appointments by the Governor or other state officials be confirmed by the Senate prior to the appointee exercising any power, duty, or function of the office. If a majority of the Senate votes on the question of confirmation of an appointment to an office and the appointment is not confirmed, the office shall become vacant at that time (KSA 75-4315b).

When the Senate is not in session, the Senate Committee on Confirmation Oversight (Committee) reviews appointments and makes recommendations related to the appointments to the full Senate.

The Committee has six members with proportional representation from the two major political parties (KSA 2018 Supp. 46-2601). One of the members of the Committee is the Majority Leader of the Senate, or the Majority Leader's designee, who serves as chairperson. The Minority Leader of the Senate, or the Minority Leader's designee, serves as vice-chairperson.

If a vacancy occurs in an office or in the membership of a board, commission, council, committee, authority, or other governmental body and the appointment to fill the vacancy is subject to confirmation by the Senate, the Committee may authorize, by a majority vote, the person appointed to fill the vacancy to exercise the powers, duties, and functions of the office until the appointment is confirmed by the Senate.

A list of those positions subject to Senate confirmation is included below, along with flow charts outlining the confirmation process for gubernatorial appointees and non-gubernatorial appointees.

#### Alphabetical List of Appointments Subject to Senate Confirmation

Adjutant General  
Administration, Secretary  
Aging and Disability Services, Secretary  
Agriculture, Secretary  
Alcoholic Beverage Control, Director  
Bank Commissioner  
Banking Board

Board of Tax Appeals, Members and Chief Hearing Officer	Kansas Development Finance Authority, Board of Directors
Central Interstate Low-Level Radioactive Waste Commission	Kansas National Guard, General Officers
Children and Families, Secretary	Labor, Secretary
Civil Service Board	Librarian, State
Commerce, Secretary	Long-Term Care Ombudsman
Corporation Commission	Lottery Commission
Corrections, Secretary	Lottery Commission, Executive Director
Court of Appeals, Judge	Mo-Kan Metropolitan Development District and Agency Compact
Credit Union Administrator	Pooled Money Investment Board
Crime Victims Compensation Board	Property Valuation, Director
Employment Security, Board of Review	Public Employee Relations Board
Export Loan Guarantee Committee	Public Employees Retirement System Board of Trustees
Fire Marshal	Racing and Gaming Commission
Gaming Agency, Executive Director	Racing and Gaming Commission, Executive Director
Healing Arts, Executive Director of State Board	Regents, State Board
Health and Environment, Office of Inspector General	Revenue, Secretary
Health and Environment, Secretary	Securities Commissioner
Highway Patrol, Superintendent	Transportation, Secretary
Historical Society, Executive Director	Veterans' Affairs Office, Commission on, Director
Hospital Authority, University of Kansas	Water Authority, Chairperson
Human Rights Commission	Water Office, Director
Indigents' Defense Services, State Board	Wildlife, Parks and Tourism, Secretary
Kansas Bureau of Investigation, Director	
Kansas City Area Transportation District	

<b>Senate Confirmation Process: Gubernatorial Appointments</b>	
Step 1	The Governor appoints an individual to a vacancy requiring Senate confirmation.
Step 2	The Governor's Office collects completed copies of the appointee's nomination form, statement of substantial interest, tax information, and background investigation, including fingerprints.
Step 3	The Governor's Office submits completed copies of the appointee's nomination form, statement of substantial interest, and acknowledgment of release of tax and criminal records information forms to the Kansas Legislative Research Department (KLRD) <i>via</i> the chairperson of the Committee.
Step 4	KLRD and Revisor of Statutes staff review the file for completeness.
Step 5	If the file is complete, KLRD staff informs the chairperson of the Committee that the file is available for review.
Step 6	The nominee's appointment is considered by the Committee.

<b>Senate Confirmation Process: Non-gubernatorial Appointments</b>	
Step 1	The chairperson of the Committee is notified by the appointing authority that an appointment has been made requiring Senate confirmation.
Step 2	The appointing authority submits completed copies of the appointee's nomination form, statement of substantial interest, tax information release form, and written request for a background investigation to the KLRD <i>via</i> the chairperson of the Committee.
Step 3	The Director of Legislative Research submits a written request to the Kansas Bureau of Investigation (KBI) for a background check, including fingerprints. The Director also submits a request to the Department of Revenue to release the appointees tax information.
Step 4	KBI and Department of Revenue officials complete the background and tax investigations. The information is sent to KLRD.
Step 5	The Director of Legislative Research informs the appointing authority and nominee the file is complete and available for review.
Step 6	The appointing authority and nominee may exercise the option to review the information and decide whether to proceed with the nomination.
Step 7	If the appointing authority and nominee decide to proceed with the nomination, the Director of Legislative Research informs the chairperson and vice-chairperson of the Committee the file is available for review.
Step 8	The nominee's appointment is considered by the Committee.

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## State and Local Government

### I-12 State Employee Issues

#### Classified and Unclassified Employees

The state workforce is composed of classified and unclassified employees. Classified employees comprise nearly two-thirds of the state workforce, while unclassified employees comprise the remaining one-third. HB 2391 (2015) revised the Kansas Civil Service Act to direct all persons in newly hired positions, including any rehired employee and any current employee who voluntarily transfers, or is voluntarily promoted or demoted, into an unclassified position. If federal law requires a state agency to maintain personnel standards on a merit basis and that agency has converted classified positions to unclassified positions, the state agency must adopt a binding statement of agency policy to meet the federal requirements.

Classified employees are selected through a competitive process, while unclassified positions can be filled through direct appointment, with or without competition. While unclassified employees are essentially “at will” employees who serve at the discretion of their appointing authority, classified employees are covered by the “merit” or “civil service” system, which provides additional employment safeguards. These safeguards are as follows:

- All actions, including recruitment, hiring, classification, compensation, training, retention, promotion, discipline, and dismissal of state employees, shall be:
  - Based on merit principles and equal opportunity; and
  - Made without regard to race, national origin or ancestry, religion, political affiliation, or other nonmerit factors and shall not be based on sex, age, or disability except where those factors constitute a *bona fide* occupational qualification or where a disability prevents an individual from performing the essential functions of a position; and
- Employees are to be retained based on their ability to manage the duties of their position.

#### Characteristics of State Employees

In FY 2017, a profile of classified state employees reflected the following:

The “average” classified employee:	The “average” unclassified employee:
Is 46 years of age	Is 45 years of age
Has 14 years of service; and	Has 10 years of service; and
Earns \$37,643 per year	Earns \$48,391 per year
Source: SHARP (June 2017)—Includes classified and unclassified, benefit-eligible employees, including full- and part-time employees. Excludes Regents universities, legislators, student employees, classified temporary, and unclassified non-benefit-eligible temporary employees.	

**State Employee Benefits**

Among the benefits available to most state employees are medical, dental, and vision plans; long-term disability insurance; deferred compensation; and a cafeteria benefits plan, which allows employees to pay dependent care expenses and non-reimbursable health care expenses with pre-tax dollars. In addition, state employees accrue vacation and sick leave. The vacation leave accrual rate increases after 5, 10, and 15 years. In general, the State also provides 9 to 10 days of holiday leave for state employees.

**Retirement Plans**

Most state employees participate in the Kansas Public Employees Retirement System (KPERs). Employees contribute 6.0 percent bi-weekly based on salary. The state contribution is set by law each year. In addition to the regular KPERs program, there are plans for certain law enforcement groups, correctional officers, judges and justices, and certain Regents unclassified employees. Contributions from both the employee and the State differ from plan to plan. (See [I-9 Kansas Public Employees Retirement System’s Retirement Plans and History](#) in this Briefing Book for more information.)

**Compensation of State Employees**

Kansas statutes direct the Director of Personnel Services, after consultation with the Director of the Budget and the Secretary of Administration, to prepare a pay plan for classified employees, which “shall contain a schedule of salary and wage ranges and steps.” The statutes also provide that this pay plan can be modified by provisions

in an appropriation bill or other act. When the Governor recommends step movement on the classified pay plan, a general salary increase, or both, funding equivalent to the percentage increase for classified employees generally is included in agency budgets to be distributed to unclassified employees on a merit basis.

The previous Kansas Civil Service Basic Pay Plan consisted of 34 pay grades, each with 13 steps. The difference between each step was approximately 2.5 percent, and the difference between each salary grade was approximately 5.0 percent. Employees typically are hired into a job at the minimum of the salary grade. Until recently, assuming satisfactory work performance, classified employees would receive an annual 2.5 percent step increase, along with any other general adjustment in salary approved by the Legislature. No classified step movement was recommended or approved from FY 2001 to FY 2006. In FY 2007, the Legislature approved a 2.5 percent step movement, effective September 10, 2006. There has been no further step movement since FY 2009.

**New Classified Employee Pay Plans**

The 2008 Legislature established five new pay plans for executive branch classified state employees and authorized multi-year salary increases for classified employees, beginning in FY 2009, who are identified in positions that are below market in salary.

The legislation authorized a four-year appropriation totaling \$68.0 million from all funds, including \$34.0 million from the State General Fund (SGF), for below-market pay adjustments (excluding the FY 2009 appropriation of \$16.0

million). Due to budgetary considerations, the appropriation for FY 2012 was eliminated, bringing the total appropriation to \$58.7 million. The State Finance Council approved an appropriation of \$11.4 million, including \$8.1 million from the SGF for FY 2013.

Finally, the legislation codified a compensation philosophy for state employees. The philosophy was crafted by the State Employee Pay Philosophy Task Force and endorsed by the State Employee Compensation Oversight Commission during the 2007 Interim. The pay philosophy includes:

- The goal of attracting and retaining quality employees with competitive compensation based on relevant labor markets;
- A base of principles of fairness and equity to be administered with sound fiscal discipline; and
- An understanding that longevity bonus payments shall not be considered as part of the base pay for classified employees.

The following table reflects classified step movement and base salary increases since FY 1997.

Fiscal Year	Salary Adjustment
1997	Step Movement: 2.5 percent Base Adjustment: None
1998	Step Movement: 2.5 percent Base Adjustment: 1.0 percent
1999	Step Movement: 2.5 percent Base Adjustment: 1.5 percent
2000	Step Movement: 2.5 percent Base Adjustment: 1.0 percent
2001	Step Movement: 2.5 percent Base Adjustment: None
2002	Step Movement: None Base Adjustment: 3.0 percent, with 1.5 percent effective for full year and 1.5 percent effective for half a year
2003	Step Movement: None Base Adjustment: None
2004	Step Movement: None Base Adjustment: 1.5 percent effective for last 23 pay periods
2005	Step Movement: None Base Adjustment: 3.0 percent
2006	Step Movement: None Base Adjustment: 2.5 percent, with 1.25 percent effective for full year and 1.25 percent effective for half a year
2007	Step Movement: 2.5 percent, effective September 10, 2006 Base Adjustment: 1.5 percent
2008	Step Movement: None Base Adjustment: 2.0 percent

Fiscal Year	Salary Adjustment
2009	Step Movement: None Base Adjustment: 2.5 percent; Below Market Salary Adjustments
2010	Step Movement: None Base Adjustment: None; Below Market Salary Adjustments
2011	Step Movement: None Base Adjustment: None; Below Market Salary Adjustments
2012	Step Movement: None Base Adjustment: None
2013	Step Movement: None Base Adjustment: None
2014	Step Movement: None Base Adjustment: None Employee Bonus: \$250 Bonus
2015	Step Movement: None Base Adjustment: None
2016	Step Movement: None Base Adjustment: None
2017	Step Movement: None Base Adjustment: None
2018	Step Movement: None Base Adjustment: 2.5 percent < 5 years; 5.0 percent > 5 years with no adjustment; 2.5 percent Judicial
2019	Step Movement: None Base Adjustment: 5.0 percent if not included in 2017 Legislative Pay Plan; 2.5 percent if included at 2.5 percent in 2017 Legislative Pay Plan; 5.0 percent uniformed corrections officers; 5.0 percent nonjudicial; 2.0 percent Judicial

**FY 2019.** The FY 2019 approved budget includes 40,103.2 full-time equivalent (FTE) positions and represents an increase of 35.4 positions, or 0.1 percent, above the FY 2018 approved number.

The increase is largely attributable to adding 20.0 FTE positions in the Department for Children and Families to increase child welfare field staff, such as social workers; adding 55.0 FTE positions at Larned State Hospital for expansion of Sexual Predator Treatment Program Reintegration facilities; and adding 13.0 FTE positions in the Kansas Bureau of Investigation for Special Agent positions in the Field Investigations Division and

the Special Operations Division, including three agents for the Child Victim Unit.

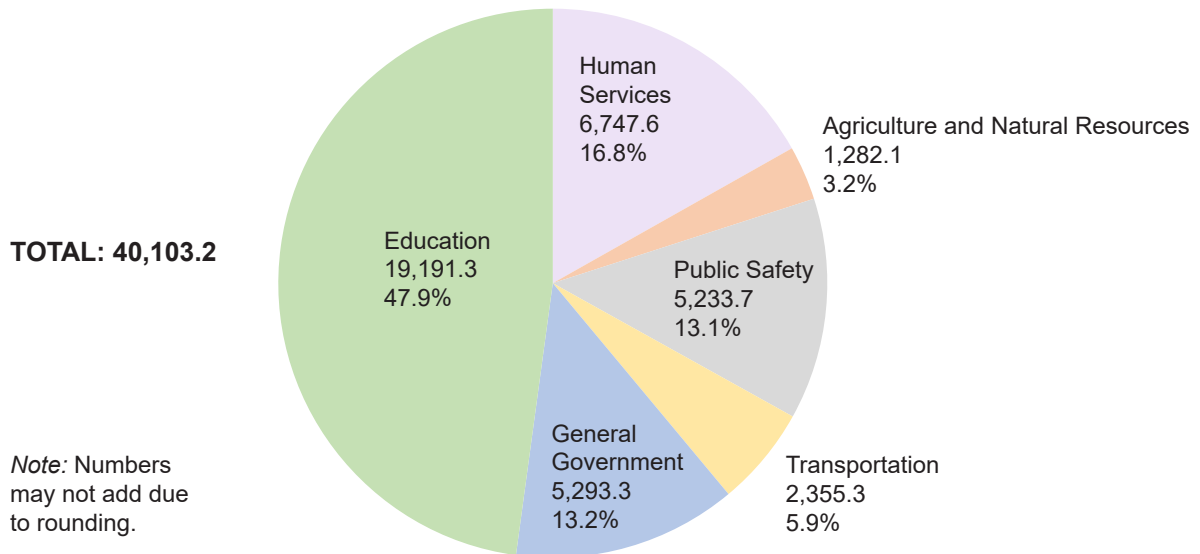
FTE positions are permanent positions, either full time or part time, but mathematically equated to full time. For example, two half-time positions equal one full-time position.

Non-FTE unclassified permanent positions are essentially unclassified temporary positions that are considered “permanent” because they are authorized to participate in the state retirement system.

The following chart reflects approved FY 2019 FTE positions by function of government:



**FY 2019 FTE Positions by Function of Government**



**Largest employers.** The following table lists the ten largest state employers and their number of FTE positions.

Agency	FTE Positions
University of Kansas	5,346.9
Kansas State University	3,864.5
University of Kansas Medical Center	2,986.5
Children and Families, Department for	2,482.9
Transportation, Department of	2,355.3
Wichita State University	2,087.4
Judicial Branch	1,868.0
KSU-ESARP	1,106.2
Revenue, Department of	1,019.1
Larned State Hospital	998.5
* Source: 2018 IBARS Approved	

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### State and Local Government

#### I-13 Voter Registration and Identification

##### Voter Registration Requirements

###### *National Voter Registration Requirements*

Federal and state elections in the United States are generally run by the states themselves, according to Article I and Article II of the *U.S. Constitution*. Nevertheless, there are some federal requirements that impact voter registration in the states.

The Voting Rights Act of 1965 allows all U.S. citizens to vote at any election in any state, so long as they are otherwise qualified by law to vote in that election (42 USC §1971).

The National Voter Registration Act of 1993 (NVRA), also known as the "Motor Voter" law, expanded the locations where a person may register to vote by requiring states to allow driver's license applications to also serve as an application for voter registration. The NVRA requires a voter registration application made as part of a driver's license application to include a statement containing each eligibility requirement (including citizenship) for that state (42 USC § 1993gg-3).

Finally, the Help America Vote Act (HAVA) (Public Law 107-252, Section 303) requires applicants to provide one of the following when registering to vote:

- The applicant's driver's license number, if the person possesses a current and valid driver's license;
- The last four digits of the applicant's Social Security number, if the person does not possess a driver's license; or
- The applicant's state assigned identification number for voter registration purposes, for those applicants with neither a driver's license nor a Social Security number.

###### *State Voter Registration Requirements*

Every state except North Dakota requires voter registration.

Generally, state voter registration laws require applicants to:

- Be 18 years old on or before the next election;

- Be a resident of the state where they are registering;
- Not be in jail and not have been convicted of a felony (or have had civil rights restored);
- Be mentally competent/not declared incapacitated; and
- Not be registered to vote in another state.

### *Same-day Voter Registration*

Most states also have registration deadlines applicants must comply with to qualify to vote in an upcoming election. As of March 2018, 18 states and the District of Columbia (D.C.) have laws that allow same-day voter registration. Sixteen of these states allow same-day registration on Election Day. Two states (Maryland and North Carolina) allow same-day registration only during the early voting period. See Chart 1 for more information on registration deadlines.

### *Online Voter Registration*

As of September 2018, 37 states and D.C. have laws allowing for online voter registration. Arizona was the first state to use online voter registration in 2002. Oklahoma is the most recent state to adopt the practice, passing authorizing legislation in 2018. The states that have not provided for the use of online voter registration are Arkansas, Maine, Michigan, Mississippi, Montana, New Hampshire, New Jersey, North Carolina, North Dakota (no registration required), South Dakota, Texas, Wisconsin, and Wyoming.

### *Preregistration*

The minimum age to vote in all federal and state elections is 18 years old. However, many states allow persons who are not yet 18 years old to register to vote before they turn 18 so they will be added to the voter rolls and able to vote as soon as they reach the required age. This practice is commonly referred to as preregistration and is administered by states in a variety of ways.

Twenty-seven states allow an individual to register to vote if they will turn 18 on or before the next election, usually referring to the next general election. Thirteen states and D.C. begin preregistration at 16 years of age, and 4 states allow such registrations beginning at 17 years of age. Five other states have their own unique age requirements: Alaska 90–days before 18th birthday; Georgia, Iowa, and Missouri 17 years, 6 months old; Texas 17 years, 10 months old.

North Dakota does not require voters to register, but specifies that qualified electors must be 18 years of age.

### *Automatic Voter Registration*

The NRVA of 1993 required states to allow individuals to register to vote when applying for or renewing their driver's licenses. Some states have taken this requirement a step further and adopted automatic voter registration (AVR). AVR is a process by which individuals are automatically registered to vote and must opt-out if they do not wish to be on the voter rolls. As of August 2018, 13 states and D.C. have implemented AVR.

## **Voter Identification Requirements**

As of March 2018, 34 states have enacted laws requiring or requesting voters to provide some form of identification (ID) before voting. However, there are many variations as to which forms of ID are accepted, whether the ID is required to include a photo, and what happens if a voter does not provide the required or requested ID upon arriving at the polling place. See Chart 2 for more information on individual state's requirements for Voter ID.

### **Kansas Law**

Prior to the 2011 Legislative Session, Kansas law required persons voting for the first time in a county to provide ID unless they had done so when they registered. At that time, acceptable ID forms included a current, valid Kansas driver's license or nondriver's ID card, utility bill, bank statement, paycheck, government check, or other

government document containing the voter’s current name and address as indicated on the registration book. A voter’s driver’s license copy or number, nondriver’s ID card copy or number, or the last four digits of the voter’s Social Security number were acceptable when the voter was applying for an advance ballot to be transmitted by mail.

In 2011, the law changed significantly through the passage of HB 2067. Effective January 1, 2012, all those voting in person were required to provide photo ID at every election (with the exception of certain voters, such as active duty military personnel, absent from the country on Election Day), and all voters submitting advance ballots by mail were required to include the ID number on, or a copy of, a specified form of photo ID for every election. Free nondriver’s ID cards and free Kansas birth certificates were available to anyone 17 or older for the purposes of meeting the new photo voter ID requirements. Each applicant for a free ID had to sign an affidavit stating he or she plans to vote and possesses no other acceptable ID form. The individual also had to provide evidence of being registered to vote. Relatively minor amendments were also made in 2012 SB 129, including adding an ID card issued by a Native American tribe to the list of photo ID documents acceptable for proving a voter’s identity when voting in person.

A U.S. District Court judge issued an order striking down Kansas’ Voter ID law as it applies to registration for federal elections on June 18, 2018. [*Fish v. Kobach*, 309 F. Supp.3d 1048 (D. Kan, 2018).]

Chart 1	
State	Voter Registration Deadline
AL	Postmarked/Delivered 15 days prior to election
AK	30 days before election
AZ	29 days before election
AR	30 days before election
CA	Same Day Voter Registration
CO	Same Day Voter Registration
CT	Same Day Voter Registration
DE	4th Saturday before general/primary election; 10 days before special elections
DC	Same Day Voter Registration

FL	29 days before election
<b>State</b>	<b>Voter Registration Deadline</b>
GA	5th Monday before elections, special elections have different rule
HI	Same Day Voter Registration
ID	Same Day Voter Registration
IL	Same Day Voter Registration
KY	29 days before election
LA	30 days before election
IN	29 days before election
IA	Same Day Voter Registration
KS	21 days before election
ME	Same Day Voter Registration
MD*	Same Day Voter Registration
MA	20 days before election
MI	30 days before election
MN	Same Day Voter Registration
MS	30 days before election
MO	28 days before election
MT	30 days before election
NE	3rd Friday before election or delivered by 6:00 p.m. 2nd Friday before election
NV	5th Saturday before primary or general, in person (County Clerk/Registrar of Voters) until 9:00 p.m. Tuesday before election
NH	Same Day Voter Registration
NJ	21 days before election
NM	28 days before election
NY	25 days before election
NC*	Same Day Voter Registration
ND	No Voter Registration Requirement
OH	30 days before election
OK	25 days before election
OR	21 days before election
PA	30 days before election
RI	30 days before election
SC	30 days before election
SD	15 days before election
TN	30 days before election
TX	30 days before election
UT	Same Day Voter Registration
VT	Same Day Voter Registration
VA	22 days before election
WA	Same Day Voter Registration
WV	21 days before election
WI	Same Day Voter Registration
WY	Same Day Voter Registration
*Allows same day registration only during early voting period	

<b>Chart 2</b>			
<b>State</b>	<b>ID Requirement</b>	<b>Photo</b>	<b>Notes</b>
<b>AL</b>	ID requested	Photo required	If no ID, 2 election workers can sign an affidavit attesting to voter's identity. Otherwise, the voter votes a provisional ballot and must provide ID within 4 days
<b>AK</b>	ID requested	No photo required	Election official can waive ID requirement if they know the voter
<b>AZ</b>	ID required	No photo required	If no ID, vote provisional ballot and must present ID within 5 days
<b>AR</b>	ID requested	Photo required	If no ID, vote provisional ballot with sworn statement that voter is registered, counted if voter returns with valid ID or Board of Elections Commissioners does not determine the ballot is invalid
<b>CA</b>	No ID required		
<b>CO</b>	ID requested	No photo required	Colorado uses mail elections, ID only impacts those persons who chose to vote in person
<b>CT</b>	No ID required		
<b>DE</b>	ID requested	No photo required	If no ID, voter signs affidavit attesting to their identity
<b>FL</b>	ID requested	Photo required	If ID not presented, voter votes provisional ballot and officials compare signature to one on record
<b>GA</b>	ID required	Photo required	If no ID, voter votes provisional ballot and must return to show ID within 3 days
<b>HI</b>	ID requested	No photo required	If no ID, date of birth and address used to corroborate identity
<b>ID</b>	ID requested	Photo required	If no ID, voter signs affidavit with name and address
<b>IL</b>	No ID required		
<b>KY</b>	ID requested	No photo required	If no ID, voter signs oath attesting to qualifications
<b>LA</b>	ID requested	Photo required	If no ID, voter signs affidavit and provides date of birth and other information
<b>IN</b>	ID required	Photo required	If no ID, voter votes provisional ballot and must return to show ID within 6 days or sign affidavit swearing indigence or religious objection
<b>IA</b>	ID requested	No photo required	If no ID, voter signs oath verifying identity and is allowed to vote regular ballot
<b>KS</b>	No ID required	Voter ID law struck down in 2018	
<b>ME</b>	No ID required		
<b>MD</b>	No ID required		
<b>MA</b>	No ID required		
<b>MI</b>	ID requested	No photo required	If no ID, voter signs affidavit and is allowed to vote regular ballot
<b>MN</b>	No ID required	Voter ID turned down by voters in 2012	
<b>MS</b>	ID required	Photo required	If no ID, voter votes on provisional ballot and must return within 5 days to show ID or sign affidavit attesting to religious objection to being graphed
<b>MO</b>	ID requested	No photo required	If no ID, voter can cast regular ballot if 2 election officials attest they know voter
<b>MT</b>	ID requested	No photo required	If no ID, voter votes on provisional ballot and signature on ballot envelope is matched to one on file
<b>NE</b>	No ID required		
<b>NV</b>	No ID required		
<b>NH</b>	ID requested	No photo required	If no ID, voter signs challenged voter affidavit and votes regular ballot. After election mailing is sent to voter, voter must sign and return or be investigated for voter fraud
<b>NJ</b>	No ID required		
<b>NM</b>	No ID required		

Chart 2			
State	ID Requirement	Photo	Notes
NY	No ID required		
NC	No ID required	2013 Voter ID law struck down	
ND	ID required	No photo required	If no ID, voter casts ballot that is set aside in sealed envelope. Voter must provide ID within 6 days for ballot to be counted
OH	ID required	No photo required	If no ID, voter votes on provisional ballot and must return to show ID within 10 days
OK	ID requested	No photo required	If no ID, voter votes provisionally and election officials verify information provided. Voter registration card accepted as ID
OR	No ID required		
PA	No ID required	2012 Voter ID law struck down	
RI	ID requested	Photo required	If no ID, voter votes provisionally and election officials check the signature against any on file
SC	ID requested	Photo not required	If no ID can be shown, voter registration card. Voter who does not show ID votes provisionally and must return to show ID after election
SD	ID requested	Photo required	If no ID requested, voter provides name and address and signs an affidavit
TN	ID required	Photo required	If no ID, voter votes provisionally and must return within 2 days to show ID or sign affidavit attesting indigence or religious objection
TX	ID requested	Photo required	If no ID and cannot obtain one, voters can present a supporting form of ID and execute a Reasonable Impediment Declaration
UT	ID requested	No photo required	If no ID, county clerk can verify through other means
VT	No ID required		
VA	ID required	Photo required	If no ID, voter votes provisionally and must return within 3 days to show ID
WA	ID requested	No photo required	Washington holds mail elections, so ID requirement affects few voters
WV	ID requested	No photo required	If no ID, voter votes provisionally and must return to show election inspectors ID by the time the polls close or show ID to municipal clerk no later than 4:00 p.m. on Friday following election
WI	ID required	Photo required	
WY	No ID required		

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### State Budget

#### J-1 District Court Docket Fees

Kansas has had a uniform system of district court docket fees since 1974. The original docket fees were \$35 for civil cases and varying amounts for criminal cases, depending upon the nature of the crime.

From 1984 to 1995, local law libraries could charge differing library fees in addition to statutorily set docket fees, which caused docket fees to be non-uniform.

In 1996, the Legislature passed legislation that returned docket fees to a uniform level and also added docket fees for filing post-divorce motions for changes in child custody, child support orders, or visitation. The 2006 Legislature passed legislation specifying that only the Legislature can establish fees or moneys for court procedures, including docket fees, filing fees, or other fees related to access to court procedures.

The 2006 Legislature raised docket fees for four purposes: to provide additional funding for the State General Fund associated with an approved judicial branch salary increase, to provide an increase in funding for the Kansas Law Enforcement Training Center Fund, to provide funding for the Kansas Judicial Council's judicial performance evaluation process, and for the Child Exchange and Visitation Centers Fund.

The 2009 Legislature raised docket fees to provide funding for the first phase of a statewide non-judicial personnel salary adjustment and raised the docket fee in criminal cases by \$1 to fund a \$186,239 increase to the Prosecuting Attorneys' Training Fund.

The 2014 Legislature redirected docket fees from state agencies to the Judicial Branch starting in FY 2014. Starting in FY 2015, docket fees are deposited in three places: the Judicial Council, the Electronic Filing Management Fund, and the Judicial Branch Docket Fee Fund. Through FY 2021, the Electronic Filing Management Fund will receive the first \$3.1 million in clerk's fees. From FY 2022 forward, that amount will be reduced to \$1.5 million for annual maintenance and upkeep.

The Office of Judicial Administration collected \$29.4 million in district court docket fees for the State Treasury in FY 2018.

**Fines, penalties, and forfeitures.** In FY 2018, the Judicial Branch collected \$17.7 million in fines, penalties, and forfeitures.

A portion of funds collected, 33.6 percent, is earmarked for assisting victims of crime, alcohol, and drug abuse programs; children’s services; and other law enforcement-related activities. The remainder is transferred to the State General Fund for general operations.

**Other fees.** In addition to docket fees, the Judicial Branch also imposes other fees and assessments on individuals who use the judicial system. The Judicial Branch collected \$7.9 million in other fees and assessments in FY 2018. These fees support law enforcement-related activities within the Kansas Bureau of Investigation, Office of the

Attorney General, Board of Indigents’ Defense Services, and the Department of Corrections.

The 2009 Legislature authorized the Supreme Court to enact a new surcharge in FY 2009. The surcharge is approved annually by the Legislature. In FY 2011, the Legislature extended the surcharge through FY 2012 and increased the surcharge by 25.0 percent. The 2014 Legislature abolished the Surcharge Fund and directed all docket fees generated by the surcharge be deposited in the Docket Fee Fund. The 2017 Legislature extended the surcharge through FY 2019.

		FY 2018 Actual		FY 2019 Estimate	
Name of Fund	Administering Authority	Percent of Fees	Revenue to Fund	Percent of Fees	Revenue to Fund
<b>Docket Fee Distribution</b>					
Judicial Branch Docket Fee Fund	Chief Justice, Kansas Supreme Court	99.01%	\$26,055,000	99.01%	\$26,055,000
Judicial Council Fund	Judicial Council	0.99%	200,980	0.99%	200,980
Electronic Filing Management Fund	Chief Justice, Kansas Supreme Court	N/A	3,100,000	N/A	3,100,000
<i>Subtotal - Docket Fee Distribution</i>		<i>100.00%</i>	<i>\$29,355,980</i>	<i>100.00%</i>	<i>\$29,355,980</i>
<b>Fines, Penalties and Forfeitures</b>					
Crime Victim’s Compensation Fund	Attorney General	10.94%	\$1,937,234	10.94%	\$1,937,234
Crime Victim’s Assistance Fund	Attorney General	2.24%	396,655	2.24%	396,655
Comm. Alcoholism and Intoxication Programs Fund	Department for Aging and Disability Services	2.75%	486,965	2.75%	486,965
Dept. of Corr. Alcohol and Drug Abuse Treatment Fund	Department of Corrections	7.65%	1,354,647	7.65%	1,354,647
Boating Fee Fund	Department of Wildlife, Parks and Tourism	0.16%	28,332	0.16%	28,332
Children’s Advocacy Center Fund	Attorney General	0.11%	19,479	0.11%	19,479
EMS Revolving Fund	Emergency Medical Services Board	2.28%	403,738	2.28%	403,738
Trauma Fund	Secretary of Health and Environment	2.28%	403,738	2.28%	403,738
Traffic Records Enhancement Fund	Department of Transportation	2.28%	403,738	2.28%	403,738
Criminal Justice Information Systems Line Fund	Kansas Bureau of Investigation	2.91%	515,297	2.91%	515,297
State General Fund	Kansas Legislature	66.40%	11,757,985	66.40%	11,757,985
<i>Subtotal - Fines, Penalties and Forfeitures</i>		<i>100.00%</i>	<i>\$17,707,809</i>	<i>100.00%</i>	<i>\$17,707,809</i>

		FY 2018 Actual		FY 2019 Estimate	
Name of Fund	Administering Authority	Percent of Fees	Revenue to Fund	Percent of Fees	Revenue to Fund
<b>Other Fees and Assessments</b>					
State General Fund	Various	Fee	\$188,747	Fee	\$188,747
Law Enforcement Training Center Fund	Various	Fee	2,273,103	Fee	2,273,103
Marriage License Fees	Various	Fee	1,027,254	Fee	1,027,254
Correctional Supervision Fund	Various	Fee	996,746	Fee	996,746
Drivers License Reinstatement Fees	Various	Fee	959,071	Fee	959,071
KBI-DNA Database Fees	Various	Fee	679,458	Fee	679,458
Community Corrections Supervision Fee Fund	Various	Fee	461,450	Fee	461,450
Indigents' Defense Services Application Fee	Various	Fee	541,372	Fee	541,372
Indigents' Defense Services Bond Forfeiture Fees	Various	Fee	567,298	Fee	567,298
Other (Law Library, Court Reporter, Interest, etc.)	Various	Fee	221,566	Fee	221,566
<i>Subtotal - Other Fees and Assessments</i>			\$7,916,065		\$7,916,065
<b>Total of all Docket Fees, Fines, Penalties and Forfeitures Assessed</b>			<b>\$54,979,854</b>		<b>\$54,979,854</b>

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### State Budget

#### J-2 Introduction to State Budget

##### Budget Overview

This report provides background information on the state budget process, including definitions of classifications of expenditures by function of government and by major purpose of expenditure.

Information about the approved FY 2018 and FY 2019 budgets also are included, as well as general information on the status of the State General Fund (SGF).

##### The Budget Process

The Kansas budget is an executive budget in that the budgetary recommendations of the Governor are embodied in the appropriation bills, which are introduced and considered by the Legislature.

- Most state agencies are required by law to submit their budget requests no later than October 1 of each year (customarily, the deadline specified by the Director of the Budget is September 15). Agency budget requests are submitted to the Division of the Budget and the Legislative Research Department at the same time.
  - Twenty state agencies, most of them occupational and professional licensing boards and financial institution regulatory agencies, are “biennial budget agencies” and authorized to file budget adjustment requests every other year.

The **Director of the Budget**, an appointee of the Governor, is directed by law to review the detailed requests submitted by the various state agencies and to make initial recommendations that are transmitted to agencies in November. An agency may appeal those initial recommendations to the Governor. By law, judicial branch agency budgets are exempt from review by the Director. By practice, legislative branch agency budgets are not reviewed.

- The Governor makes budgetary recommendations, which are provided to the Legislature at the beginning of each legislative session. The Governor’s recommendations also are included in appropriations bills, which become the Legislature’s base for approving the budget each year.

- At the discretion of the Governor, a budget cycle may include two budget years. In the first year of a two-year cycle, the agency requests and the Governor recommends a current year budget and two budget years. In the second year, the Governor's recommendation includes the current year and a budget year with the approved amount from the first year's legislation. In this case, the Governor's recommendation reflects only changes from the previously approved budget year amount. This distinction changes the comparison made in the *Budget Analysis* and the changes made to the appropriations bill(s).
- The **Legislative Research Department** prepares an analysis of both the budget request made by each agency and the Governor's recommendations, which is submitted to the Legislature approximately three weeks after the Director of the Budget submits the *Governor's Budget Report*.
- Agencies' budgets receive simultaneous consideration in the House Committee on Appropriations and the Senate Committee on Ways and Means. Identical appropriation bills reflecting the Governor's recommendation are introduced in both chambers.
  - *Consideration by the first chamber.* The chairpersons of the House Committee on Appropriations and the Senate Committee on Ways and Means appoint budget committees and subcommittees, respectively, to consider appropriations for various agencies. After reviewing the budget requests and recommendations, the budget committees and subcommittees draft a report that details all budgetary adjustments to the Governor's recommendations the budget committee or subcommittee support. Once the report is prepared, it is presented to the corresponding full committee. The committee may adjust the recommendations or it may adopt the report as submitted. The recommendations of the committee are considered by the full chamber, which also may adjust or adopt the recommendations.
  - *Consideration by the second chamber.* The process for review of an appropriation bill in the second house repeats the steps followed in the house of origin.
  - *Conference Committee action.* After consideration of an appropriation bill by the second house, the bill typically goes to a conference committee to reconcile differences between the House and Senate versions of the bill.
  - *Omnibus Appropriations Bill.* The Legislature usually adjourns its regular session sometime in early April and returns for a wrap-up session that occurs roughly two-and-one-half weeks following the first adjournment. During the wrap-up session, the Legislature takes action on a number of items of unfinished business, one of which is the Omnibus Appropriations Bill. It is designed to make technical adjustments to the appropriation bills passed earlier in the session and to address the fiscal impact of legislation passed during the session. The Omnibus Appropriations Bill is usually one of the last bills passed each session.
  - *Classifications of state spending.* The State of Kansas classifies state spending by major purpose of expenditure and by function of government.

**FY 2018 and FY 2019 Approved Budget**

The 2018 Legislature approved:

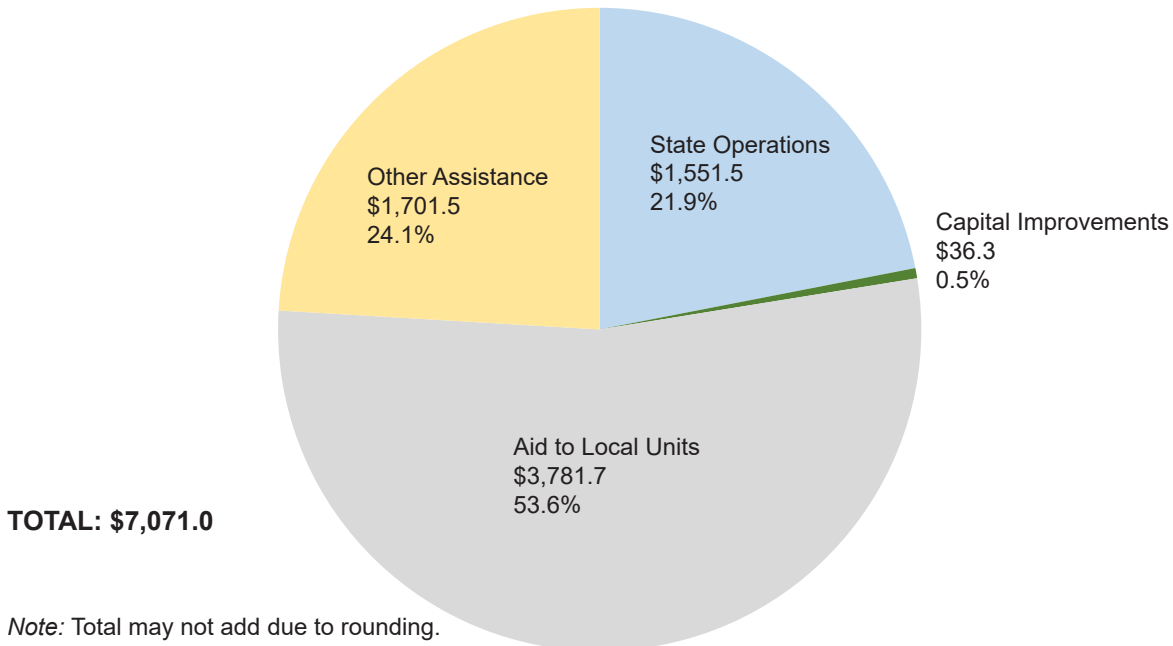
- An FY 2018 budget totaling \$16.3 billion from all funding sources, which is an increase of \$765.8 million (4.9 percent) above FY 2017 actual expenditures.
- An FY 2018 SGF budget totaling \$6.7 billion, which is an increase of \$415.4 million (6.6 percent) above FY 2017 actual expenditures.
- An FY 2019 budget totaling \$17.0 billion from all funding sources, which is an increase of \$665.7 million (4.1 percent) above the approved FY 2018 approved budget.
- An FY 2019 SGF budget totaling \$7.1 billion, which is an increase of \$379.3 million (5.7 percent) above the approved FY 2018 approved.

Major purposes of expenditure include the following:

- **State Operations.** Actual agency operating costs for salaries and wages, contractual services, commodities, and capital outlay.
- **Aid to Local Units.** Aid payments to counties, cities, school districts, and other local government entities.
- **Other Assistance, Grants, and Benefits.** Payments made to or on behalf of individuals as aid, including public assistance benefits, unemployment benefits, and tuition grants.
- **Capital Improvements.** Cash or debt service payments for projects involving new construction, remodeling and additions, rehabilitation and repair, razing, and the principal portion of debt service for a capital expense.

The following illustration reflects approved FY 2019 SGF expenditures by major purpose of expenditure.

**FY 2019 SGF Expenditures  
by Major Purpose  
(Dollars in Millions)**



Expenditures by function of government are grouped by agencies which make expenditures for similar programs and purposes. There are six functions of government:

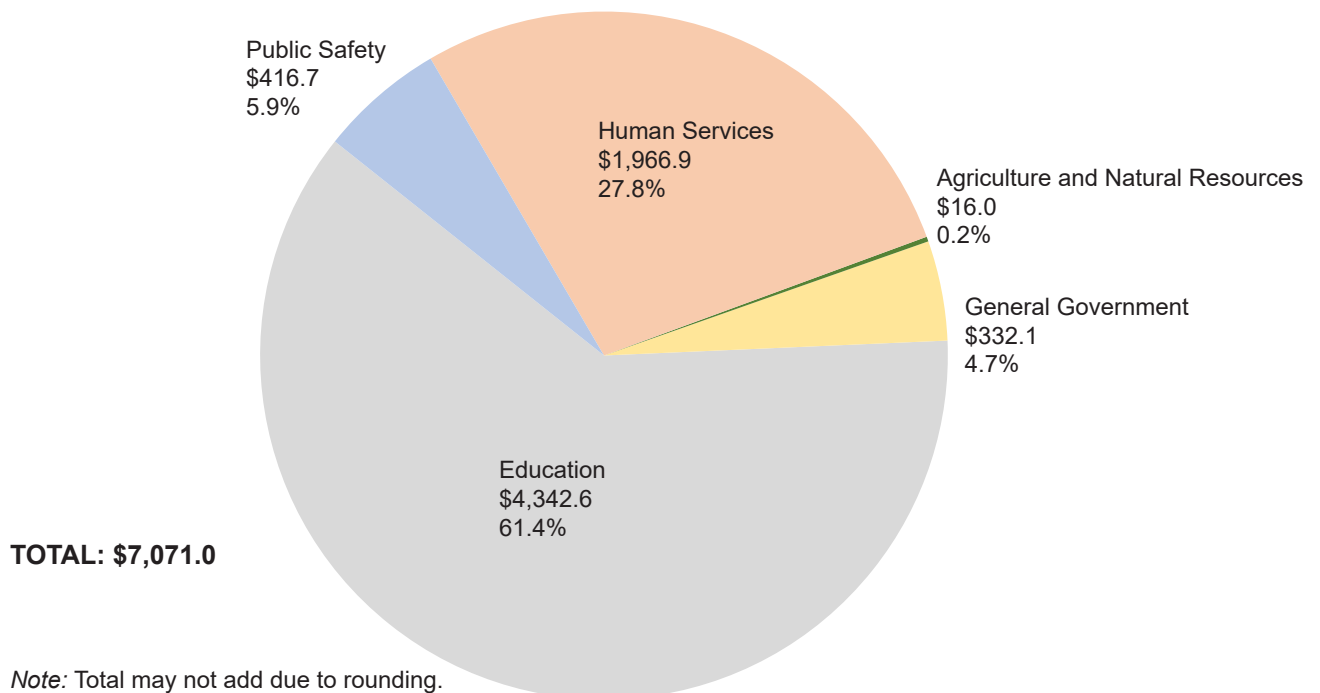
- **General Government.** State agencies with both administrative and regulatory functions, including statewide elected officials, the legislative and judicial branches, and fee-funded professional and regulatory licensing agencies.
- **Human Services.** Agencies that provide services to individuals, including the Department for Aging and Disability Services and state hospitals, the Department for Children and Families, the Department of Labor, the health portions of the Department of Health and Environment, and the Commission on Veterans' Affairs Office.
- **Education.** Agencies that provide various educational services to Kansans, including the Department of Education, the Board of Regents and the Regents institutions, the State Library, the

Arts Commission, the State Historical Society, and the Schools for the Blind and the Deaf.

- **Public Safety.** Agencies that ensure the safety and security of citizens, including the Department of Corrections and its facilities, the Highway Patrol, and the Kansas Bureau of Investigation.
- **Agriculture and Natural Resources.** Agencies that protect the natural and physical resources of the state, including the Department of Agriculture, the environment portion of the Department of Health and Environment, and the Department of Wildlife, Parks and Tourism.
- **Transportation.** This function includes only the Department of Transportation.

The following illustration reflects approved FY 2019 SGF expenditures by function of government (the chart does not reflect reductions of \$3.9 million for FY 2019 for non-agency specific savings).

**FY 2019 SGF Expenditures  
by Function of Government  
(Dollars in Millions)**





**Consensus Revenue Estimating Process**

Since 1974, a consensus approach involving the legislative and executive branches (Division of the Budget, Legislative Research Department, the Department of Revenue, and one consulting economist each from the University of Kansas, Kansas State University, and Wichita State University) has been utilized for estimating revenues to the SGF. These consensus estimates are used by both the Governor and the Legislature to formulate and approve budget requests. The law requires that on or before December 4 and April 20, the Director of the Budget and the Director of the Legislative Research Department prepare a joint estimate of revenue to the SGF for the current and ensuing fiscal year.

The following table reflects actual SGF receipts (in millions) for FY 2017 and the April 2018 estimate, as adjusted for legislation, of the Consensus Revenue Estimating Group for FY 2018 and FY 2019.

(Dollars in Millions)			
	Actual FY 2017	Estimated FY 2018	Estimated FY 2019
Income Taxes	\$ 2,670	\$ 3,517	\$ 3,728
Excise Taxes	2,962	3,010	30,383
Other Taxes	174	174	166
Other Revenue	533	330	71
<b>Total</b>	<b>\$ 6,339</b>	<b>\$ 7,031</b>	<b>\$ 7,003</b>

SGF revenue sources include:

- **Income taxes** include individual and corporate income and financial institutions taxes.
- **Excise taxes** include sales and compensating use taxes, alcohol and cigarette taxes, and severance taxes.
- **Other taxes** include motor carrier property fees and insurance premium taxes.

- **Other revenue** includes interest earnings, agency earnings, and net transfers to and from the SGF.

The following tables reflect where a SGF dollar is projected to come from in FY 2018 and how it will be spent.

Where Each FY 2019 SGF Dollar Will Come From (Dollars in Millions)		
48¢	Individual Income Tax	\$3,334
40¢	Sales and Compensating Use Tax	2,766
5¢	Corporation and Financial Income Tax	351
2¢	Insurance Premium Tax	163
2¢	Tobacco Taxes	107
2¢	Alcohol Taxes	121
1¢	Severance Tax	36
2¢	Other Taxes and Revenue	125
<b>\$1.00</b>	<b>Total Receipts</b>	<b>\$7,003</b>

*Note: Totals may not add due to rounding.*

Where Each FY 2019 SGF Dollar Will Be Spent (Dollars in Thousands)		
50¢	Department of Education	\$3,527,282
11¢	Board of Regents/ Postsecondary Education	792,583
0¢	Other Education	22,498
<b>61¢</b>	<b>Subtotal - Education</b>	<b>\$4,342,363</b>
12¢	Department for Aging and Disability Services and State Hospitals	854,186
12¢	Department of Health and Environment	821,134
5¢	Department of Corrections and Facilities	367,469
4¢	Department for Children and Families	281,288
2¢	Department of Administration	125,724
1¢	Judicial Branch, Board of Indigents' Defense Services	133,687
3¢	All Other	145,105
<b>\$1.00</b>	<b>Total Expenditures</b>	<b>\$7,071,046</b>

*Note: Totals may not add due to rounding.*

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### State Budget

#### J-3 Kansas Laws to Eliminate Deficit Spending

Various laws or statutory sections are designed to provide certain safeguards with respect to state budgeting and managing of expenditures and to prevent deficit financing. These laws and statutes are summarized below.

#### Constitutional Provisions

Sometimes certain provisions of the *Kansas Constitution* are cited with regard to financial limitations. For instance, Section 24 of Article 2 says, "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." Section 4 of Article 11 states, "The Legislature shall provide, at each regular session, for raising sufficient revenue to defray the current expenses of the state for two years."

Sections 6 and 7 of Article 11 relate to incurring public debt for the purpose of defraying extraordinary expenses and making public improvements. Such debt shall not, in the aggregate, exceed \$1.0 million without voter approval of a law passed by the Legislature.

The Kansas Supreme Court, in several cases over the years, has said these sections apply only to debts payable from the levy of general property taxes and thus do not prohibit issuance of revenue bonds to be amortized from non-property tax sources.

#### Unencumbered Balance Required

KSA 75-3730, enacted in 1953, states that all commitments and claims shall be pre-audited by the Division of Accounts and Reports as provided in KSA 75-3731: "No payment shall be made and no obligation shall be incurred against any fund, allotment, or appropriation, except liabilities representing the expenses of the legislature, unless the Director of Accounts and Reports shall first certify that his or her records disclose there is a sufficient unencumbered balance available in such fund, allotment, or appropriation to meet the same."

#### State General Fund Ending Balance Law

A portion of 1990 HB 2867 (then KSA 75-6704) provided that the Governor and Legislature must target year-end State General

Fund (SGF) balances expressed as a percentage of fiscal year expenditures and demand transfers, as follows: at least 5.0 percent for FY 1992, 6.0 percent for FY 1993, 7.0 percent for FY 1994, and 7.5 percent for FY 1995 and thereafter (now KSA 2018 Supp. 75-6702).

Beginning in the 1992 Legislative Session, an “Omnibus Reconciliation Spending Limit Bill” is to be relied upon to reconcile total SGF expenditures and demand transfers to the applicable ending balance target. The law does not require any future action by the Governor or Legislature if the target is missed when actual data on receipts, expenditures, and the year-end balance become known.

## Allotment System

The allotment system statutes (KSA 2018 Supp. 75-3722 through 3725) were enacted in 1953 as part of the law that created the Department of Administration. In response to a request from Governor Carlin, the Attorney General issued an opinion (No. 82-160) on July 26, 1982, which sets forth some of the things that can and cannot be done under the allotment system statutes. Some of the key points in that opinion are:

- With certain exceptions, noted below, the Governor (through the Secretary of Administration and Director of the Budget) has broad discretion in the application of allotments in order to avoid a situation where expenditures in a fiscal year would exceed the resources of the SGF or a special revenue fund. Allotments need not be applied equally or on a *pro rata* basis to all appropriations from, for example, the SGF. Thus, the Governor may pick and choose “as long as such discretion is not abused.”
- Demand transfers from the SGF to another fund are not subject to the allotment system because, technically, appropriations are made from the other fund and not the SGF. Such transfers include those to the Local *Ad Valorem* Tax Reduction Fund, County and City Revenue Sharing Fund, City-County

Highway Fund, State Highway Fund, State Water Plan Fund, and School District Capital Improvements Fund.

- The allotment system cannot be used in any fiscal year for the purpose of increasing the year-ending balance of a fund nor for controlling cash shortages that might occur at any time within a fiscal year. Thus, if a “deficit” were to be projected at the end of the fiscal year, the allotment system could be used to restore the SGF balance to zero.

The Legislature and the Courts and their officers and employees are exempt from the allotment system under KSA 2018 Supp. 75-3722.

## The \$100.0 Million Balance Provision

A provision in 1990 HB 2867 (KSA 2018 Supp. 75-6704) authorizes the Governor to issue an executive order or orders, with approval of the State Finance Council, to reduce SGF expenditures and demand transfers if the estimated year-end balance in the SGF is less than \$100.0 million. The Director of the Budget must continuously monitor receipts and expenditures and certify to the Governor the amount of reduction in expenditures and demand transfers that would be required to keep the year-end balance from falling below \$100.0 million.

Debt service costs, the SGF contribution to school employees retirement (KPERs-School), and the demand transfer to the School District Capital Improvements Fund created in 1992 are not subject to reduction.

If the Governor decides to make reductions, they must be on a percentage basis applied equally to all items of appropriations and demand transfers (*i.e.*, across-the-board with no exceptions other than the three mentioned above). In contrast to the allotment system law, all demand transfers but one are subject to reduction.

In August 1991 (FY 1992), the Governor issued an executive directive, with the approval of the State Finance Council, to reduce SGF expenditures (except debt service and the KPERs-School

employer contributions) by 1.0 percent. At the time of the State Finance Council action, the SGF ending balance was projected at approximately \$76.0 million.

### **Certificates of Indebtedness**

KSA 75-3725a, first enacted in 1970, authorizes the State Finance Council to order the Pooled Money Investment Board (PMIB) to issue a certificate of indebtedness when the estimated resources of the SGF will be sufficient to meet in full the authorized expenditures and obligations of the SGF for an entire fiscal year, but insufficient to meet such expenditures and obligations fully as they become due during certain months of a fiscal year. The certificate must be redeemed from the SGF no later than June 30 of the same fiscal year in which it was issued. If necessary, more than one certificate may be issued in a fiscal year. No interest is charged to the SGF.

However, to whatever extent the amount of a certificate results in greater spending from the SGF than would occur if expenditures had to be delayed, there may be some reductions in interest earnings that otherwise would accrue to the SGF.

To cover cash flow issues, the State Finance Council authorized issuance of certificates of indebtedness as follows:

- \$65.0 million in December FY 1983;
- \$30.0 million in October FY 1984;
- \$75.0 million in April FY 1986;
- \$75.0 million in July FY 1987;
- \$140.0 million in December FY 1987 (replaced the July certificate);
- \$75.0 million in November FY 1992;
- \$150.0 million in January FY 2000;
- \$150.0 million in January FY 2001;
- \$150.0 million in September FY 2002;
- \$200.0 million in December FY 2002;
- \$450.0 million in July FY 2003;
- \$450.0 million in July FY 2004;
- \$450.0 million in July FY 2005;

- \$450.0 million in July FY 2006 ;
- \$200.0 million in December FY 2007;
- \$350.0 million in December FY 2008;
- \$300.0 million in June FY 2009;
- \$250.0 million in December FY 2009;
- \$225.0 million in February FY 2009;
- \$700.0 million in July FY 2010;
- \$700.0 million in July FY 2011;
- \$600.0 million in July FY 2012;
- \$400.0 million in July FY 2013;
- \$300.0 million in July FY 2014;
- \$675.0 million in July FY 2015;
- \$840.0 million in July FY 2016;
- \$900.0 million in July FY 2017;
- \$900.0 million in July FY 2018; and
- \$600.0 million in July FY 2019.

The amount of a certificate is not “borrowed” from any particular fund or group of funds. Rather, it is a paper transaction by which the SGF is temporarily credited with the amount of the certificate and state moneys available for investment and managed by the PMIB.

The PMIB is responsible for investing available moneys of all agencies and funds, as well as for maintaining an operating account to pay daily bills of the state. Kansas Public Employees Retirement System invested money is not part of “state moneys available for investment” nor is certain money required to be separately invested by the PMIB under statutes other than the state moneys law.

Certificates of indebtedness could be used if allotments were imposed or if expenditures were reduced under the \$100.0 million balance provision or if neither such action was taken.

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### State Budget

#### J-4 State General Fund Transfers

This article provides an explanation of State General Fund (SGF) transfers, including both revenue and demand transfers.

FY 2019 SGF expenditures are estimated at \$7.1 billion. Not included as expenditures in the budget are \$375.4 million in SGF revenue transfers to various state agencies and local units of government, approximately 5.3 percent of the total SGF budget. Offsetting these transfers are \$374.1 million in transfers into the SGF, mostly from the State Highway Fund (\$293.1 million), State Gaming Revenues Fund (\$26.0 million), and Economic Development Initiatives Fund (\$18.7 million).

#### Distinction between Demand Transfers and Revenue Transfers

A SGF **revenue transfer** is specified in legislation, usually an appropriations bill, and involves transferring money into and out of the SGF. Any transfer from the SGF to a special revenue fund or local unit of government is considered an expenditure from the special revenue fund.

**Demand transfers** are expenditures specified by statute rather than appropriation acts. An important characteristic of a demand transfer is that the amount of the transfer is based on a formula or authorization in substantive law. The appropriation of the funds traditionally was made through statutory authority rather than through an appropriation. In recent years, adjustments to the statutory amounts of the demand transfers have been included in appropriation bills. *SGF demand transfers are considered to be SGF expenditures.* The only current demand transfer is the transfer to the School District Capital Outlay Fund.

The following list includes select SGF state revenue transfers, which are set in statute and modified by acts of appropriation:

- State Water Plan Fund – \$6.0 million transferred to the Fund by statute annually, reduced to \$1.4 million in FY 2018 and \$2.7 million in FY 2019;
- State Fair – Up to \$300,000 for capital improvements transferred to the Fund annually, capped at \$100,000 in FY 2018 and \$0 in FY 2019;

- Tax Increment Financing Revenue Replacement Fund – Transfers to the Fund capped at \$0 while statute is reviewed; and
- The following funds are transferred in part to the SGF despite an alternate statutory purpose: State Highway Fund (\$288.3 million), Economic Development Initiatives Fund (\$20.1 million), Expanded Lottery Act Revenues Fund (ELARF) (\$2.5 million), State Water Plan

Fund (\$1.3 million), State Safety Fund (\$1.1 million). *All amounts are FY 2018 Actuals.*

The following table reflects actual and approved demand or revenue transfers for FY 2018 - FY 2019.

See [A-2 State Water Plan Fund, Kansas Water Authority, and State Water Plan](#) for additional information on State Water Plan Fund Transfers.

FY 2018 Actual to FY 2019 Approved State General Fund Transfers				
Transfers	Funds Affected	Statutory Authority	FY 2018 Actual	FY 2019 Approved
<b>Transfers In:</b>				
Economic Dev't Initiatives Fund	Transfer to SGF	HB 2002-Sec 83(g), SB109-Sec 59	\$ 20,130,000	\$ 18,700,000
ELARF	Transfer to SGF	HB 2002-Sec 170(b)	2,471,610	1,757,030
State Water Plan Fund	Transfer to SGF	HB 2002-Sec 159(j)	1,260,426	1,260,426
Various Agencies	27th Paycheck Transfer	HB 2002-Sec 65(l)	11,344,876	8,223
Regents Institutions	27th Paycheck Transfer	HB 2002-Sec 65(b)	1,175,831	1,175,831
Kansas Corporation Commission	Public Service Regulation Fund	HB 2002-Sec 60(h)	100,000	100,000
PMIB	PMIB Investment Portfolio Fee Fund *	KSA 75-4235(b)	2,875,000	2,400,000
	Bridge Funding	HB 2052-Sec 44, KSA 75-2263	118,800,000	-
Kansas Public Employees Retirement System (KPERs)	KS Endowment for Youth Fund	HB 2002-Sec 56(e)	200,000	-
Kansas Lottery	Gaming Revenues Fund *	KSA 79-4801: > \$50m	23,698,170	26,000,000
	Special Veterans Benefit Game	SB 109-Sec 63	1,028,373	--
Racing and Gaming	Tribal Gaming Program Loan Repayment	HB 2002-Sec 80(b)	450,000	450,000
Department of Revenue	Ag. Ethyl Alcohol Producer Incentive Fund	SB 161-Sec 112	3,500,000	-
	Car Company Tax Fund *	KSA 79-917	373,228	350,000
	Division of Vehicles Operating Fund	HB 2002-Sec 75(f)	2,172,408	2,172,408
Attorney General	Court Cost Fund	SB 109-Sec 39(c)	250,000	1,750,000
	Medicaid Fraud Prosecution Revolving Fund	HB 2002-Sec 37(g)	1,000,000	--



<b>FY 2018 Actual to FY 2019 Approved State General Fund Transfers</b>				
<b>Transfers</b>	<b>Funds Affected</b>	<b>Statutory Authority</b>	<b>FY 2018 Actual</b>	<b>FY 2019 Approved</b>
Insurance Department	Service Regulation Fund	HB 2002-Sec 61(h), Sec 44(c)	\$ 8,125,000	\$ 8,250,000
	Securities Act Fee Fund	KSA 17-12a601(a)(4), HB 2002-Sec 44(d)	13,615,552	14,044,541
Kansas Department for Aging and Disability Services	Problem Gambling & Addiction Grant Fund	HB 2002-Sec 99(n)	8,597	114,004
Department of Education	State Safety Fund	SB 19-Sec 1(c)	1,100,000	1,100,000
Board of Regents	Priv. & Out-of-State Post. Ed. Inst. Fee Fund	SB 109-Sec 93(c)	-	535,000
Emergency Med. Services Board	EMS Operating Fund	HB 2002-Sec 149(g)	250,000	250,000
State Fire Marshal	Fire Marshal Fee Fund	SB 109-Sec 98(b)	2,000,000	1,000,000
State Fair	Special Cash Fund *	KSA 2-220	200,000	200,000
Kansas Water Office	Water Marketing Fund	HB 2002-Sec 158(i), SB 109-Sec 109(b)	418,724	419,474
Department of Transportation	State Highway Fund	HB 2002-Sec 66(e), 164(i)	288,297,663	293,126,335
	Overhead Payment/Purchasing	HB 2002-Sec 6 65(c)	210,000	210,000
<i>Subtotal - Transfers In</i>			<b>\$ 505,055,458</b>	<b>\$ 375,373,272</b>
<b>Transfers Out:</b>				
ELARF	SGF Contingent Transfer	HB 2002-Sec 65(o)	\$ -	\$ -
Various Agencies	27th Paycheck Transfer	HB 2002-Sec 65(l)	(11,344,876)	(8,223)
	Bioscience Initiatives	HB 2002-Sec 34	(6,000,000)	-
	State Water Plan Fund Transfer	HB 2002-Sec 243	(1,400,000)	(2,750,000)
Department of Administration	Tax Increment Financing Revenue Replacement	KSA 12-1775a	8,597	-
Health Care Stabilization Fund	Support for KUMC Graduate Students *	KSA 40-3403(J)	(5,048,835)	(2,500,000)
Pooled Money Investment Board	Bridge Funding-Payment Plan	HB 2052-Sec 44	-	(52,866,667)
KPERS	Kansas Public Employees Retirement Fund	SB 109-Sec 128	(56,000,000)	(82,000,000)
Department of Revenue	Automated Tax Systems Fund	HB 2002-Sec 74(l); KSA 75-5147	(13,000,000)	(13,000,000)
Racing and Gaming	Tribal Gaming Program Loan	HB 2002-Sec 80(b)	(450,000)	(450,000)
State Bank Commissioner	Bank Commissioner Fee Fund	HB 2002-Sec 11(c)	(534,517)	-

<b>FY 2018 Actual to FY 2019 Approved State General Fund Transfers</b>				
<b>Transfers</b>	<b>Funds Affected</b>	<b>Statutory Authority</b>	<b>FY 2018 Actual</b>	<b>FY 2019 Approved</b>
Kansas Real Estate Commission	Real Estate Fee Fund	HB 2002-Sec 24(b)	\$ (196,671)	\$ -
Attorney General	Medicaid Fraud Prosecution Revolving Fund	SB 109-Sec 39(d)	-	(600,000)
	Tort Claims *	KSA 75-6116, 75-6117	(3,045,127)	(3,504,095)
	Sexually Violent Predator Expense Fund	HB 2002-Sec 38(f)	(50,000)	(50,000)
State Treasurer	Spirit Aerosystems Incentive	KSA 74-50,122 74-50,136, HB 2002-Sec 41	(3,639,724)	(3,600,000)
	Siemens Manufacturing Incentive		(743,423)	(550,000)
	Learjet Incentive		(815,963)	-
	Learning Quest Matching Funds *	KSA 75-650(g) & Treasurer Certification	(370,000)	(375,000)
Department of Education	School District Cap. Improvements Fund	KSA 72-6417(c) 75-2319(c)	(189,763,800)	(200,000,000)
	School District Declining Enrollment Fund	SB 19-Sec 1(i)	(2,593,542)	-
	School Safety and Security Fund	SB 109-Sec 76(c)	-	(5,000,000)
Board of Regents	Regents Faculty of Distinction Program	KSA 76-775	(686,682)	(688,776)
Kansas State University	National Bio Agro-defense Facility Fund	HB 2002-Sec 120(d)	-	(5,000,000)
KU Medical Center (KUMC)	Rural Health Bridging Psychiatry Fund	HB 2002-Sec 132(e)	(1,000,000)	(1,000,000)
State Fair	Special Cash Fund *	KSA 2-220	(200,000)	(200,000)
	Capital Improvements Fund	HB 2002-Sec 227(b)(2)(c)	(100,000)	
Local Units of Government	LAVTRF	HB 2002-Sec 38	-	-
	CCRSF	HB 2002-Sec 39	-	-
<i>Subtotal - Transfers Out</i>			<u>\$ (296,974,564)</u>	<u>\$ (374,142,761)</u>
<b>Total Transfers</b>			<b>\$ 208,080,894</b>	<b>\$ 1,230,511</b>
Interest	ADB <sup>1</sup> Interest on Various Funds		(8,740,823)	(9,030,511)
<b>Net Transfers</b>			<b>\$ 199,340,072</b>	<b>\$ (7,800,000)</b>
* Transfers set in statute and unmodified by acts of appropriation.				
<sup>1</sup> Average Daily Balance				

## Transfers to Local Units of Government

- The demand transfer to local units of government is the School District Capital Outlay Fund (SDCOF). The 2005 Legislature created the capital outlay state aid program as part of its response to the Kansas Supreme Court's opinion in school finance litigation. The program is designed to provide state equalization aid to school districts for capital outlay mill levies, up to eight mills;
- The School District Capital Improvements Fund (SDCIF) is used to support school construction projects. The appropriations bill caps the SDCIF transfer and is no longer included with total SGF expenditures. By statute, the State Board of Education certifies school

districts' entitlements determined under statutory provisions; and

## Suspended Local Transfers

The Local *Ad Valorem* Tax Reduction Fund (LAVTRF), County and City Revenue Sharing Fund (CCRSF), and Special City-County Highway Fund (SCCHF) were last treated as demand transfers in FY 2001 and the SDCIF transfer was changed to a revenue transfer in FY 2003.

- No transfers to the LAVTRF or the CCRSF have occurred since FY 2004; and
- No transfers to the SCCHF have occurred since FY 2009.

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## Taxation

### K-1 Homestead Program

When Kansas enacted the Homestead Property Tax Refund Act in 1970, it became the sixth state to enact a “circuit-breaker” style of property tax relief.

A “circuit-breaker” is a form of property tax relief in which the benefit is dependent on income or other criteria and the amount of property taxes paid. This moniker developed as an analogy to the device that breaks an electrical circuit during an overload, just as the property tax relief benefit begins to accrue once a person’s property taxes have become overloaded relative to his or her income.

Currently, 34 states, including Kansas, have some form of circuit-breaker program.

In 27 states, excluding Kansas, renters are permitted to participate in the programs.

### Eligibility Requirements

- Household income of \$34,450 or less; and
- Someone in the household is:
  - Age 55 or above;
  - A dependent under age 18;
  - Blind; or
  - Otherwise disabled.

Renters were eligible (15.0 percent of rent was equivalent to property tax paid) until tax year 2013.

### Program Structure

The current Kansas Homestead Refund Program (Program) is an entitlement for eligible taxpayers based upon their household income and their property tax liability. The maximum available refund is \$700 and the minimum refund is \$30.

### Legislative History

A 2006 change to the Program expanded it by approximately \$4.5 million. The 2007 Legislature enacted an even more significant expansion of the Program, which increased the size of the Program by an additional \$9.9 million.

PROGRAM CLAIMS AND REFUNDS			
	Eligible Claims Filed	Amount	Average Refund
FY 2011	120,029	\$42.860 million	\$357
FY 2012	126,762	\$43.049 million	\$340
FY 2013	115,719	\$37.586 million	\$325
FY 2014	86,082	\$29.415 million	\$342
FY 2015	70,343	\$23.032 million	\$327
FY 2016	76,202	\$25.968 million	\$341
FY 2017	79,737	\$24.649 million	\$309
FY 2018	83,155	\$24.948 million	\$324

Among the key features of the 2007 expansion law:

- The maximum refund available under the Program was increased from \$600 to \$700;
- 50.0 percent of Social Security benefits were excluded from the definition of “income” for purposes of qualifying for the Program; and
- A residential valuation ceiling prohibits any homeowner with a residence valued at \$350,000 or more from participating in the Program.

### Hypothetical Taxpayers

The impact of the 2006 and 2007 Program expansion legislation is demonstrated on the following hypothetical taxpayers.

HOMESTEAD REFUND			
	Pre-2006 Law	2006 Law	2007 Law
Elderly couple with \$1,000 in property tax liability and \$23,000 in household income, \$11,000 of which comes from Social Security benefits.	\$72	\$150	\$385
Single mother with two young children, \$750 in property tax liability and \$16,000 in household income.	\$240	\$360	\$420
Disabled renter paying \$450 per month in rent, with \$9,000 of household income from sources other than disability income.	\$480	\$528	\$616

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**Selected Tax Rate Comparisons**

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## Taxation

### K-2 Kansas Income Tax Reform

Beginning in 2012, the Kansas Legislature passed legislation enacting major changes to the Kansas individual income tax. Virtually all areas of the determination of income tax liability were affected by the reforms, including additions and subtractions to adjusted gross income, standard and itemized deductions, tax rates and brackets, tax credits, and tax liability exclusion. Major legislation was passed in 2012, 2013, 2015, and 2017, with additional legislation being passed related to individual income tax reform in 2014.

#### Addition and Subtraction Modifications

In 2012, legislation specifically exempted certain non-wage business income by providing a modification to federal adjusted gross income that subtracted the taxpayer's income reported on lines 12, 17, and 18 of federal Form 1040. This included business income; income from rents, royalties, partnerships, S corporations, and trusts; and farm income. In addition to this subtraction modification, the legislation included a modification requiring taxpayers to add their losses attributable to those categories back to their federal adjusted gross income in determining their adjusted gross income for Kansas income tax purposes. In 2015, legislation modified the subtraction modification by requiring taxpayers to include "guaranteed payments" in their determination of income.

"Guaranteed payments" is a federally defined term for a specific type of business income. The 2017 Legislature eliminated the addition and subtraction modifications in their entirety, largely returning this area of the Kansas individual income tax to its condition prior to 2012.

#### Standard Deduction and Itemized Deductions

In 2012, legislation increased the standard deduction for single head-of-household filers from \$4,500 to \$9,000 and for married taxpayers filing jointly from \$6,000 to \$9,000. These amounts were reduced to \$7,500 for married taxpayers filing jointly and \$6,000 for single head-of-household filers by 2013 legislation.

Itemized deductions were unaffected by 2012 legislation, but 2013 legislation eliminated the itemized deduction for certain gambling losses and provided for a series of "haircuts" to all other itemized

deductions—excluding charitable contributions—that reduced those deductions by 30.0 percent beginning in tax year 2013 and increasing to 50.0 percent by tax year 2017. In 2015, legislation further reduced itemized deductions by eliminating all itemized deductions other than charitable contributions, mortgage interest, and property taxes beginning in tax year 2015. Mortgage interest and property taxes were reduced to 50.0 percent of their federal amount effective for tax year 2015, and charitable contributions remained at the full federal amount.

In 2017, legislation reinstated the itemized deduction for medical expenses at 50.0 percent of the federal amount beginning in tax year 2018 and increased the amount for medical expenses, property taxes, and mortgage interest to 75.0 percent of the federal level in 2019 and 100.0 percent of the federal level in 2020.

### **Tax Rates and Brackets**

In 2012, legislation collapsed the three-bracket structure for individual income tax Kansas had used since 1992 into a two-bracket system and applied rates of 3.0 and 4.9 percent. Previous rates had been 3.5, 6.25, and 6.45 percent. In 2013, legislation provided a schedule of future rate reductions to lower the rates to 2.3 and 3.9 percent in tax year 2018, and then provided a formula that could—under certain circumstances—provide additional rate reductions in the future based upon year over year growth of specified State General Fund tax receipts. In 2015, legislation altered the rate reduction schedule to provide that the rates would be reduced to 2.6 and 4.6 percent before a modified version of the rate reduction formula would go into effect in tax year 2021.

In 2017, legislation reinstated a three-bracket individual income tax structure with tax rates set at 2.9, 4.9, and 5.2 percent for tax year 2017 and at 3.1, 5.25, and 5.7 percent for tax year 2018 and all tax years thereafter. The statutory future rate reduction formula was repealed by 2017 legislation.

### **Income Tax Credits**

In 2012, legislation repealed or limited numerous sales tax rebate credit. In 2014, legislation reinstated tax credits for adoption expenses and disability access expenses. In 2017, legislation reinstated the child and dependent care tax credit through a three-year phase beginning in tax year 2018.

### **Low-Income Tax Exclusion**

In 2015, legislation created a provision that eliminated any positive income tax liability for single filers with \$5,000 or less of taxable income and for married taxpayers filing jointly with \$12,500 or less of taxable income beginning in tax year 2016. In 2017, legislation changed the thresholds for this exclusion to \$2,500 for single filers and \$5,000 for married filers, effective tax year 2018.

### **Fiscal Information**

When fully implemented, tax legislation passed in 2012 and 2013 had the effect of reducing individual income tax receipts, while tax legislation passed in 2015 and 2017 had the effect of increasing individual income tax receipts.

The combined fiscal effect of major tax legislation enacted during those four sessions on individual income tax was a reduction in receipts of \$358.1 million for fiscal year 2018.

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K-1  
Homestead Program

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Kansas Income Tax  
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K-3  
Liquor Taxes

K-4  
Selected Tax Rate  
Comparisons

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### Taxation

#### K-3 Liquor Taxes

Kansas has three levels of liquor taxation, each of which imposes different rates and provides for a different disposition of revenue.

**Liquor gallonage tax.** The first level of taxation is the gallonage tax, which is imposed upon the person who first manufactures, sells, purchases, or receives the liquor or cereal malt beverage (CMB).

**Liquor enforcement or sales tax.** The second level of taxation is the enforcement or sales tax, which is imposed on the gross receipts from the sale of liquor or CMB to consumers by retail liquor dealers and grocery and convenience stores; and to clubs, drinking establishments, and caterers by distributors.

**Liquor drink tax.** The third level of taxation is levied on the gross receipts from the sale of liquor by clubs, caterers, and drinking establishments.

#### Gallonage

Since the gallonage tax is imposed upon the person who first manufactures, uses, sells, stores, purchases, or receives the alcoholic liquor or CMB, the tax has already been paid by the time the product has reached the retail liquor store—or in the case of CMB, the grocery or convenience store. (*Note:* Examples of taxation rates are detailed throughout this article.)

***When the liquor store owner purchases a case of light wine from a distributor, the 30 cents per gallon tax has already been built in as part of that store owner's acquisition cost.***

Rates	
	Per Gallon
Beer and CMB	\$0.18
Light Wine	\$0.30
Fortified Wine	\$0.75
Alcohol and Spirits	\$2.50

Gallonge tax receipts in fiscal year (FY) 2018 were approximately \$22.5 million. Of this amount, nearly \$9.5 million was attributed to the beer and CMB tax.

Gallonge Tax Disposition of Revenue		
	State General Fund (SGF)	Alcoholism and Intoxication Programs Fund (CAIPF)
Alcohol and Spirits	90.0%	10.0%
All Other Gallonge Taxes	100.0%	--

Liquor gallonge tax rates have not been increased since 1977.

**Enforcement and Sales**

**Enforcement.** Enforcement tax is an in-lieu-of sales tax imposed at the rate of 8.0 percent on the gross receipts of the sale of liquor to consumers and on the gross receipts from the sale of liquor and CMB to clubs, drinking establishments, and caterers by distributors.

- A consumer purchasing a \$10 bottle of wine at a liquor store is going to pay 80 cents in enforcement tax.

*The club owner buying the case of light wine (who already had paid the 30 cents per gallon gallonge tax as part of his acquisition cost) also now would pay the 8.0 percent enforcement tax.*

**Sales.** CMB purchases in grocery or convenience stores are not subject to the enforcement tax, but rather are subject to state and local sales taxes. The state sales tax rate is 6.5 percent, and combined local sales tax rates range as high as 5.0 percent.

**CMB sales, therefore, are taxed at rates ranging from 6.5 to 11.5 percent.**

Besides the rate differential between sales of strong beer (and other alcohol) by liquor stores and CMB by grocery and convenience stores, there is a major difference in the disposition of revenue.

Enforcement and Sales Tax Disposition of Revenue			
	SGF	State Highway Fund	Local Units
Enforcement (8.0%)	100.00%	--	--
State Sales (6.5%)	83.846%	16.154%	--
Local Sales (up to 5.0%)	--	--	100.00%

Enforcement tax receipts in FY 2018 were approximately \$73.5 million. Grocery and convenience store sales tax collections from CMB are unknown.

The liquor enforcement tax rate has not been increased since 1983.

**Drink**

The liquor drink tax is imposed at the rate of 10.0 percent on the gross receipts from the sale of alcoholic liquor by clubs, caterers, and drinking establishments.

*The club owner (who had previously paid the gallonge tax and the enforcement tax when acquiring the case of light wine) next is required to charge the drink tax on sales to its customers. Assuming the club charged \$4.00 for a glass of light wine, the drink tax on such a transaction would be 40 cents.*

Drink Tax – Disposition of Revenue			
	SGF	CAIPF	Local Alcoholic Liquor Fund
Drink Tax (10.0%)	25.0%	5.0%	70.0%

Liquor drink tax revenues in FY 2018 were about \$46.0 million, of which \$11.5 million were deposited in the SGF. The liquor drink tax rate has remained unchanged since imposition in 1979.

### Taxation of Beer and CMB

Starting on April 1, 2019, CMB licensees may sell beer containing no more than 6.0 percent alcohol

by volume; liquor retailers may sell CMB products. For purposes of taxation, CMB products and beer sold at grocery or convenience stores and other CMB licensed establishments will be subject to the state and local sales tax rates. Beer and CMB products sold at liquor stores will continue to be subject to the liquor enforcement tax. Revenues from these taxes will be distributed in accordance with current law.

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**K-1**  
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**K-2**  
Kansas Income Tax Reform

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Liquor Taxes

**K-4**  
Selected Tax Rate Comparisons

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### Taxation

#### K-4 Selected Tax Rate Comparisons

The following tables compare selected tax rates and tax bases with those of nearby states.

Sales Tax			
	Rate	Food	Non-prescription Drugs
Kansas	6.50%	6.50%	Non-exempt
Missouri	4.23%	1.23%	Non-exempt
Nebraska	5.50%	Exempt	Non-exempt
Oklahoma	4.50%	4.50%	Non-exempt
Colorado	2.90%	Exempt	Non-exempt
Iowa	6.00%	Exempt	Non-exempt
Arkansas	6.50%	1.50%	Non-exempt
Texas	6.25%	Exempt	Exempt

Source: Federation of Tax Administrators, as of January 1, 2018.

Motor Fuel Tax <sup>1</sup> (cents per gallon)		
	Gasoline	Diesel Fuel
Kansas	25.03	27.03
Missouri	17.30	17.30
Nebraska	29.30	28.70
Oklahoma	20.00	20.00
Colorado	22.00	20.50
Iowa	30.50	32.50
Arkansas	21.80	22.80
Texas	20.00	20.00

<sup>1</sup> Includes fees, such as environmental and inspection fees.  
Source: Federation of Tax Administrators, as of January 1, 2018.

Cigarette Tax	
	Excise Tax (cents per pack)
Kansas	129
Missouri	17
Nebraska	64
Oklahoma	103
Colorado	84
Iowa	136
Arkansas	115
Texas	141

Source: Federation of Tax Administrators, as of January 1, 2018.

<b>Corporate Income Tax</b>				
	<b>Tax Rate</b>	<b>Number of Brackets</b>	<b>Bracket Range</b>	<b>Apportionment Method</b>
Kansas <sup>1</sup>	4.00%	1	Flat Rate	Three Factor
Missouri	6.25%	1	Flat Rate	Three Factor
Nebraska	5.58%-7.81%	2	\$100,000	Sales
Oklahoma	6.00%	1	Flat Rate	Three Factor
Colorado	4.63%	1	Flat Rate	Sales
Iowa	6.00%-12.00%	4	\$25,000-\$250,001	Sales
Arkansas	1.00%-6.50%	6	\$3,000-\$100,001	Double Weighted Sales
Texas <sup>2</sup>	N/A	N/A	N/A	Sales

1 Kansas levies a 3.0 percent surtax on taxable income over \$50,000.  
 2 Texas imposes a franchise tax on entities with more than \$1,110,000 total revenues at a rate of 0.75 percent, or 0.375 percent for entities primarily engaged in retail or wholesale trade, on lesser of 70.0 percent of total revenues or 100.0 percent of gross receipts after deductions for either compensation or cost of goods sold.  
 Source: Federation of Tax Administrators, as of January 1, 2018.

Individual Income Tax							
	Federal IRC <sup>1</sup> Starting Point	Tax Rate Range	Number of Brackets	Bracket Range	Personal Exemption Single	Personal Exemption Married	Personal Exemption Dependent
Kansas	Adjusted Gross Income	3.10%-5.70%	3	\$15,000-\$30,000	\$2,250	\$4,500	\$2,250
Missouri	Adjusted Gross Income	1.50%-5.90%	10	\$1,028-\$9,253	\$2,100	\$4,200	\$1,200
Nebraska	Adjusted Gross Income	2.46%-6.84%	4	\$3,150-\$30,420	\$134 (credit)	\$268 (credit)	\$134 (credit)
Oklahoma	Adjusted Gross Income	0.50%-5.00%	6	\$1,000-\$7,200	\$1,000	\$2,000	\$1,000
Colorado	Taxable Income	4.63%	1	Flat Rate	-- <sup>2</sup>	-- <sup>2</sup>	-- <sup>2</sup>
Iowa	Adjusted Gross Income (as defined in IRC effective 1/1/15)	0.36%-8.98%	9	\$1,598-\$71,910	\$40 (credit)	\$80 (credit)	\$40 (credit)
Arkansas	No Relation to Federal IRC	0.90%-6.90%	6	\$4,299-\$35,100	\$26 (credit)	\$52 (credit)	\$26 (credit)
Texas	N/A	N/A	N/A	N/A	N/A	N/A	N/A

1 Internal Revenue Code (IRC)

2 Colorado uses the personal exemption amounts provided in the current version of the IRC. The Tax Cuts and Jobs Act of 2017 set the IRC personal exemption amounts at \$0.

Source: Federation of Tax Administrators, as of July 1, 2018.

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### Transportation

#### L-1 Distracted Driving: State Laws

In 2016, 3,450 people were killed in motor vehicle crashes involving distracted drivers in the United States. Of those killed, 562 were pedestrians, bicyclists, and others who were not occupants of the vehicles. Of the police-reported motor vehicle traffic crashes in 2015, 10 percent of fatal crashes, 15 percent of injury crashes, and 14 percent of all crashes were reported as distraction-affected crashes, and an estimated 391,000 people were injured in those crashes.<sup>1</sup>

Kansas data for 2017 show distracted driving was recorded as a factor in 2,201 crashes that led to injuries or property damage exceeding \$1,000; 11 people died and 905 were injured in those crashes. In 2016, a total of 16,785 crashes involved distracted drivers, with total costs of those crashes estimated at \$820.9 million.<sup>2</sup>

Distractions caused by cell phones and other electronic devices account for large percentages of deaths, injuries, and crashes in which distraction is recorded as a factor. Researchers say that is because such devices often cause all of the three types of distraction described by the National Highway Traffic Safety Administration:

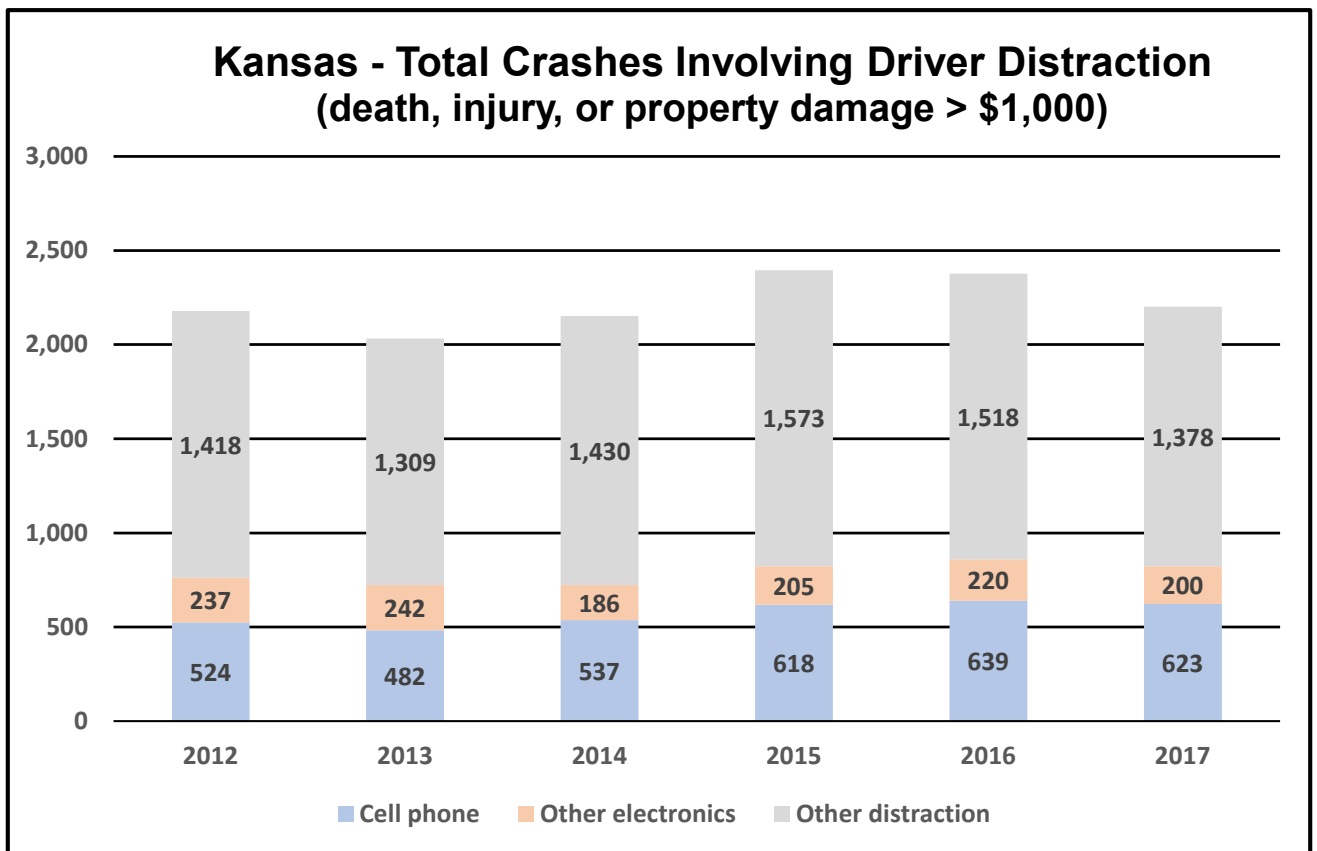
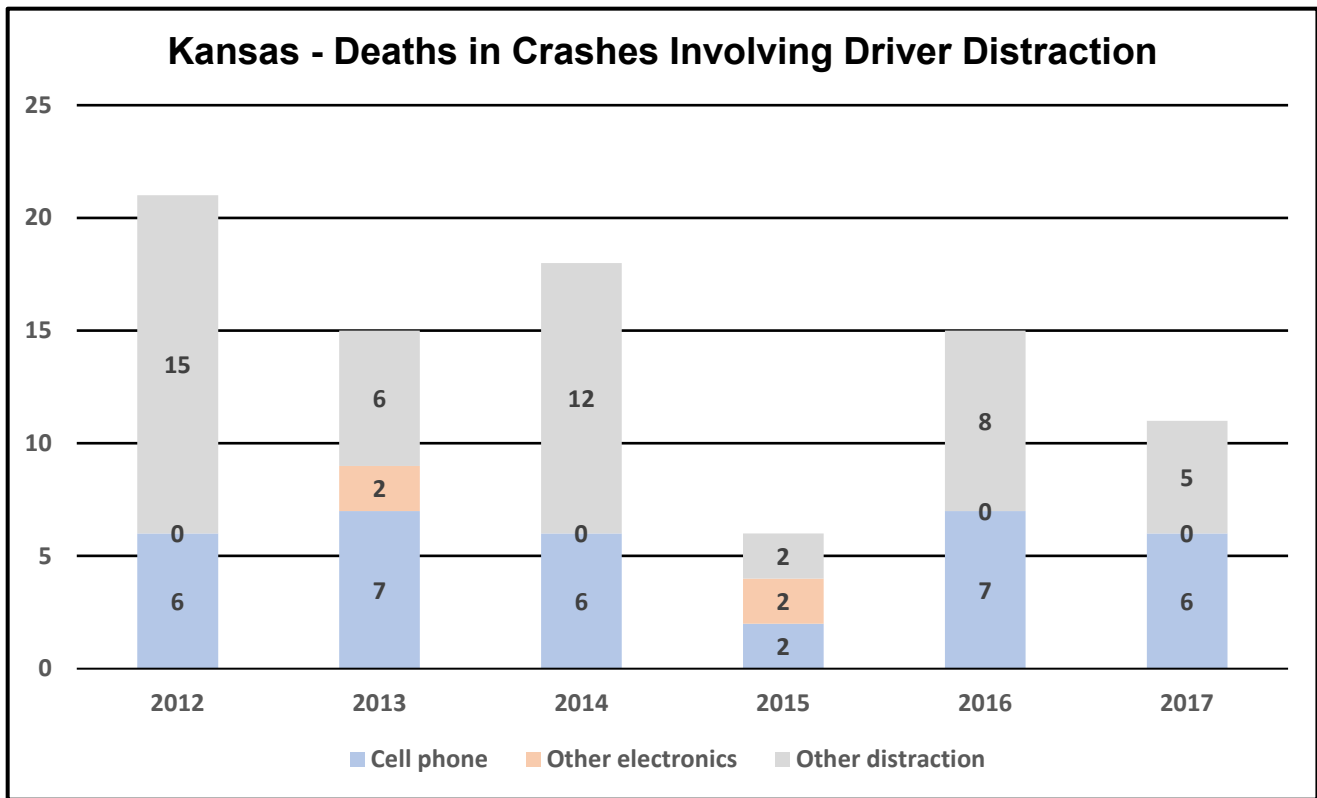
- Visual: taking your eyes off the road;
- Manual: taking your hands off the wheel; and
- Cognitive: taking your mind off driving.<sup>3</sup>

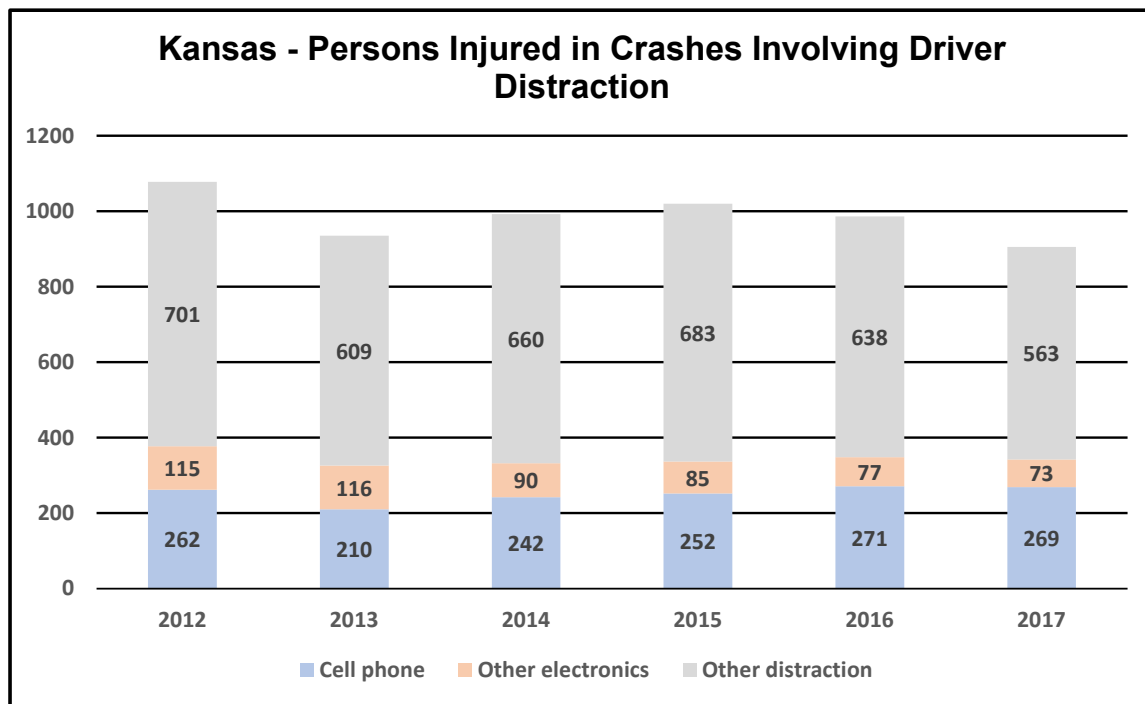
#### State Responses to Distracted Driving

According to the Insurance Institute for Highway Safety:

- Text messaging is banned for all drivers in 47 states (including Kansas; KSA 2018 Supp. 8-15,111) and the District of Columbia. In addition, novice drivers are banned from texting in Arizona and Missouri;
- The use of all cellphones by novice drivers is restricted in 38 states (including Kansas; KSA 2018 Supp. 8-296 and 8-2,101) and the District of Columbia; and
- Talking on a hand-held cellphone while driving is banned in 16 states and the District of Columbia.<sup>4</sup>

The states' full or partial bans on hand-held device use vary in many ways, including the exceptions to the bans. All of these states allow use for emergency purposes, and most allow use of two-way or federally licensed amateur radios. Most require a vehicle to be





off a roadway, *i.e.*, not just stopped in traffic, for use of hand-held devices to be permitted.

At least six states and the District Columbia also have laws generally prohibiting distracted driving, defined as engaging in any activity that interferes with the safe operation of the vehicle.

### Effectiveness of Bans on Device Usage

Reviews of peer-reviewed studies suggest state laws intended to reduce distracted driving, particularly distraction caused by use of electronic devices, do affect driver behavior. For example, a 2014 review of studies published since 2009 found “all-driver bans on hand-held phone conversations have resulted in long-term reductions in hand-held phone use, and drivers in ban states reported higher rates of hands-free phone use and lower overall phone use compared with drivers in non-ban states.”<sup>5</sup> A study of rear-end crashes in California found such crashes were less frequent after a ban on hand-held device use was implemented.<sup>6</sup>

Studies also find driver distractions impair driver performance. A review of 350 analyses reported in 206 articles published between 1968 and

2012 found 80 percent of the analyses identified “detrimental relationships between secondary tasks and driving performance.”<sup>7</sup> Studies directly observing driver behavior found novice drivers made more driving errors than experienced drivers when distractions were involved, but the rates of errors were similar when the distraction took the driver’s eyes away from the road,<sup>8</sup> and even law enforcement officer driving performance was impaired when the officers were using a device while simulating driving.<sup>9</sup> Another study found “cell-phone participants’ assessments of the safeness of their driving and confidence in their driving abilities were uncorrelated with their actual errors. Thus, talking on a cell phone not only diminished the safeness of participants’ driving, it diminished their awareness of the safeness of their driving.”<sup>10</sup>

**Additional information.** Specific information about state laws regarding use of hand-held devices and more information about effectiveness of bans on device usage can be found in the memorandum “Hands-free and Distracted Driving Laws in Other States,” available at <http://www.kslegresearch.org/KLRD-web/Transportation.html>.

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- 2 Data used for the graphics were downloaded from “Driver-Related Data” at <http://www.ksdot.org/bureaus/burTransPlan/prodinfo/accista.asp>, specifically “2016 Kansas Traffic Crash Facts” and “Driver Distraction,” accessed September 2018. Data for 2017 were provided via e-mail.
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### Transportation

#### L-2 Kansas Turnpike: The Relationship Between KTA and KDOT

##### KTA and KDOT

The Kansas Turnpike Authority (KTA) is a separate entity from the Kansas Department of Transportation (KDOT), but the two entities work together to serve the transportation needs of Kansas. This article discusses the statutory relationship between KTA and KDOT.

##### The Relationship Between KTA and KDOT

In 1953, the Kansas Legislature created the KTA as a separate, quasi-public organization. The KTA was tasked with constructing, operating, and maintaining Kansas Turnpike (Turnpike) projects. The KTA has a statutory relationship with KDOT in terms of governance, contracts, and potentially adding Turnpike projects to the state highway system.

##### *The KTA Board*

A five-member board oversees KTA operations. Two of these members are appointed by the Governor for four-year terms. The Governor's appointees must be residents of Kansas and be owners of revenue bonds issued by the KTA. One member must be the Secretary of Transportation (Secretary) and another must be the chairperson of the Senate Committee on Transportation. The fifth member must be a member of the House Committee on Transportation and is appointed by the Speaker of the House of Representatives. The KTA elects one member as chairperson and another as vice-chairperson. The KTA also must elect a secretary-treasurer who does not need to be a member of the KTA (KSA 68-2003). Thus, KDOT has always had a relationship with KTA by virtue of the Secretary serving on the KTA board.

The Secretary's role as a member of the KTA significantly expanded with enactment of 2013 HB 2234. Beginning on July 1, 2013, the Secretary became the director of operations of the KTA. The provision was set to sunset on July 1, 2016, but enactment of 2015 HB 2085 removed the sunset and changed the title to "director." As director of the KTA, the Secretary is responsible for the daily administration of the toll roads, bridges, structures, and

facilities constructed, maintained, or operated by the KTA. The director or the director's designee has such powers as necessary to carry out these responsibilities.

### **Contracts Between Secretary and KTA**

The KTA and KDOT may solidify their partnership by forming contracts with each other. The Secretary and KTA are authorized and empowered to contract with one another to provide personnel and equipment for preliminary project studies and investigations (KSA 68-2021). Generally, KSA 68-2021 allows the KTA to contract with KDOT for use of KDOT resources for certain types of work related to KTA projects. These provisions have remained essentially unchanged since 1955.

Another statute authorizes the Secretary and KTA to contract with each other to provide personnel and equipment and other resources for recordkeeping, reporting, administrative, planning, engineering, legal, and clerical functions and for construction, operation, and maintenance of Turnpike projects and state highways (KSA 68-2021a). Additionally, KSA 68-2021a requires the two parties to minimize duplication of effort, facilities, and equipment in operation and maintenance of turnpikes and highways of the state.

KTA and KDOT contract with one another frequently to minimize duplication of efforts and provide cost savings to the state. According to the Secretary's testimony on 2015 HB 2085, KDOT and KTA have worked together more since the partnership was formalized in 2013. The entities put together six innovation teams for project delivery and construction contracting, legislative and organizational development, revenues and expenditures, technology capabilities, maintenance, and communications and performance measures.

According to testimony provided to a legislative committee in 2017, KTA and KDOT have partnered on bridge surveys, bridge inspections, and construction. Also, KDOT and KTA partnered with the City of Wichita on a major construction project on East Kellogg.

### **Potential for KTA Projects to Become Part of the State Highway System**

Although KTA and KDOT have a formalized partnership, the KTA retains its separate identity, powers, and duties (KSA 68-2021a). KTA maintains the integrity of bonded indebtedness, but when bonds issued under the provisions of KSA 68-2001 to KSA 68-2020 are paid or a sufficient amount for the payment of all bonds and the interest have been set aside for the benefit of bondholders, the project can become a part of the state highway system and therefore be maintained by KDOT (KSA 68-2017).

When a project becomes a part of the state highway system, the Secretary would have the power granted to the KTA under KSA 68-2009 to fix, revise, charge, and collect tolls for the use of such Turnpike project. The tolls, rents, and rates of the charges must be sufficient to maintain, repair, operate, regulate, and police such Turnpike (KSA 68-2017). However, subsequent bonds issued for maintenance and rebuilding have meant no Turnpike project has thus far become a part of the state highway system.

### **Adding Tolled Highways**

KSA 68-2002, unchanged since it was enacted in 1953, states no toll road project shall be undertaken unless and until a project has been thoroughly studied and the study shows public funds for such a project are not available, construction could be financed entirely using private funds in toll road revenue bonds, and the project and indebtedness will be entirely self-liquidating through tolls and other income from operating the project. Additional information on the financing of Turnpike projects is available in [L-6 Toll or Tax?](#)

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## Transportation

### L-3 Safety Belt Requirements and Fines

Kansas is one of 34 states that allows law enforcement officers to ticket a vehicle occupant for not wearing a seat belt without alleging any other traffic offense. In Kansas, since 2010, primary enforcement is allowed if anyone younger than age 18 or anyone riding in the front seat is not properly restrained. Kansas law includes exceptions for mail and newspaper carriers and for anyone who has a written statement from a licensed physician that such person is unable for medical reasons to wear a seat belt. A violation by an adult in the back seat remains a secondary violation, meaning a citation can be issued only if another law has been violated, but others are primary violations, for which an officer may stop a vehicle.

### Background on Kansas Law

Kansas law has required the wearing of seat belts since 1986 and has required restraint of children in passenger vehicles since 1981. In both cases, a “passenger vehicle” carries ten or fewer passengers and is manufactured or assembled with safety belts.

SB 89 (2017) increased the fine for a seat belt violation by an adult from \$10 to \$30 (KSA 2018 Supp. 8-2504). The bill directs 2.20 percent of all fines, penalties, and forfeitures received from clerks of the district court to the Seat Belt Safety Fund (Fund). (See KSA 2018 Supp. 12-4120.) Of the \$30 fine for violation of a city ordinance requiring seat belt use by those 18 and older, \$20 is directed to the Fund, which is used for the promotion of and education on occupant protection among children, including, but not limited to, programs in schools in Kansas (KSA 2018 Supp. 8-1,181).

KSA 2018 Supp. 8-2504 also prohibits any city, county, subdivision, or local authority from enacting or enforcing any law in conflict with or in addition to the fines for violations by those 14 and older.

A summary of Kansas safety belt requirements can be found in the table on the next page.

### Laws in Surrounding States

Nearby states’ statutes vary regarding safety belt violations of those not covered by mandatory child restraint laws:

- Colorado: 16 and older; secondary offense, class B traffic infraction (Colo. Rev. Stat. Ann. §§ 42-4-236, 42-4-237); \$65 penalty plus \$16 surcharge (Colo. Rev. Stat. Ann. § 42-4-1701);
- Missouri: 16 and older; secondary violation if 16 or older; maximum \$10 fine and no court costs (Mo. Ann. Stat. § 307.178);
- Nebraska: 18 and older, driver and front seat occupants; secondary violation unless 17 or younger and in a portion of the vehicle not intended for passengers; \$25 fine and no court costs (Neb. Rev. Stat. Ann. §§ 60-6,267, 60-6,268, 60-6,270, 60-6,271, 60-6,272); and
- Oklahoma: primary violation; maximum \$20 for fine and court costs; driver or front-seat passenger age 8 or older or meeting height requirements (Okla. Stat. Ann. tit. 47, §§ 11-1112, 12-417).

PASSENGER CAR SAFETY BELT REQUIREMENTS IN KANSAS LAW		
General Requirement	Which person(s) in the vehicle	State Fine
The driver is responsible to protect each child by properly using a child safety restraining system meeting Federal Motor Vehicle Safety Standard No. 213.	Age 7 or younger and who weighs less than 80 pounds or is less than 4 feet 9 inches in height	\$60.00 (fine does not include court costs) <sup>1</sup>
The driver is responsible to protect each child by properly using a safety belt manufactured in compliance with Federal Motor Vehicle Safety Standard No. 208.	Age 8-13 or a younger child who weighs more than 80 pounds or is more than 4 feet 9 inches in height	\$60.00 (fine does not include court costs) <sup>1</sup>
A properly fastened safety belt required at all times when the vehicle is in motion if the car has been manufactured with safety belts meeting Federal Motor Vehicle Safety Standard No. 208.	Age 14-17	\$60.00 (fine includes court costs) <sup>2</sup>
	Age 18 and older	\$30.00 (fine includes court costs) <sup>2</sup>
1 KSA 2018 Supp. 8-1344(a) and 8-1345; the fine may be waived upon proving to the court that an approved restraining system has been acquired. Any conviction is not a moving violation.		
2 KSA 2018 Supp. 8-2503(a) and 8-2504. A conviction is not reported to the Department of Revenue.		

Sources:

Governors Highway Safety Association, "Seat Belts," updated May 2018, <https://www.ghsa.org/state-laws/issues/Seat-Belts>, accessed September 2018.  
 Insurance Institute for Highway Safety, "Safety Belts and Child Safety Seats," September 2018, <http://www.iihs.org/iihs/topics/laws/safetybeltuse/mapbeltenforcement>, accessed September 2018.

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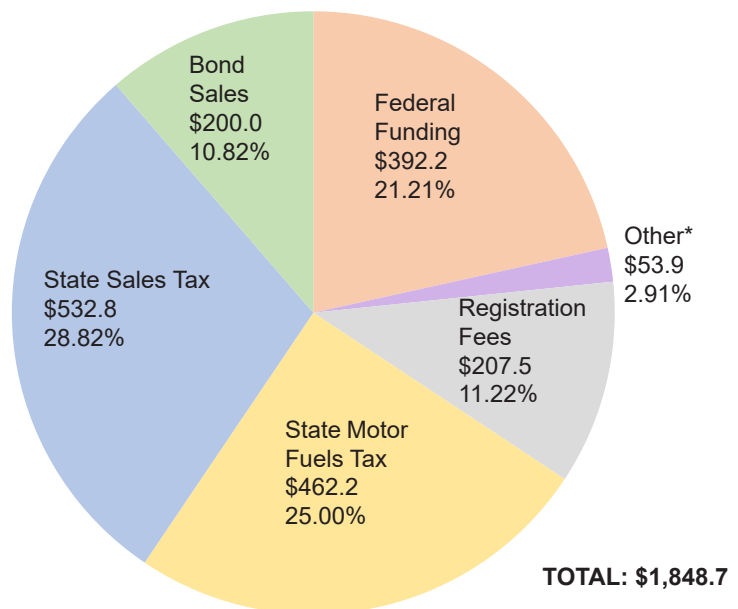
### Transportation

#### L-4 State Highway Fund Receipts and Transfers

Article 11, Section 10 of the *Kansas Constitution* says, “The State shall have power to levy special taxes, for road and highway purposes, on motor vehicles and on motor fuels.” Projected revenues to the State Highway Fund (SHF) for use by the Kansas Department of Transportation (KDOT) can be described in five categories: state sales tax, state motor fuels tax, federal funding, vehicle registration fees, and “other.” This article discusses the components of those categories and transfers from the SHF.

KDOT estimates detailed in the pie chart below—updated through November 2018—include the amounts within the agency’s budget submission for revenues in fiscal year (FY) 2019.

**Projected KDOT FY 2019 Revenues as of November 2018  
(Dollars in Millions)**



\* Other funds include: Driver's license fees, special vehicle permits, interest on funds, and miscellaneous revenues.

## Components of State Highway Fund Revenues

The following information summarizes statutes related to major categories of state funding collected in the SHF.

**State motor fuels tax.** Kansas imposes a tax of 24¢ a gallon on gasoline and 26¢ a gallon on diesel fuel, unchanged since 2003. A separate article on state motor fuel taxes and fuel use is provided as [L-5 State Motor Fuels Taxes and Fuel Use](#). KSA 2018 Supp. 79-34,142 directs 66.37 percent of fuels tax revenues to the SHF and 33.63 percent to the Special City and County Highway Fund; the percentages have not changed since 2003.

**State sales tax.** KSA 2018 Supp. 79-3620 directs 16.154 percent of the revenues from the state sales tax to the SHF. The sales tax rate on which this is imposed is 6.5 percent. KSA 2018 Supp. 79-3710 similarly directs 16.154 percent of compensating use tax to the SHF.

**Registration fees.** Statutes also direct moneys from vehicle registration and title fees (KSA 2018 Supp. 8-145 and others), fees from permits for oversize or overweight vehicles (KSA 2018 Supp. 8-1911), and other registration-related fees to the SHF. For most vehicles, property taxes paid at

registration and retained by the counties are the majority of the total amount paid. Examples are provided in the general memorandum “Taxes and Fees Paid at Vehicle Registration,” available at <http://www.kslegresearch.org/KLRD-web/Transportation.html>.

**Other fees.** Driver’s license exam and reinstatement fees (KSA 8-267 and others) are included in this category, as are smaller items, such as junkyard certificate of compliance fees (KSA 68-2205) and sign permit and license fees (KSA 68-2236).

## Anticipated Revenues the State Highway Fund Has Not Realized

Since 1999, actual State General Fund (SGF) revenues to the SHF have been reduced by approximately \$4.3 billion when compared with the amounts anticipated. The following table summarizes the categories of those reductions. A detailed spreadsheet, “State Highway Fund Revenue Adjustments,” shows year-by-year revenue adjustments by category. It is available at <http://www.kslegresearch.org/KLRD-web/Transportation.html>. This table reflects KDOT’s budget estimates through November 2019.

<b>Net Changes to SHF Revenues from SGF, Authorized to Anticipated, FY 1999-2019 (Dollars in Millions)</b>	
<b>Sales Tax Demand Transfer.</b> Sales taxes were transferred from the SGF to the SHF under highway program bills starting in 1983. The Comprehensive Transportation Program as enacted in 1999 included provisions to transfer certain percentages of sales tax (9.5 percent in 2001; 14.0 percent in 2006 and later) from the SGF to the SHF. Appropriations reduced those amounts and the transfers were removed from the law in 2004.	(\$1,456.73)
<b>Sales and Compensating Use Tax.</b> When sales tax transfers were eliminated, the sales tax was increased and the percentage going directly into the SHF was increased. The amount reflects the changes enacted in 2010 Senate Sub. for HB 2360, and as amended by 2013 House Sub. for SB 83 and 2015 House Sub. for SB 270.	\$420.75
<b>Loans to the SGF.</b> A total of \$125.2 million was “borrowed” from the SHF with arrangements to replace that money from FY 2007 through FY 2010. Only the first two payments were made.	(\$61.79)
<b>Bond payments.</b> The 2004 Legislature authorized the issuance of \$210.0 million in bonds backed by the SGF. SGF payments were made on those bonds only in 2007 and 2008. (Subsequent payments have been made from the SHF.)	\$26.58
<b>Transfers from the SHF.</b> Transfers include amounts for the Fair Fares program at the Department of Commerce, Highway Patrol operations, payments on SGF-backed bonds, budget reductions and allotments, and education and health-related transfers. Note: The amount includes transfers authorized by 2018 House Sub. for SB 109.	(\$3,288.65)
<b>Total</b>	<b>(\$4,359.84)</b>

### Highway-related Transfers to Local Governments

KSA 2018 Supp. 79-3425i states the Special City and County Highway Fund (SCCHF) will receive certain moneys related to commercial vehicles in addition to moneys from fuel taxes. Transfers to the SCCHF of commercial motor vehicle *ad valorem* taxes and the commercial vehicle fees that replaced the *ad valorem* taxes as of January 1, 2014 (see KSA 2018 Supp. 8-143m), have

been suspended since FY 2010. Appropriations bills, most recently Section 240 of 2017 Senate Sub. for HB 2002, have amended KSA 79-3425i so that no commercial vehicle taxes or fees are transferred from the SGF to the SCCHF. The transfers had been limited to approximately \$5.1 million a year beginning in FY 2001.

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### Transportation

#### L-5 State Motor Fuels Taxes and Fuel Use

For many years, the state sources that provide the most funding for transportation programs have been motor fuels taxes, sales tax, and registration fees. This article provides information regarding Kansas motor fuels taxes and fuel use.

#### Per Gallon Motor Fuel Taxes

Kansas' motor fuels taxes are 24¢ per gallon on gasoline and 26¢ per gallon on diesel fuel, unchanged since 2003. The table below lists the effective dates of tax increases for motor fuels. The increases in 1989 through 1992 were part of the Comprehensive Highway Plan as it was enacted in 1989, and those in 1999 and 2001 were part of the Comprehensive Transportation Program enacted in 1999. No increases in fuels taxes are associated with the Transportation Works for Kansas (T-Works) program enacted in 2010.

Motor Fuels Tax Rates Changes—1925-2017		
Effective Date	Gasoline	Diesel
1925	2¢	--
1929	3¢	--
1941	--	3¢
1945	4¢	4¢
1949	5¢	5¢
1956	--	7¢
1969	7¢	8¢
1976	8¢	10¢
1983	10¢	12¢
1984	11¢	13¢
1989	15¢	17¢
1990	16¢	18¢
1991	17¢	19¢
1992	18¢	20¢
1999	20¢	22¢
2001	21¢	23¢
2002	23¢	25¢
2003	24¢	26¢

A tax of 17¢ per gallon was imposed on E-85 fuels beginning in 2006. Certain fuel purchases, including aviation fuel and fuel used for non-highway purposes, are exempt from fuel tax.

A federal fuels tax of 18.4¢ per gallon for gasoline, gasohol, and special fuels and 24.4¢ per gallon for diesel fuel also is included in fuel prices. The amount of federal tax per gallon has not increased since 1993, although increases have been proposed in Congress.

Combined state, local, and federal gasoline taxes across the country as of July 1, 2018, averaged 52.49¢ per gallon and ranged from a low of 33.05¢ per gallon in Alaska to 77.10¢ per gallon in Pennsylvania and 73.62¢ per gallon in California. The equivalent rate for Kansas was 42.43¢ per gallon; for Colorado, 40.40¢; for Missouri, 35.75¢; for Nebraska, 47.30¢; and for Oklahoma, 38.40¢.<sup>1</sup>

In 2018, Oklahoma added taxes of 3¢ a gallon on gasoline and 6¢ a gallon on diesel. If approved by voters in November 2018, Missouri gasoline taxes will increase by 2.5¢ each year for four years beginning July 1, 2019. According to the National Conference of State Legislatures, California, Indiana, Montana, Oregon, South Carolina, Tennessee, and West Virginia increased gasoline taxes in 2017, and Utah accelerated indexing provisions enacted in 2015. In October 2016, New Jersey enacted a tax bill that, among other tax changes, increased the state's fuel tax by 23¢ per gallon starting November 1, 2016, which is its first fuel tax increase since 1988. In

2015, eight states passed legislation to increase fuel taxes. In 2013, six states and the District of Columbia enacted legislation to increase or allow an increase (generally, by indexing the rate) in gas taxes, followed by three more states in 2014.<sup>2</sup>

### **Revenue Projections if Tax Increased**

In 2017, three bills were introduced to increase motor fuel taxes in Kansas: SB 224 and HB 2412 proposed 5¢ increases, and HB 2382 proposed an 11¢ increase. The fiscal notes prepared by the Division of the Budget on those bills project revenue increases for FY 2019 of approximately \$92.0 million for a 5¢ increase and approximately \$203.0 million for an 11¢ increase.<sup>3</sup>

### **Fuels Usage and Tax Revenues**

Kansas fuel tax revenues and gasoline usage fluctuate, as illustrated in the graphics on the following pages.<sup>4</sup>

### **Amounts Households Spend**

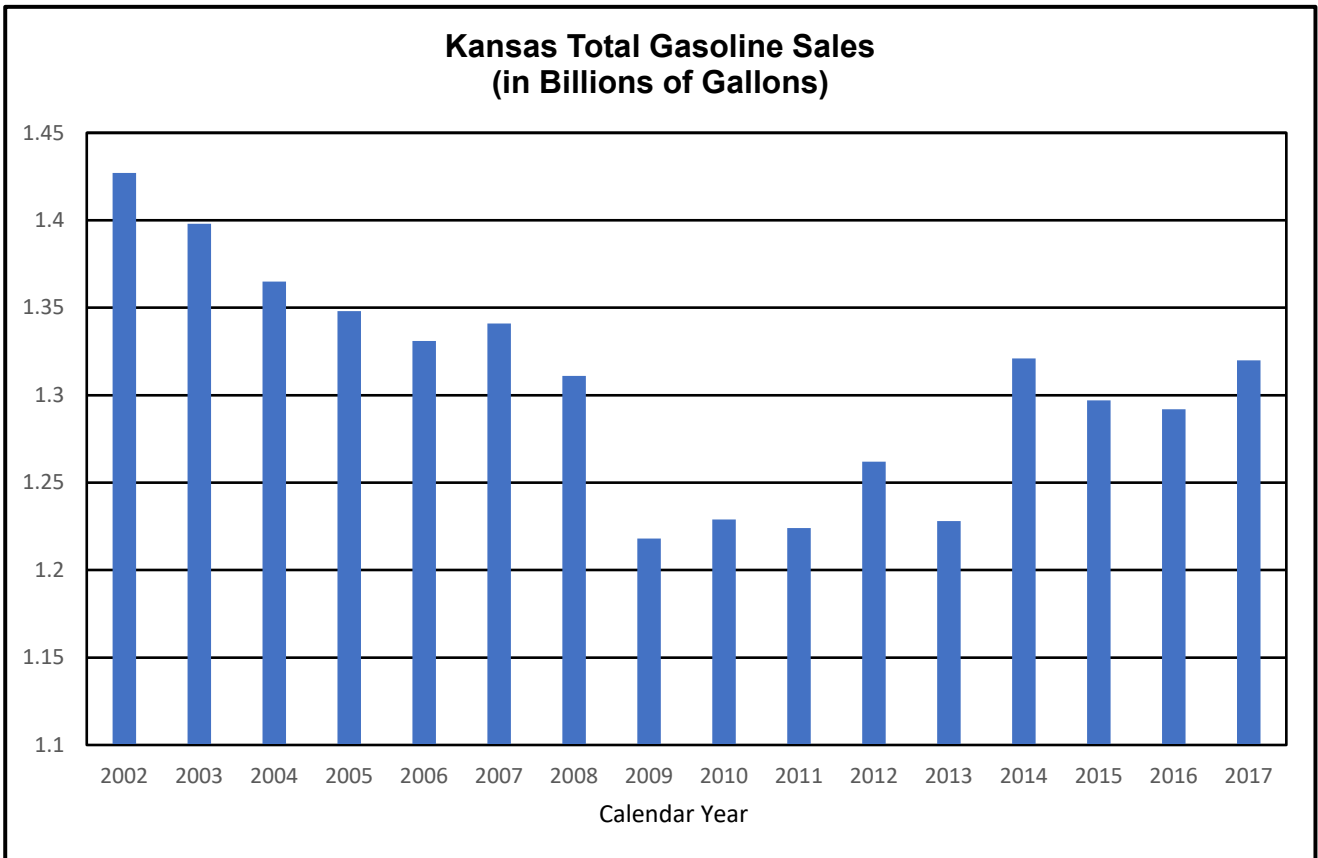
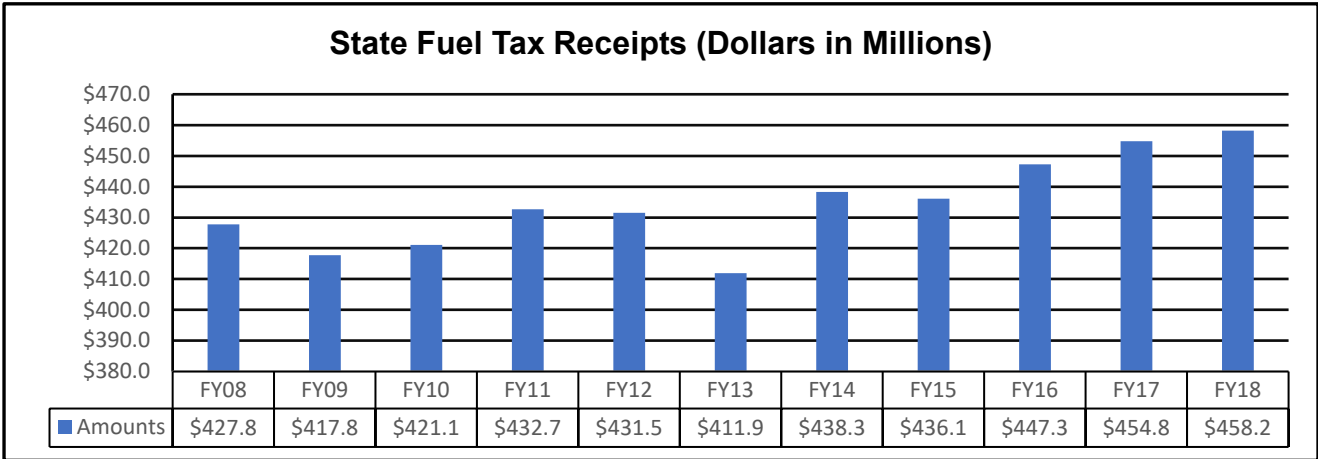
According to the Bureau of Labor Statistics in the U.S. Department of Labor, U.S. households spent an average of \$9,576 on transportation in 2017, which is an increase from \$8,293 in 2011. In 2017, \$1,968 (20.6 percent) of the transportation total was spent on gasoline.<sup>5</sup> If fuel prices average \$2.66 per gallon, Kansas state fuel taxes account for 9.0 percent of the amount motorists spend on fuel.

State Gasoline Taxes as Portion of Overall Fuel Cost													
Vehicle, driving	Gallons used	U.S. average		Kansas		Colorado		Missouri <sup>1</sup>		Nebraska		Oklahoma	
		Fuel cost average, \$	State tax average, \$	Fuel cost average, \$	Tax average, \$	Fuel cost average, \$	Tax average, \$	Fuel cost average, \$	Tax average, \$	Fuel cost average, \$	Tax average, \$	Fuel cost average, \$	Tax average, \$
12,000 miles, 15 mpg	800	\$2,280	\$0.3409	\$2,128	\$0.24	\$2,328	\$0.22	\$2,080	\$0.1735	\$2,200	\$0.28	\$2,112	\$0.19
12,000 miles, 25 mpg	480	\$1,368	\$164	\$1,277	\$115	\$1,397	\$104	\$1,248	\$83	\$1,320	\$134	\$1,267	\$91
12,000 miles, 35 mpg	343	\$977	\$117	\$912	\$82	\$998	\$74	\$891	\$59	\$943	\$96	\$905	\$65
30,000 miles, 15 mpg	2,000	\$5,700	\$682	\$5,320	\$481	\$5,820	\$432	\$5,200	\$347	\$5,500	\$560	\$5,280	\$380
30,000 miles, 25 mpg	1,200	\$3,420	\$409	\$3,192	\$288	\$3,492	\$259	\$3,120	\$208	\$3,300	\$336	\$3,168	\$228
30,000 miles, 35 mpg	857	\$2,443	\$292	\$2,280	\$206	\$2,494	\$185	\$2,229	\$149	\$2,357	\$240	\$2,263	\$163
State gasoline tax as percent of overall fuel cost		12.0%		9.0%		7.4%		6.7%		10.2%		7.2%	

<sup>1</sup> The 2018 general election ballot in Missouri will include a measure to increase state fuel taxes by 2.5¢ each year for four years.

Fuel costs from <https://gasprices.aaa.com/> as of September 17, 2018.

State tax costs from <https://www.api.org/oil-and-natural-gas/consumer-information/motor-fuel-taxes> and as of July 1, 2018.





- 1 American Petroleum Institute, “Combined Local, State and Federal (Cents per Gallon) Rates Effective 7/1/2018,” <http://www.api.org/oil-and-natural-gas/consumer-information/motor-fuel-taxes>, accessed September 17, 2018.
- 2 2018 Oklahoma HB 1010 and 2018 Missouri HB 1460. National Conference of State Legislatures, “Recent Legislative Actions Likely To Change Gas Taxes,” February 20, 2018, <http://www.ncsl.org/research/transportation/2013-and-2014-legislative-actions-likely-to-change-gas-taxes.aspx>, accessed September 17, 2018.
- 3 A very small percentage of the overall revenue increases projected would come from commercial vehicle fuel permit increases included in the bills.
- 4 Reports, Monthly Motor Fuel Reported by States, U.S. Department of Transportation, Federal Highway Administration, Office of Highway Policy Information, Motor Fuel, and the Highway Trust Fund. [http://www.fhwa.dot.gov/policyinformation/motorfuelhwy\\_trustfund.cfm](http://www.fhwa.dot.gov/policyinformation/motorfuelhwy_trustfund.cfm) and reports for previous years, accessed September 18, 2018.
- 5 U.S. Department of Labor Bureau of Labor Statistics, news release dated September 11 2018, “Consumer Expenditures–2017,” <https://www.bls.gov/news.release/pdf/cesan.pdf>, accessed September 17, 2018.

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### Transportation

#### L-6 Toll or Tax?

The Kansas Turnpike (Turnpike) is operated by the Kansas Turnpike Authority (KTA). State and federal tax dollars do not flow to or from the KTA.

Additionally, the KTA cannot use toll or other revenue in ways other than maintaining, repairing, and operating Turnpike projects; paying principal and interest on bonds and creating reserves for the same; fixing and collecting tolls; and entering into certain types of contracts (KSA 68-2009). If a toll were to be used outside of the aforementioned purposes, the toll likely would be considered a tax. This article includes information on the KTA, statutes governing its operations, and court decisions related to turnpike tolls in other states.

#### Overview and Background of the Turnpike

Toll roads have a long history in the United States: the first turnpike in the United States was chartered in 1792. In a 1939 report to Congress titled “Toll Roads and Free Roads,” the U.S. Bureau of Public Roads, now the Federal Highway Administration, rejected a toll-financed interstate system. The report found that most interstate corridors would not generate enough toll revenue to retire the bonds that would be issued to finance them.

However, the financial success of the Pennsylvania Turnpike that opened in 1940 prompted several states to follow Pennsylvania’s lead and construct their own toll roads in the late 1940s and early 1950s. The Interstate Highway System had not yet been created, so highway supporters in Kansas saw advantages in connecting the state’s largest cities. Opponents argued that residents in the western half of the state should not have to pay for an expensive highway they would rarely use. Thus, a user-fee system was the only viable option to pay for the roadway.

In 1953, the Kansas Legislature created the KTA as a separate, quasi-public organization (KSA 68-2003). The KTA was tasked with constructing, operating, and maintaining a toll road connecting the three largest cities in Kansas. The 236-mile Kansas Turnpike stretching from Kansas City to the Oklahoma state line south of Wichita was constructed in 22 months and opened to traffic on October 25, 1956. The price tag for its construction was about \$147.0 million.

## Financing the Turnpike

Financing the construction of the Turnpike was a major concern for legislators and citizens. When the Kansas Legislature created the KTA, legislators wanted to make it clear that any Turnpike debt would not be considered a debt of the State or any political division of the State (KSA 68-2008). Legislation was enacted to outline the terms of Turnpike projects, including the issuance of revenue bonds and the use and disposition of tolls.

### *Creating a Turnpike Project*

Under KSA 68-2002, a toll road project cannot be undertaken unless the project and the proposed location have been thoroughly studied with respect to traffic, engineering, cost, and financing. The study must show public funds for construction of a free expressway are not available, the construction of the toll expressway can be financed wholly through the investment of private funds in toll road revenue bonds, and the project and indebtedness incurred will be entirely self-liquidating through tolls and other income from operation of the project. Various projects have been authorized for study over the years, but none have been added to the Turnpike system.

### *Issuing Revenue Bonds*

KSA 68-2007 outlines the issuance of Turnpike revenue bonds. At any time, the KTA is authorized to provide by resolution for the issuance of Turnpike revenue bonds to pay for all or part of the cost of any one or more Turnpike projects.

The proceeds of the bonds of each issue are used solely for the payment of the cost of the Turnpike project or projects for which the bonds were issued. The KTA sold \$160.0 million of revenue bonds on October 14, 1954. According to the KTA, the original 1954 bond issue has been paid off and new bonds have been issued for financing safety improvements and major reconstruction projects. All current KTA bonds will mature by September 1, 2039.

## *Use and Disposition of Turnpike Tolls*

The KTA has the authority to fix, revise, charge, and collect tolls for the use of each Turnpike project (KSA 68-2009). The tolls are fixed and adjusted with respect to the aggregate of tolls from the Turnpike projects or projects in connection with issued bonds to provide a fund that is sufficient with other revenues to pay the cost of maintaining, repairing, and operating the Turnpike project or projects, and the principal of and the interest on those bonds (KSA 68-2009(a)).

The KTA does not receive federal or state tax dollars, including the fuel tax collected at any of the six service stations along the Turnpike. Instead, those fuel tax revenues are deposited into the State Highway Fund and distributed to pay for other transportation needs throughout Kansas. Maintenance and operations of the Turnpike are funded from tolls, which also pay back bondholders that loaned private capital to finance, construct, and reconstruct the Turnpike. Some additional revenue is received by non-tolling sources, such as leases and other contractual agreements. The Kansas Turnpike is self-financed and does not rely on taxes; therefore, the customer is not paying twice for use of the facility.

Tolls are strictly subject to the control of the KTA; they are not subject to supervision or regulation by any other commission, board, bureau, or agency of the State (KSA 68-2009(b)). Effective October 1, 2018, two-axle vehicles traveling the entire length of the Turnpike will pay a total of \$15.00 in cash, or \$11.15 as a K-TAG customer. The KTA reported toll revenue of \$112,525,112 for the fiscal year ending June 30, 2017.

The tolls and all other revenues derived from the Turnpike project or projects pay for the maintenance, repair, and operation of those projects. Excess funds are set aside in a sinking fund, which is charged with the payment of the principal and interest of bonds as they become due and the redemption price or purchase price of bonds retired by call or purchase. The sinking fund is a fund for all bonds without distinction or priority of one bond over the other (KSA 68-

2009(b)). The KTA is not allowed to use tolls or other revenues for any other purpose (KSA 68-2009(c)).

Charging tolls has several important practical implications. First, tolls assure out-of-state users pay their fair share for use of the Turnpike. Toll also provide a mechanism to charge users in proportion to the actual cost of their use. For example, most turnpikes across the country charge higher tolls for trucks than automobiles, reflecting the greater wear and tear trucks have on roadways. Some turnpikes charge variable rates per mile by section so that users of sections that are more costly to maintain pay accordingly. Toll are calculated based on the length of the route traveled.

### Is a Toll a Tax? Other States' Views on Tolls

Drivers can choose to pay tolls or take alternate routes, whereas taxes are mandatory and charged to everyone. The issue of whether a toll is considered a tax has arisen in the U.S. Supreme Court and in several individual states. In the case of *Sands v. Manistee River Imp. Co.*, 123 U.S. 288, 294, 8 S. Ct. 113, 115, 31 L. Ed. 149 (1887), the Supreme Court stated there is no analogy between the imposition of taxes and the levying of tolls for improvement of highways. Taxes are levied for the support of government and their amount is regulated by its necessities. Toll, on the other hand, are the compensation for the use of another's property, or of improvements made. The cost of a toll is determined by the cost of the property, improvements of the property, and considerations of the return such values or expenditures should yield.

Courts in Florida, Illinois, Massachusetts, Montana, and Virginia all agree that tolls are not taxes. It is clear that toll revenue cannot be used to fund projects outside of a state's transportation system. However, there is no generally accepted principle that toll revenue from one facility can be used to fund another facility.

### Florida

Florida citizens have challenged the validity of tolls, claiming that tolls are akin to taxes; however, the Florida Supreme Court has repeatedly held that tolls are user fees and not taxes. In *City of Boca Raton v. State*, 595 So. 2d 25 (Fla. 1992), the Florida Supreme Court noted that a tax is an enforced burden imposed by sovereign right for the support of the government, the administration of law, and the exercise of various functions the sovereign is called on to perform. User fees are charges based upon proprietary right of the governing body permitting the use of the instrumentality involved. User fees share common traits that distinguish them from taxes: they are charged in exchange for a particular government service that benefits the party paying the fee in a manner not shared by other members of society, and they are paid by choice. They are paid by choice because the party paying the fee has the option of not utilizing the government service and thereby avoiding the charge. This concept of user fees was approved by the *Florida Supreme Court in City of Daytona Beach Shores v. State*, 483 So. 2d 405 (Fla. 1985).

In the case of *Gargano v. Lee Cnty. Bd. of Cnty. Comm'rs*, 921 So. 2d 661, 667 (Fla. Dist. Ct. App. 2006), the plaintiff argued a toll on a bridge was not a user fee because she did not pay the toll by choice. The court noted it is true that anyone who lives on the surrounding islands and does not own a boat or helicopter must pay a toll to reach that person's home from the mainland and does not have the choice to take other roadways. However, the court stated the concept of "choice" for defining user fees is designed to distinguish a tax whose payment can be compelled from charges for services that one can avoid. In this case, the plaintiff had the choice to stay on the island and not visit the mainland; the county did not compel her to use the bridge or pay the fee. The court noted, as a practical matter, the plaintiff did not have many available options, but as a legal matter, the toll was not a tax.

The Florida Supreme Court has stated revenue from bridge tolls can be used to fund financial improvements of approaches and approach roads to the bridge. In *McGovern v. Lee Cnty.*,

346 So. 2d 58, 64 (Fla. 1977), the court stated inherent in the legislative scheme for funding self-liquidating projects is the principle that those who directly benefit from the project should bear a substantial portion of the cost and those who bear the substantial cost should benefit from the expenditure of money on the project. To allow bridge tolls to finance improvements of approaches and approach roads to the bridge does not violate this principle because those paying the tolls will benefit by having convenient access to the bridge.

However, the court stated there are limits to utilizing revenue from bridges to fund approaches and approach roads. The closer an access road is to a bridge or causeway, the more likely a significant portion of its traffic will use the bridge. Toll revenue can be used if the roads to be improved are within the immediate vicinity of the project. However, revenues from a toll bridge or causeway can fund improvements to roads distant from the facility only if the road functions as an approach or approach road. A road or segment of road is an approach or approach road if a significant portion of its traffic moves onto the bridge or causeway, or if a significant portion of the traffic moving across the bridge or causeway came from the road or road segment.

Consequently, the Florida Supreme Court has determined tolls are user fees and not taxes. Additionally, toll revenue from a bridge or causeway can fund improvements within the immediate vicinity. Toll revenue from a toll bridge or causeway can fund improvements to roads distant from the facility, as long as a functional test is used to determine whether a road or segment of a road is an approach or approach road.

### **Illinois**

In 1945, the Supreme Court of Illinois decided on the constitutionality of the State Superhighway Act. The Act created the Illinois State Superhighway Commission and defined its powers and duties (*People ex rel. Curren v. Schommer*, 392 Ill.17, 20, 63 N.E.2d 744, 746 (1945)). The Act contemplated a system of toll roads to be known as superhighways and provided that such system of highways would be planned, built, operated,

and maintained by the State Superhighway Commission. Plaintiffs argued the creation of the commission was unconstitutional and tolls were unconstitutional taxes.

The court found that the creation of the commission was not an unconstitutional delegation of legislative power. Additionally, the court found there is a clear-cut and definite distinction between tolls and taxes. The essential meaning of a tax is that it is a mode of raising revenue for the public needs of a public purpose, while tolls are the compensation for the use of another's property.

Illinois courts have found tolls are not taxes, but the courts have not stated whether toll revenue from one toll facility can be used to fund another toll facility.

### **Massachusetts**

In the case of *Murphy v. Massachusetts Tpk. Auth.*, 462 Mass. 701, 971 N.E.2d 231 (2012), users of toll roads and tunnels in the Metropolitan Highway System (MHS) alleged tolls collected by the Massachusetts Turnpike Authority (MTA) were an unconstitutional tax, to the extent the tolls were used to pay for overhead, maintenance, and capital costs associated with MHS's non-tolled roads, bridges, and tunnels. According to the plaintiffs, the tolls are lawful user fees when applied to pay the expenses of tolled roads and tunnels, but an unconstitutional tax when applied to pay the expenses of non-tolled roads, tunnels, and bridges.

The Supreme Judicial Court of Massachusetts found the Legislature authorized the MTA to collect tolls on only certain parts of the MHS and use those toll revenues to pay the expenses of the entire MHS. The MTA did not need to demonstrate the toll fee exactly equals the costs of maintenance or the benefits conferred. Instead, all that is required is the tolls reflect a fair approximation of the use of facilities for whose benefit they are imposed (the court here quoting *Cohen v. Rhode Island Turnpike & Bridge Auth.*, 775 F. Supp.2d 439, 449–450 (D.R.I. 2011)). Where the MHS tolls were required by statute to be used to pay the costs of the entire MHS integrated system of roads, tunnels, and bridges,

and where there is no allegation they were put to a use prohibited by the statute or the toll revenues exceeded the total cost of the MHS, the tolls reflect a reasonable and non-excessive approximation of the value of use of the MHS (*Wallach v. Brezenoff*, 930 F.2d 1070, 1072 (3d Cir.1991)).

The court in *Murphy* found the MTA charged user fees and not unconstitutional taxes by expending portions of revenue charged to users of toll roads and tunnels to pay for overhead, maintenance, and capital costs associated with the MHS's non-tolled roads, bridges, and tunnels because the legislature specifically authorized the MTA to use tolls for expenses of non-toll roads. Users who paid the MHS tolls enjoyed a particularized benefit not enjoyed by those who traveled only on non-toll roads. Additionally, users had the option of not driving on tolled MHS roads and tunnels and thereby could avoid paying the tolls. Toll revenues were collected to compensate the MTA for expenses incurred in operating the MHS, not to raise revenues for the state.

### **Montana**

The Supreme Court of Montana has stated there is a clear distinction between taxes and tolls. A tax is a demand of the sovereignty levied for support of the government and its amount is regulated by its necessities. Toll revenues are the demands of proprietorship, exacted as compensation for use of another's property (*Monarch Min. Co. v. State Highway Commn.*, 128 Mont. 65, 70, 270 P.2d 738, 740 (1954)). Montana has not yet considered the issue of whether toll revenue from one toll facility can be used to fund another toll facility.

### **Virginia**

The authority of the KTA to charge and collect tolls has not been a contentious issue like it has been in Virginia. The Metropolitan Washington Airports Authority (MWAA) was formed in 1986 as an entity independent from Virginia, the District of Columbia, and the federal government. However, it possessed the powers delegated to it by the District of Columbia and Virginia. Congress explicitly granted MWAA the power "to levy fees or other charges" (*Corr v. Metro. Washington Airports Auth.*, 740 F.3d 295, 297 (4th

Cir. 2014)). Although the MWAA assumed control over the two Washington airports, the Dulles Toll Road continued to be operated by the Virginia Commonwealth Transportation Board (CTB).

The Virginia General Assembly repeatedly authorized CTB to use toll revenue to fund mass transit projects within the Dulles Corridor. In December 2006, Virginia agreed to transfer control over to MWAA. MWAA then had the power to set tolls on the Dulles Toll Road, but the MWAA was required to use toll revenues exclusively for transportation improvements within the Dulles Corridor.

Many legal challenges arose from this arrangement. In April 2011, plaintiffs initiated an action seeking to enjoin MWAA from using toll road revenue to repay bonds issued to fund the Metrorail project and seeking refunds of all excess tolls collected. They argued the toll paid by users of the Dulles Toll Road is in fact a tax because instead of defraying the cost of a driver's use of the road, a portion of the toll is used for other purposes, namely the Metrorail expansion project.

The *Corr* court, citing *Elizabeth River Crossings*, 286 Va. 286, 749 S.E.2d 176, 183 (2013), found the tolls paid by drivers on the Dulles Toll Road are not taxes for these reasons: (1) the toll road users pay the tolls in exchange for a particularized benefit not shared by the general public, (2) drivers are not compelled by the government to pay the tolls or accept the benefits of the project facilities, and (3) the tolls are collected solely to fund the project, not to raise general revenues.

The court agreed with Virginia's and MWAA's assessments that the Metrorail expansion and Dulles Toll Road are parts of a single interdependent transit project. Since they are parts of the same project, tolls charged on the Dulles Toll Road are not taxes just because they are used to fund the Metrorail expansion. The record did not indicate that surplus tolls are diverted outside those confines or are treated as general revenue. Therefore, tolls are user fees, not taxes, because they are nothing more than an authorized charge for the use of a special facility. In 2015, the U.S. Supreme Court denied review of the case.

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**M-1**  
**Affordable Clean  
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**M-4**  
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## Utilities and Energy

### M-1 Affordable Clean Energy Rule

On August 21, 2018, the U.S. Environmental Protection Agency (EPA) proposed the Affordable Clean Energy (ACE) rule. If adopted, the ACE rule would replace the 2015 Clean Power Plan (CPP) in establishing guidelines for states to address greenhouse gas (GHG) emissions from existing coal-fired electric generation Units (EGU). The EPA accepted comments on the proposed rule through October 31, 2018. The public hearing for the proposed rule was held on October 1, 2018.

#### Overview

According to the National Conference of State Legislatures, ACE would provide states with the flexibility to determine how to reduce GHG emissions; however, ACE proposes that states only be allowed to require actions within the fence line of their existing EGU. The CPP allowed states to take actions outside the fence line, such as adding more renewable energy or establishing emission trading systems.

The ACE rule has four components. First, the rule would define the “best system of emission reduction” for GHG emissions from existing power plants as on-site heat rate efficiency improvements. (*Note:* Heat rate is the amount of energy input required to generate one kilowatt-hour of electricity. The lower the heat rate, the more efficient the production.) Second, the EPA would provide a list of “candidate technologies” for states to choose from when developing their plan to improve an EGU’s heat rate efficiency. Third, it would update the EPA’s New Source Review (NSR) permitting program to incentivize efficiency improvements to existing power plants. Finally, the rule would make changes to the EPA’s implementation regulations to give states additional time and flexibility to develop state plans.

According to the EPA, the current NSR program requires industrial facilities to install modern pollution control equipment when constructed or when making a change that would increase emissions significantly. The proposed rule would give states the option to only require a NSR permit when a physical or operational change made to an existing EGU increases its hourly rate of pollutant emissions. According to the EPA, this change would mean “fewer sources will trigger major NSR under an hourly emissions increase.”

States would have three years from publication of the final ACE rule to submit a state action plan. The EPA would have up to one year to act on a state plan. If a plan is not approved or not submitted, the EPA would be allowed two years to issue a federal plan for the state.

Unlike the CPP, the ACE rule would not impose a total allowable GHG limit for states. In its regulatory analysis provided in Vol 83, No. 170 of *Federal Register*, the EPA acknowledges that when compared to the CPP, implementing the proposed rule is expected to increase emissions of carbon dioxide and increase the level of emissions of certain pollutants in the atmosphere that adversely affect human health. The EPA estimates 600 coal-fired EGU's at 300 facilities could be covered by the proposed rule.

## History

On August 3, 2015, President Obama and the EPA announced the CPP, a federal rule to regulate reductions in carbon pollution from power plants. The ultimate goal of the CPP was to reduce U.S. carbon dioxide emissions by 32.0 percent from 2005 levels by 2030. On March 28, 2017, President Trump signed an Executive Order on Promoting Energy Independence and

Economic Growth, which called for the review of the CPP. On October 10, 2017, in response to the Executive Order, the EPA issued a notice of Proposed Rulemaking, proposing to repeal the CPP upon publication in the *Federal Register*.

## Clean Power Plan—Litigation

Several petitions, some challenging the legality of the CPP and others supporting the rule, have been filed. The D.C. Circuit Court has consolidated all of the various filings for challenges under Section 111(d), dealing with new emissions limits for existing power plants into one proceeding, *West Virginia v. EPA*, D.C. Cir., No. 15-1363. On June 26, 2018, the Court on its own motion, ordered that the case remain in abeyance for 60 days and directed the EPA to continue to file status reports at 30-day intervals.

Additionally, the D.C. Circuit Court has consolidated all the various filings for challenges under Section 111(b), the “new source rule,” into one proceeding, *North Dakota v. EPA*, D.C. Cir., No 15-1381. On August 10, 2017, the D.C. Circuit Court ordered the proceedings be held until further order is issued and directed the EPA to file status reports at 90-day intervals. No further order has been issued.

### Regional Greenhouse Gas Initiative

The Regional Greenhouse Gas Initiative (RGGI) is a cooperative effort among nine northeastern and mid-Atlantic states to reduce carbon dioxide emissions through a coordinated cap-and-trade program. RGGI is administered and implemented by a non-profit corporation, RGGI, Inc. The nine states currently participating are Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont. RGGI officially organized in 2003, but the first compliance period did not begin until January 1, 2009. RGGI participants adopted a Model Rule to guide their actions, namely, to set limits on in-state emissions, issue carbon allowances, and establish state participation for regional carbon allowance auctions. The program uses three-year compliance periods and establishes overall emissions budgets for each period. The fourth compliance period began January 1, 2018, and extends through December 31, 2020. RGGI distributes state allowances through quarterly auctions where bidders may submit multiple confidential bids for a specific quantity of allowances at a specific price. Proceeds from the auctions are then distributed among the states by RGGI, Inc. As of September 2018, cumulative auction proceeds reached \$3 billion. While 25 percent of proceeds must be reinvested into consumer benefit programs such as energy efficiency, renewable energy, and direct bill assistance, in practice, states reinvest virtually all of their proceeds. Power sector carbon emissions in participating states have declined 50.0 percent since 2005. Emissions were capped at 82.2 million short tons in 2018. The cap will decline 2.5 percent annually until 2020. On August 23, 2017, RGGI announced a program change implementing a 30.0 percent emissions cap reduction from 2020 levels. This goal is projected to be achieved by 2030.

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## Utilities and Energy

### M-2 Broadband Expansion

The federal government in conjunction with states, including Kansas, has engaged in multiple efforts over the past few decades to determine how to expand broadband access, particularly to rural America. The definition of “broadband” has evolved as multiple task forces and advisory committees, at the state and federal level, have grappled with the issue of broadband accessibility.

### Federal Developments

#### *The 1996 Telecommunications Act*

With the enactment of the 1996 Telecommunications Act (Act), Congress comprehensively updated federal telecommunication law for the first time since the enactment of the Communications Act of 1934. The Act addresses five general areas: radio and television broadcasting; cable television; telephone services; Internet and online computer services; and telecommunications equipment manufacturing. The Act was signed into law by President Clinton, who stated the legislation “opens up competition between local telephone companies, long distance providers, and cable companies, and expands the reach of advanced telecommunications services to schools, libraries, and hospitals.”

The Act contains provisions that created the Federal Universal Service Fund (FUSF) (now known as the Connect America Fund (CAF)). The FUSF was created to provide support through four programs: High-Cost Support; Low-Income Support; Schools and Libraries Support; and Rural Health Care Support. The FUSF is funded by contributions from providers of telecommunications based on an assessment on their interstate and international end-user revenues.

#### *Definitions*

Following is a list of terms defined in the Act and codified in Title 47 of the *U.S. Code of Federal Regulations* (CFR).

**Local exchange carrier (LEC).** Any person engaged in the provision of telephone exchange service or exchange access. [47 CFR § 51.5]

**Incumbent local exchange carrier (ILEC).** With respect to an area, the local exchange carrier that:

- Provided telephone exchange service in such area on February 8, 1996, and was deemed to be a member of the exchange carrier association pursuant to 47 CFR § 69.601(b) on February 8, 1996; or
- Is a person or entity that, on or after February 8, 1996, became a successor or assign of a member of the exchange carrier association. [47 CFR § 51.5]

**Rural incumbent local exchange carrier.** A carrier that meets the definitions of “rural telephone company” and “incumbent local exchange carrier.” [47 CFR § 51.5]

**Rural telephone company.** A LEC operating entity to the extent that such entity:

- Provides common carrier service to any local exchange carrier study area that does not include either:
  - Any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or
  - Any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;
- Provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;
- Provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or
- Has less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996. [47 CFR § 51.5]

**Rate-of-return carrier.** Any ILEC not subject to price cap regulation as defined in 47 CFR § 61.3. [47 CFR § 51.5]

**Price cap regulation.** A method of regulation of dominant carriers (a carrier found by the Federal

Communications Commission (FCC) to have market power (*i.e.*, power to control prices)) provided in 47 CFR §§ 61.41 through 61.49. [47 CFR § 61.3]

**Frozen high-cost support.** Beginning January 1, 2012, each price cap LEC and rate-of-return carrier affiliated with a price cap LEC receives a “baseline support amount” equal to its total 2011 support in a given study area, or an amount equal to \$3,000 times the number of reported lines for 2011, whichever is lower. Each price cap LEC and rate-of-return carrier affiliated with a price cap LEC receives a “monthly baseline support amount” equal to its baseline support amount divided by 12. [47 CFR § 54.312]

### ***The National Broadband Plan (2010)***

In early 2009, Congress directed the FCC to develop a National Broadband Plan (Plan) to ensure every American has “access to broadband capability.” Congress also required the Plan to include a detailed strategy for achieving affordability and maximizing use of broadband to advance “consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, employee training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.”

The Plan states the government may influence broadband in the following four ways:

- Design policies to ensure robust competition and, as a result, maximize consumer welfare, innovation, and investment;
- Ensure efficient allocation and management of assets the government controls or influences, such as spectrum, poles, and rights-of-way, to encourage network upgrades and competitive entry;
- Reform current universal service mechanisms to support deployment of broadband and voice in high-cost areas; ensure that low-income Americans

can afford broadband; and, in addition, support efforts to boost adoption and utilization; and

- Reform laws, policies, standards and incentives to maximize the benefits of broadband in sectors government influences significantly, such as public education, health care, and government operations.

The Plan also recommended, as part of creating the CAF, supporting the provision of affordable broadband and voice with at least 4 megabits per second (Mbps) actual download speeds and shift up to \$15.5 billion over the next decade from the existing Universal Service Fund program to support broadband.

### ***Connect America Fund (also known as the Federal Universal Service High-cost Program)***

In 2011, the FCC issued a Reform Order (Order) creating the CAF to support broadband, create a Mobility Fund to support 3G or better wireless coverage, and expand the Lifeline Program to allow subsidies to be provided for broadband. The Order set performance goals for reform of the FUSF to include, among other things, ensuring universal availability of modern networks capable of providing voice and broadband service to homes, businesses, and community anchor institutions; ensuring universal availability of modern networks capable of providing advanced mobile and broadband service; and ensuring rates for broadband services and rates for voice services are reasonably comparable in all regions of the nation.

The Order provided CAF to be implemented in two phases, with the first phase deploying new broadband service to 37 states with \$115.0 million in public funding and tens of millions in private investment. To qualify for CAF Phase I support, a carrier had to provide broadband with actual speeds of 4 Mbps download and 1 Mbps upload and deploy broadband to at least one currently unserved location for each \$775 in additional high-cost support received. CenturyLink accepted \$35.0 million, none of

which was spent in Kansas. In the second round of Phase I funding, AT&T was approved for \$95.0 million, none designated for Kansas; CenturyLink was approved for nearly \$40.0 million, of which \$81,474 was designated to be spent in Kansas; and FairPoint Communications Missouri, Inc., was approved for \$2.9 million, of which \$91,612 was designated to be spent in Kansas.

In CAF Phase II, each incumbent price-cap carrier was asked to make a state-level commitment to provide affordable broadband to all high-cost locations in its service territory. In CAF Phase II funding, rate-of-return carriers receiving CAF support to offset lost intercarrier compensation (charges that one carrier pays to another carrier to originate, transport, and/or terminate telecommunications traffic) must offer broadband service with actual speeds of at least 4 Mbps download and 1 Mbps upload upon a customer's reasonable request. AT&T accepted \$18.9 million in support offered for Kansas; therefore, it will be required to deploy 10 Mbps/1 Mbps voice and broadband-capable services to at least 95.0 percent of the 35,375 eligible areas by the end of 2020. CenturyLink accepted \$16.5 million in support offered for Kansas; therefore, it will be required to deploy 10 Mbps/1 Mbps voice and broadband-capable services to at least 95.0 percent of the 29,018 eligible areas by the end of 2020. (*Note: Eligible areas include census blocks unserved by mobile broadband services, and carriers may not receive support for areas they have previously stated they plan to serve.*)

The areas for which price-cap carriers did not accept model-based support, as well as other areas, will be made available in the Phase II auction. FairPoint declined support; therefore, the 497 eligible locations in FairPoint's service area in Kansas will be included in the CAF II competitive bidding process. The competitive bidding process began in March 2018 and is scheduled to end in February 2019. More information on the CAF II auction can be found at <https://www.fcc.gov/auction/903>.

The 2011 Order also created the Remote Areas Fund (RAF), to be funded with a budget of at least \$100.0 million annually. The RAF's stated purpose is to ensure that people living in the most remote

areas of the nation, where the cost of providing broadband service is extremely high, can obtain service. The FCC plans to commence the RAF no later than one year after the commencement of the CAF Phase II auction. The RAF will employ technology-neutral rules.

### **Broadband Deployment Advisory Committee (2017)**

On January 31, 2017, the FCC chairperson announced the formation of the Broadband Deployment Advisory Committee, to provide advice and recommendations for the FCC on how to accelerate the deployment of high-speed Internet access. The Committee is anticipated to meet for two years. The Committee has recommended, among other things, a model code for states titled The State Broadband Deployment Act. A full list of recommendations can be found at <https://www.fcc.gov/broadband-deployment-advisory-committee>.

#### **Federal Communications Commission's Broadband Definitions**

In 1999, the FCC determined that “advanced telecommunications capability” and “advanced services” and, in effect, “broadband” are services and facilities with an upstream (customer-to-provider) and downstream (provider-to-customer) transmission speed of more than 200 kilobits per second. The FCC changed the definition of broadband in 2010 to minimum download speed of 4 Mbps and minimum upload speed of 1 Mbps. As part of its 2015 Broadband Progress Report, the FCC voted to change the definition of broadband by raising the minimum download speeds to 25 Mbps and the minimum upload speed to 3 Mbps, which triples the number of U.S. households without broadband access (as defined by the current definition).

## **Kansas Developments**

### **Statutes**

In 1996, the Kansas Legislature enacted a series of telecommunication-related statutes that, among other things, set forth a statewide policy and a definition of broadband (KSA 66-2001 *et seq.*).

Kansas statute declares it is the policy of the State to ensure every Kansan will have access to a first class telecommunications infrastructure that provides excellent services at an affordable price; ensure consumers throughout the state realize the benefits of competition through increased services and improved telecommunications facilities and infrastructure at reduced rates; promote consumer access to a full range of telecommunications services, including advance telecommunications services that are comparable in urban and rural areas throughout the state; advance the development of a statewide telecommunications infrastructure that is capable of supporting applications, such as public safety, telemedicine, services for persons with special needs, distance learning, public library services, access to Internet providers, and others; and protect consumers of telecommunications services from fraudulent business practices and practices that are inconsistent with the public interest, convenience, and necessity.

Kansas law provides the following definitions:

- KSA 66-2005 defines “broadband network” to mean a connection that delivers services at speeds exceeding 200 kilobits per second in both directions; and
- KSA 66-1,187 defines broadband as the transmission of digital signals at rates equal to or greater than 1.5 Mbps.

The Kan-Ed Act defines “broadband technology-based video communication” to mean a class of communications technologies that may include switched ethernet services, DSL, cable modem, private line service, multiprotocol label switching based networks, managed or dedicated Internet technologies and other future technologies,



capable of supporting such applications (KSA 2018 Supp. 75-7222).

### **Task Forces and Committees**

#### *Kansas Broadband Advisory Task Force (2010)*

In 2010, the Kansas Broadband Advisory Task Force (KBATF) was created by Governor Parkinson by Executive Order (EO) 10-08. The KBATF was charged with, among other things, developing recommendations for development and implementation of a broadband digital strategy to support statewide availability and adoption of broadband services consistent with the 2010 National Broadband Plan.

In 2015, Governor Brownback abolished the KBATF by EO 15-01.

#### *Special Committee on Rural Broadband Services (2012)*

The Special Committee was charged with examining how recent FCC changes to the FUSF and the Kansas Universal Service Fund would affect rural broadband, the accessibility of rural broadband services, and the progress and accuracy of mapping rural broadband service.

In its report to the 2013 Legislature, the Special Committee recommended, among other things, the standing committees on utilities should review short- and long-term planning and solutions for rural broadband, the Department of Commerce should report to the standing committees on utilities a broadband mapping update, and members of the Legislature should be provided an electronic notification when the updated broadband mapping is released.

#### *Telecommunications Study Committee (2013)*

The Telecommunications Study Committee was created by 2013 HB 2201. The Committee was created to study, among other things, the possibility of establishing a Kansas Broadband Fund. In its statutorily required annual report to the

2015 Legislature, the Committee recommended the Senate and House utilities committees review the definitions of broadband, telecommunications services, and telecommunications infrastructure with a focus on “future-proofing” those definitions to accommodate the rapid changes in technology.

#### *Statewide Broadband Expansion Task Force (2018)*

Senate Sub. for HB 2701 (2018) created the Statewide Broadband Expansion Task Force. The mission of the Task Force is as follows:

- Work collaboratively to develop an approach that includes, but is not limited to, the development of criteria for the creation of a statewide map for defining and evaluating the broadband needs of Kansas citizens, business, industries, institutions, and organizations;
- Identify and document risks, issues, and constraints associated with a statewide broadband expansion project and to develop any corresponding risk mitigation strategies where appropriate;
- Consider any recent actions by the FCC relating to broadband services;
- Identify opportunities and potential funding sources to:
  - Expand broadband infrastructure and increase statewide access to broadband services;
  - Remove barriers that may hinder deployment of broadband infrastructure or access to broadband services; and
  - Consider options for the deployment of new advanced communication technologies;
- Develop criteria for prioritizing the expansion of broadband services across Kansas;
- Review current law and regulations concerning access to the public right-of-way for public utilities and make corresponding recommendations for

any changes necessary to encourage broadband deployment; and

- Propose future activities and documentation required to complete the statewide broadband expansion plan, including an upgradeable, functional map of the state of available broadband service, as well as including which technologies should be deployed and the methods to finance broadband expansion.

The Task Force is required to submit a progress report to the Legislature by January 15, 2019, and a final report by January 15, 2020. The Task Force has not convened as of October 2018.

### **Mapping**

In 2018, Kansas was awarded a \$300,000 grant to complete a statewide broadband mapping project. Connected Nation, a nonprofit organization that works with states to develop tools, resources, and methods to implement solutions to their broadband and digital technology gaps, in partnership with the Governor's Office, will prepare a statewide broadband map of wireline and wireless coverage to be provided to the Statewide Broadband Expansion Planning Task Force. The map will be created by collecting data in collaboration with the Kansas broadband service providers and will also be available to the public.

### **Legislation**

In addition to Senate Sub. for HB 2701, at least nine bills addressing the expansion or definition of broadband have been introduced in the past four years. Two bills that were discussed in committees during the 2018 Session are summarized below.

#### ***HB 2451 (2018)***

HB 2451 would have created the Statewide Broadband Deployment Authorization Act

to encourage deployment of advanced telecommunications capability throughout rural Kansas by promoting competition in the local telecommunications market and removing barriers to infrastructure investment. The bill would have defined terms associated with the rural broadband service and the process to be followed by an entity or person who seeks authorization to provide service, authorized by the Kansas Corporation Commission. The bill was referred to the House Committee on Energy, Utilities and Telecommunications. The Committee held a hearing on the bill but took no further action.

#### ***HB 2473 (2018)***

HB 2473 would have created various tax incentives for providers of broadband and broadband deployment in rural areas. The bill would have created an income tax credit, deduction from Kansas adjusted gross income, an adjustment for calculating federal adjusted gross income, and exemptions from sales tax. The bill also would have defined broadband to mean at least 25 Mbps download and at least 3 Mbps upload, which would have brought Kansas' definition in line with the FCC's current definition. The bill was referred to the House Committee on Taxation, where it died without a hearing. However, the bill was discussed during a broadband informational hearing in the Senate Committee on Utilities.

### **Other States**

Forty-three states and the District of Columbia have at least one statute related to broadband technology. While some states merely provide definitions of broadband for various purposes, states have also endeavored to expand access to high-speed Internet through broadband technology and to improve existing broadband service. For additional information about other states, please see the memorandum at <http://www.kslegresearch.org/KLRD-web/Utilities&Energy.html>.

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### Utilities and Energy

#### M-3 Electric Utility Regulation and Ratemaking

##### Overview of Electric Utility Structure in Kansas

Three types of electric utilities exist in Kansas: investor-owned, cooperative, and municipal. Investor-owned utilities (IOUs) are those in which shareholders provide the capital for operation and maintenance of electric service. Westar Energy, Kansas City Power & Light (KCP&L), and Empire District Electric are the three IOUs in Kansas. (Note: The Kansas Corporation Commission (KCC) approved a merger of Westar Energy and Great Plains Energy, Inc. (parent company of KCP&L) on May 24, 2018, creating a new company called Eergy Energy, Inc. For the purposes of this article, the companies will be referenced as Westar and KCP&L.) Cooperatives generally exist in rural areas where the customers own the company that provides their electric service. There are 32 cooperatives currently operating in Kansas. Finally, 118 municipalities provide electric service for their citizens.

The following electric companies are regulated by the KCC: KCP&L, Westar, Empire District Electric, and Southern Pioneer. Cooperatives and municipalities are outside of the KCC jurisdiction pursuant to KSA 66-104b and KSA 66-104f, respectively, though KCC may have jurisdiction over these entities in certain limited circumstances.

Electric utilities under the jurisdiction of the KCC must receive KCC approval to change their rates or terms of service. The KCC's role, according to KSA 66-101 *et seq.*, is to establish rates that are just and reasonable while ensuring efficient and sufficient service from the utility. In addition to setting rates, the KCC has the authority to regulate:

- Structure of the retail market for sales of electricity;
- Permitting and siting of transmission and generation;
- Transmission of bundled retail electricity (service in which all aspects of energy production, *i.e.*, generation, transmission, and distribution, are provided by one entity);
- Mergers and acquisition activity; and
- Other various public policies relating to regulated entities.

## Ratemaking

In determining an appropriate rate for a regulated electric utility, the KCC must first determine the utility's annual revenue requirement considering five factors:

- The cost of capital invested in assets (also called a rate of return) that reflects the actual cost of debt and a reasonable return or profit the utility has an opportunity to earn on shareholders' equity;
- The total investment, or rate base, upon which a return will be earned;
- The accumulated and ongoing depreciation of plant(s) and equipment;
- The company's reasonable and prudent operating expenses; and
- Income taxes.

After determining the revenue requirement, the KCC must design rates that will collect the utility's revenue requirement from the utility's customers in an efficient and equitable manner.

### Process

**Application.** The process of ratemaking begins when the utility files an application to change its rates, including details of the proposal, prepared testimony, and supporting data. In most cases, the KCC is allowed 240 days from the filing date to make its decision. However, the time limit can be waived under certain circumstances.

**Review.** In its review of the application, KCC staff, composed of accountants, economists, financial analysts, and engineers, reviews the utility's books and records. This review can take several months to complete. Staff then provides a non-binding recommendation to the three-member Commission. Interested parties, such as consumer groups or industrial customers, may also file recommendations in the case. The Citizens Utility Ratepayer Board (CURB) is the State-appointed representative of residential and small commercial ratepayers in rate cases before the KCC.

**Public hearing.** A public hearing is not required by law, but it is generally held in significant rate cases. The hearing provides an opportunity for the public to learn more about a utility company's proposal and speak before the KCC to express their views on the case. The public may also submit comments online *via* the KCC's website or in an e-mail or letter during the designated comment period.

**Evidentiary hearing.** The facts of a rate case are presented during a formal evidentiary hearing. Expert witnesses may testify and answer questions based on their written testimony submitted by the utility, KCC staff, CURB, and other parties to the case. The three members of the Commission read the written testimony, review the exhibits, hear the cross-examination, and may ask the witnesses questions as they weigh the evidence in the case.

**Reviewing the record.** Commissioners review the record, the facts of the case, and legal briefs to make their decision. The KCC will authorize rate changes that are just and reasonable and in the public interest. By law, the company must be allowed the opportunity to make enough money to meet reasonable expenses, pay interest on debts, and provide a reasonable return to stockholders.

**Decision.** When a decision is made, the KCC announces it through a written order that is approved in an open business meeting. That order is subject to appellate court review, which may be initiated by any party, with the exception of KCC staff, who has filed a timely request for reconsideration.

Additional information on ratemaking may be found at <http://www.kcc.state.ks.us/electric/how-rates-are-set>.

### Recent Developments in Ratemaking

In the 2018 Legislative Session, the Kansas Senate introduced a concurrent resolution (SCR 1612) urging the KCC to lower electric rates to regionally competitive levels. Proponents of the concurrent resolution stated electric rates in Kansas are much higher than those in surrounding

states. Opponents stated the resolution was unnecessary as rate reductions would be realized through a pending merger of Westar and KCP&L. The resolution passed the Senate Committee of the Whole but died in the House Committee on Energy, Utilities and Telecommunications.

In September 2018, the KCC approved a \$66.0 million rate cut for electric customers of Westar, resulting in a decrease of \$3.80 per month for the average residential customer.

### Additional Regulators of Electricity

In addition to the KCC, several other entities have regulatory power over the generation, transmission, and distribution of electricity in Kansas.

**Kansas Department of Health and Environment (KDHE).** KDHE regulates electric generating units (EGUs) pursuant to KSA 65-3001 *et seq.*, the Kansas Air Quality Act. Specifically, KSA 65-3031 provides the Secretary of Health and Environment, in accordance with the requirements of the Environmental Protection Agency's (EPA's) rule on *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, may develop and submit to the EPA a state plan for compliance with the regulation of carbon dioxide from any affected or existing EGUs. The Secretary may implement such standards through flexible regulatory mechanisms, including the averaging of emissions, emissions trading, or other alternative implementation measures that the Secretary determines to be in the interest of Kansas.

**Environmental Protection Agency.** Amendments to the federal Clean Air Act in 1970 established comprehensive regulations for stationary sources of air pollutants such as fossil-fuel burning power plants throughout the United States; the EPA began regulating greenhouse gases emitted by power plants in 2011. President Obama proposed the Clean Power Plan (CPP) rule in 2015, which aimed to reduce carbon dioxide emissions from electrical power generation by 32.0 percent by 2030, relative to 2005 levels. On

August 21, 2018, President Trump proposed the Affordable Clean Energy (ACE) rule, which would establish emission guidelines for states to develop plans to address greenhouse gas emissions from existing coal-fired EGUs. If adopted, ACE would replace the CPP. The ACE rule is discussed in article [M-1 Affordable Clean Energy Rule](#) of this Briefing Book.

**Federal Energy Regulatory Commission (FERC).** FERC has jurisdiction over electricity in Kansas as it relates to:

- Wholesale sales of electricity;
- Reliability of large interconnected electrical systems made up of generation and transmission facilities and their control systems, often referred to as the “bulk power system” or electrical grid;
- Transmission of unbundled electricity, which provides for independent accounting for separate operations such as generation, transmission, and distribution;
- Allocation of costs for interstate electric transmission;
- Licensure of non-federal hydroelectric power;
- Capacity requirements for regional transmission organizations;
- Mergers and acquisitions activity; and
- Market manipulation enforcement.

**North American Electric Reliability Corporation (NERC).** The federal Energy Policy Act of 2005 provided for the creation of a federal electric reliability organization to develop mandatory reliability standards for the bulk power system in the United States. In 2007, FERC granted NERC the legal authority to enforce those reliability standards. NERC oversees the nine regional reliability entities that comprise the interconnected power system in the United States, Canada, and Mexico. Other responsibilities of the NERC include assessing adequacy of resources and providing education and training opportunities as part of an accreditation program to ensure power system operators remain qualified and proficient.

**Southwest Power Pool (SPP).** SPP is a regional transmission organization (RTO) mandated by FERC to ensure reliable supplies of power, adequate transmission infrastructure, and a competitive wholesale electricity market. To meet those mandates, SPP oversees the bulk power system and wholesale power market in the central United States on behalf of utilities and transmission companies in 14 states composed of Kansas, Arkansas, Iowa, Louisiana, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wyoming.

### **State Legislation Relating to Utility Regulation**

The Kansas Legislature has passed several bills related to the regulation of electric utilities over the years. Examples of such legislation follow.

#### ***HB 2047 (1976)***

With the enactment of the Retail Electric Suppliers Act (RESA) in 1976, the state was divided into electric service territories. RESA provides that “within each such territory, only one retail electric supplier shall provide retail electric service, and any such territory established for a retail electric supplier pursuant to this section shall be certified to such retail electric supplier by the [KCC] and such area shall be provided retail electric service exclusively by such supplier.”

#### ***HB 2263 (2005)***

The 2005 Legislature passed the Kansas Electric Transmission Authority Act, creating the Kansas Electric Transmission Authority (KETA). The purpose of KETA was to further ensure reliable operation of the integrated electrical transmission system, diversify and expand the state’s economy, and facilitate the consumption of Kansas energy through improvements in the state’s electric transmission infrastructure. KETA fulfilled that purpose through building electric transmission facilities or by facilitating the construction, upgrade, and repair of third party transmission facilities. The 2016 Legislature repealed the

statutes authorizing KETA and abolished its funds in SB 318.

#### ***Senate Sub. for HB 2369 (2009)***

The 2009 Legislature passed the Renewable Energy Standards Act (Act) that requires electric public utilities, except municipally owned electric utilities, to generate or purchase specified amounts of electricity generated from renewable resources. The 2015 Legislature amended the Act by making it a voluntary goal for affected utilities to achieve net renewable generation capacity equal to at least 20.0 percent of the utility’s peak demand by the year 2020 rather than a mandatory requirement with the enactment of House Sub. for SB 91.

#### ***HB 2233 (2015)***

The 2015 Legislature passed HB 2233, which established the procedure for developing and submitting a state plan to the EPA to comply with the proposed federal CPP rule. In response to the U.S. Supreme Court’s issuance of a stay on litigation related to the CPP rule on February 9, 2016, the 2016 Legislature suspended all state agency activities, studies, and investigations in furtherance of the preparation of the submission of a final state plan pursuant to the CPP rule in SB 318.

#### ***Sub. for SB 323 (2018)***

The 2018 Legislature amended law related to Kansas municipal energy agencies (MEAs), the oversight of electric cooperatives by KCC, and retail electric suppliers with the enactment of Sub. for SB 323.

**MEAs.** The bill requires MEAs to file for a certificate for transmission rights for any electric facilities used to transmit electricity constructed in the certificated territory of a retail electric supplier. Under continuing law, MEAs are authorized to operate as public utilities without obtaining a certificate of public convenience (certificate requirements described in KSA 66-131). The bill also provides a MEA is allowed to elect to be exempt from the jurisdiction, regulation,



supervision, and control of the KCC by having an election of its voting members, not more often than once every two years, by complying with specified requirements as listed in the bill.

**Oversight of electric cooperatives.** The bill allows the KCC's oversight role of electric cooperatives to be limited as it relates to charges or fees for transmission services that are recovered through an open access transmission tariff of an RTO and that has its rates approved by FERC.

**Retail electric suppliers.** When a municipality proposes to annex land located within the certified territory of a retail electric supplier, the municipality is required to provide notice to the

retail electric supplier no less than 30 days prior to the municipality making a selection for a franchise agreement. When a municipality is making a franchise agreement selection, it is required by continuing law to consider certain factors. The bill adds two factors for a municipality to consider: 1) proposals from any retail electric supplier holding a certificate in the annexed area; and 2) whether the selection is in the public interest as it relates to all the factors considered by the municipality.

For a comprehensive summary of bills related to the regulation of electricity in Kansas, see the memorandum entitled "1998 through 2018 Bills Impacting Energy Production and Transportation of Energy" located on the Kansas Legislative Research Department's website.

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**M-1**  
**Affordable Clean  
Energy Rule**

**M-2**  
**Broadband  
Expansion**

**M-3**  
**Electric Utility  
Regulation and  
Ratemaking**

**M-4**  
**Small Wireless  
Facility Siting**

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### Utilities and Energy

#### M-4 Small Wireless Facility Siting

The fifth generation of mobile communication network, referred to as 5G, will be deployed primarily through a network of small wireless antennas. With each new generation of wireless networks, cellular and internet connection speed has improved. 5G is projected to increase connection speed, possibly enabling speed ten times faster than current 4G networks. It is also projected to increase connectivity and capacity, allowing more people to communicate using their devices at the same time. In an effort to accelerate deployment of next generation cellular technology, the Federal Communications Commission (FCC) approved a *Declaratory Ruling and Third Report and Order* (Report) addressing 5G siting in the United States on September 26, 2018. This article reviews certain sections of the Report and addresses how the Report may impact Kansas law.

#### FCC Declaratory Ruling and Third Report and Order Overview

The FCC states the purpose of the Report is to:

- Clarify the scope and meaning of the “effective prohibition” standards set forth in Sections 253 and 332(c)(7) of the Telecommunications Act of 1996 (Act) as they apply to state and local regulation of wireless infrastructure deployment;
- Conclude Sections 253 and 332(c)(7) limit state and local governments to charging fees that allow for cost recovery only for processing applications and managing structures in rights-of-way;
- Identify specific fee levels for small wireless facility deployments that comply with the relevant standard;
- Provide guidance on certain state and local non-fee requirements, including aesthetic and undergrounding requirements;
- Establish new “shot clocks” for small wireless facilities (“shot clocks” refers to timeliness for a municipality to review small wireless facility applications);
- Codify existing shot clocks for non-small wireless facility deployments established by the *2009 Declaratory Ruling* (not discussed in this article);

- Clarify all state and local government authorizations necessary to deploy personal wireless service infrastructure are subject to these shot clocks; and
- Establish that a failure to act within the new small wireless facility shot clocks constitutes a presumptive prohibition on the provision of services, and set the expectation that local governments shall provide all required authorizations without further delay.

The FCC states its intent is to “promote the timely build out of new infrastructure across the country by eliminating regulatory impediments that unnecessarily add delays and costs to bringing advanced wireless services to the public.” Further, the FCC states, “America is in a transition to the next generation of wireless service,” and this action “is the next step in the FCC’s ongoing efforts to remove regulatory barriers that would unlawfully inhibit the deployment of infrastructure necessary to support these new services.” The Report was published in the *Federal Register* on October 1, 2018, and will be in effect 90 days after publication.

According to the National Conference of State Legislatures (NCSL), the Report places new limits on local wireless infrastructure siting review and has the potential to preempt the 20 states, including Kansas, that have enacted small cell legislation.

### **Standard for Determining Effective Prohibition of Service**

One of the expressed purposes of the Report is the intent to clarify the FCC’s interpretation of the term “effective prohibition,” found in Sections 253 and 332(c)(7) of the Act. Paragraph 37 of the Report states that effective prohibition occurs where a state or local legal requirement materially inhibits a provider’s ability to engage in any of the variety of activities related to its provision of a covered service. This would include both inhibiting additional services or improving existing ones.

### **Fees**

Another purpose of the Report is intended to resolve confusion regarding limits on state and local fees. Paragraph 50 of the Report states right-of-way access fees and fees for the use of government property in the right-of-way, as well as application or review fees and similar fees imposed by a state or local government as part of their regulation of the deployment of small wireless facilities inside and outside the right-of-way, violates Sections 253 and 332(c)(7) of the Act unless the following conditions are met:

- The fees are a reasonable approximation of the state or local governments costs;
- Only objectively reasonable costs are factored into those fees; and
- The fees are no higher than the fees charged to similarly situated competitors in similar situations.

Paragraph 79 of the Report prescribes the following fee structure that the FCC believes would not violate Sections 253 and 332(c)(7) of the Act:

- \$500 for a single up-front application that includes up to five small wireless facilities with an additional \$100 for each additional facility; and
- \$270 annually per small wireless facility for all recurring fees.

### **Aesthetic Requirements**

The Report also uses the FCC’s interpretation of Sections 253 and 332(c)(7) of the Act to provide guidance on certain potential regulations imposed by local governments.

Regarding aesthetic regulations, the FCC clarifies in Paragraph 86 of the Report that requirements must meet the following three criteria to be permissible under the Act:

- Be reasonable;
- Be no more burdensome than those applied to other types of infrastructure deployments; and
- Be objective and published in advance.

Paragraph 90 of the Report indicates some jurisdictions have adopted blanket ordinances or regulations requiring all wireless facilities to be deployed under ground, some for aesthetic reasons. The FCC clarifies this would amount to an effective prohibition due to the characteristics of wireless signals and violate Sections 253 and 332(c)(7) of the Act.

Minimum spacing requirements are addressed in Paragraph 91 of the Report. The FCC clarifies spacing requirements that prevent providers from replacing preexisting facilities or collocating equipment would be unreasonable. An example of this would include requiring facilities be sited a certain minimum distance away from other facilities.

### **Review Deadlines and Remedies**

Paragraph 105 of the Report establishes the following new shot clocks or timelines for a municipality to review small wireless facility applications:

- 60 days for an application for collocation of small wireless facilities on preexisting structures; and
- 90 days for an application for new construction of small wireless facilities.

In Paragraph 113 of the Report, the FCC indicates that because small wireless facilities are likely to be deployed in large numbers as part of a system to cover a particular area, it anticipates some providers will submit batched applications. “Batched” is defined as multiple separate applications filed at the same time, each for one or more sites or a single application covering multiple sites. As a result, the FCC states in Paragraph 114, with regard to the new shot clocks, these types of applications should follow the same rules as if the applications were filed separately. In addition, if an application contains both sites for collocation and new construction, then it should adhere to the longer 90-day shot clock.

These shot clocks are being established under the FCC interpretation of Section 332 of the Act. The FCC notes these shot clocks are similar to shot

clocks adopted in a Declaratory Ruling issued by the FCC in 2009 for non-small cell wireless facilities (which have been further clarified by the Report, but are not addressed in this article). The FCC notes the 2009 shot clocks were affirmed by the Fifth Circuit and the Supreme Court in *City of Arlington v. FCC* in 2013.

Section B Paragraphs 116 through 131 of the Report clarify that failure to adhere to the small wireless facility shot clock deadlines is considered a presumptive prohibition of service, violating Section 332 of the Act, and an applicant would be able to seek relief in court through a preliminary or permanent injunction.

### **Kansas Law**

Kansas is one of 20 states to enact legislation dealing with the siting of small cell wireless facilities. Senate Sub. for HB 2131 (2016) established application processes, limitations, and construction procedure for operating and maintaining equipment in the public right-of-way.

### **Kansas Fees**

Under KSA 66-2019, authorities cannot charge an application fee, consulting fee, or other fee associated with the submission, review, processing, and approval of an application that is not required for other wireless infrastructure providers or wireline telecommunications or broadband providers in their jurisdiction.

Further, the law directs an authority (defined as any governing body, board, agency, office, or commission of a city, county, or the state that is authorized by law to make legislative, quasi-judicial, or administrative decisions concerning an application) can only assess fees for the actual costs relating to granting or processing an application that are directly incurred. This portion is in line with what is required by the FCC Report.

Kansas law also limits the amount an authority can receive from application charges and fees to:

- \$500 for a collocation application that is not a substantial modification, small

cell facility application, or distributed antenna system application; or

- \$2,000 for an application for a new wireless support structure or for a collocation application that is a substantial modification of a wireless support structure.

As noted above, the Report allows for a maximum application fee of \$500 for the first five sites and \$100 for every site thereafter. There is no distinction between collocated sites and new support structures in the Report.

Kansas law also allows for small cell network applications with no greater than 25 individual facilities of similar design within a jurisdiction of a single authority to file a consolidated application and receive a single permit for the installation, construction, maintenance, and repair of the network instead of filing separate applications for each.

An authority also has the ability to enter into a lease with an applicant for the use of public lands, buildings, and facilities. The lease must be at market rate and at least ten years in duration, unless otherwise agreed to by both the applicant and the authority. Charges for placement of wireless facilities on public lands, if the authority chooses to charge, are required to be competitively neutral and not unreasonable, discriminatory, or in violation of existing federal or state law. The FCC's Report suggests that a reoccurring fee of no more than \$270 per facility would be acceptable when determining if such a fee creates an "effective prohibition" under the Act.

### ***Kansas Application Review Process***

Similar to the Report, KSA 66-2019 establishes a shot clock for review and issuance of a final decision for small cell network applications by an authority. Kansas law requires local authorities to adhere to the following time lines:

- Review and issue a final decision for consolidated applications for small cell networks containing no more than 25

individual and similar small cell facilities within 60 calendar days;

- Review and issue a final decision for applications for substantial modification to an existing wireless support structure within 90 calendar days; and
- Review and issue a final decision for applications for a new wireless support structure within 150 calendar days.

With regard to modified and new wireless structures, if an authority fails to act within the required time the application is considered approved.

The shot clocks in Kansas law are several weeks longer than what is mandated by the Report, depending on how a wireless provider wants to install a small cell network. However, Kansas law eliminates the need for a provider to seek relief through a court injunction if an application is not reviewed by the deadline, because it is deemed approved at the end of the shot clock period.

### ***Kansas Aesthetic Requirements***

Kansas law states that an authority has the right to prohibit the use or occupation of a specific portion of the public right-of-way due to reasonable public interest necessitated by public health, safety, and welfare so long as such interest is exercised in a competitively neutral manner and is not unreasonable or discriminatory. Kansas law further states a wireless services provider or wireless infrastructure provider, subject to an application, shall have the right to construct, maintain, and operate wireless support structures, utility poles, small cell wireless facilities or distributed antenna systems along, across, upon, under, or above the public right-of-way. (*Note: the limitation of access for aesthetic reasons is not expressly stated in statute.*) The authority must be competitively neutral with regard to other users of the public right-of-way, may not be unreasonable or discriminatory, and may not violate any applicable state or federal law, rule, or regulation.

<b>Comparison of Certain Requirements for Siting of Small Wireless Facilities</b>		
<b>Requirement</b>	<b>FCC Report</b>	<b>KSA 66-2019</b>
Co-location Application Fee	\$500 for first five facilities, \$100 for each beyond initial five	\$500 for non-substantial modification to existing structure. \$2,000 for substantial modification
New Structure Application Fee	\$500 for the first five facilities, \$100 for each beyond initial five	\$2,000
Batched Application Fee	\$500 for the first five facilities, \$100 for each beyond initial five	\$500 or \$2,000 depending on application. Can only be applied for by a network with 25 or fewer individual facilities
Co-location Application Review	60 days	90 days
New Structure Application Review	90 days	150 days
Batched Application Review	90 or 150 days depending on if the application requires construction of a new wireless support structure	60 calendar days for networks with 25 or fewer individual facilities

### Response

In response to the Report, NCSL and the National Governors Association sent a joint letter to express their concerns regarding the preemptive nature of the ruling for the 20 states that have worked with the industry and localities to address small cell wireless facility siting. They also indicated the ruling may compromise the traditional authority of state and local governments.

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### Veterans, Military, and Security

#### N-1 Cybersecurity

A number of provisions related to cybersecurity have been considered in the Legislature in recent years, while several other states introduced and enacted cybersecurity measures of their own. An overview of these activities follows.

#### Recent Legislation

##### *House Sub. for SB 56 (2018 Law)*

House Sub. for SB 56 (2018) created the Kansas Cybersecurity Act (Act). The legislation established the position of Chief Information Security Officer (CISO) and the Kansas Information Security Office (KISO) within the Office of Information Technology Services (OITS) to administer the Act and perform various functions related to cybersecurity of executive branch agencies. The definition of “executive branch agency” excludes elected office agencies, the Kansas Public Employees Retirement System, Regents institutions, the Kansas Board of Regents, or the Adjutant General’s Department. Executive branch agency heads are solely responsible for security of all data and information technology resources under its purview through various measures and procedures. Executive branch agencies have the discretion to pay for cybersecurity services from existing budgets, from grants or other revenues, or through special assessments to offset costs. Any increase in fees or charges due to the Act, including cybersecurity fees charged by the KISO, are to be fixed by rules and regulations adopted by the agency and can only be used for cybersecurity.

##### *Sub. for HB 2331 (2017)*

Sub. for HB 2331 (2017) would have enacted the Representative Jim Morrison Cybersecurity Act. The bill was based on the previous year’s HB 2509 in that it would have created the KISO and established the position of CISO in statute. The bill would have also established the Kansas Information Technology Enterprise (KITE), which would have consolidated functions of OITS and transfer current OITS employees and officers to KITE.

The House Committee on Government, Technology, and Security introduced HB 2331 during the 2017 Legislative Session. The House Committee recommended a substitute bill be passed that would have included various amendments to the original contents

of 2017 HB 2331, as well as an amended version of 2017 HB 2359 (relating to the creation of KITE). After passing the House Committee of the Whole, the bill was referred to the Senate Committee on Ways and Means. The Senate Committee heard testimony on the bill but failed to take any further action during the 2017 Legislative Session.

**HB 2509 (2016)**

The House Committee on Vision 2020 introduced 2016 HB 2509, which would have given the Executive Branch chief information technology officer (CITO) authority to approve all information technology expenditures, established KISO within OITS, and designated a CISO within OITS. The bill passed out of committee and the House Committee of the Whole, but the Senate Committee on Commerce removed the contents of the bill and inserted provisions related to economic development programs.

**Executive Branch Action**

**Executive Order 11-46**

Governor Brownback issued Executive Order (EO) No. 46 on November 7, 2011. The EO directed all non-Regents executive branch agency information technology (IT) directors and all staff performing IT functions in all executive branch state agencies, departments, or other entities under the Governor’s jurisdiction to report directly to the executive CITO. The CITO would be directed and charged, in addition to the duties set forth in KSA 2018 Supp. 75-7205, to manage and order executive branch IT systems in a uniform, efficient, service-oriented, and cost-effective manner.

**Cybersecurity Funding**

The Governor recommended funding for cybersecurity in FY 2018 and FY 2019, as follows.

	<b>FY 2018</b>	<b>FY 2019</b>
State General Fund	\$1,877,493	\$3,754,985
All Other Funds	\$1,522,507	\$3,045,015
All Funds	\$3,400,000	\$6,800,000
FTE Positions	17	26

The 2017 Legislature approved cybersecurity funding at a lower level than the Governor’s recommendation, and for FY 2018 only.

	<b>FY 2018</b>
State General Fund	\$938,747
All Other Funds	\$1,522,507
All Funds	\$2,461,254
FTE Positions	17

The 2018 Legislature rejected the Governor’s recommended \$2.7 million appropriation for cybersecurity in FY 2019 and instead allocated those funds to IT modernization for FY 2019. OITS remains authorized to charge agencies a fee for cybersecurity-related services.

**State Legislation**

In 2018, 36 states, the District of Colombia, and Puerto Rico considered more than 265 bills or resolutions related to cybersecurity, while 14 states have enacted 31 bills related to cybersecurity. Categories of cybersecurity legislation include:

- Improving government security practices;
- Providing funding for cybersecurity programs and initiatives;
- Restricting public disclosure of sensitive security information; and
- Promoting workforce, training, and economic development.

For more information on other states, see <http://www.ncsl.org/research/telecommunications-and-information-technology/cybersecurity-legislation-2018.aspx>.

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### Veterans, Military, and Security

#### N-2 Veterans and Military Personnel Benefits

Most benefits for military personnel and veterans are offered by the federal government. However, states can offer additional benefits and resources to veterans and military families. Kansas has established agencies to assist veterans and military family members in filing claims for federal benefits and offers other benefits for veterans and military families in Kansas, and provides information on resources where more detailed information can be found.

#### 2018 Legislation

Kansas regularly passes legislation to address veterans' needs. Legislation passed in 2018 made significant changes to the Kansas National Guard Educational Assistance Act, established a process for Native American military veterans to receive an income tax refund for money improperly withheld from their federal pay, and created four new specific military operation license plates. More information about the current benefits and protections available for Kansas veterans, servicemembers, and military families is included below.

#### Benefits Assistance

**Kansas Commission on Veterans' Affairs Office (KCVAO).** The KCVAO provides Kansas veterans and their families with information and assistance by coordinating programs and services to help them improve their quality of life. The KCVAO's available services range from helping veterans file claims for medical, educational, or other benefits to helping veterans obtain earned medals and military awards. KCVAO veterans services representatives are available, free of charge, to assist veterans and family members.

**Veterans' Claims Assistance Program (VCAP).** The purpose of the VCAP is to improve the coordination of veterans' benefits counseling in Kansas, ensure efficient use of taxpayer dollars, and serve veterans with the necessary counseling and assistance. The VCAP, through its advisory board, also advises the Director of the KCVAO on all veterans' services, including the VCAP. The VCAP Advisory Board also makes recommendations to the Director of the KCVAO regarding match funding levels for veterans' service organizations.

## State of Kansas Veterans' Benefits

### Education

**Residency.** Veterans, their spouses, and their children are considered residents by community colleges and Kansas Board of Regents (KBOR) institutions. When such a person is using federal educational benefits to attend college, resides in or is assigned to a permanent duty station in Kansas, or previously established residence in Kansas prior to service and lives in Kansas at the time of enrollment, the person will be charged in-state tuition and fees regardless of length of residency.

### Scholarships

Kansas offers scholarships for veterans, active duty military personnel, and Kansas National Guard members. In some cases, spouses and dependents of veterans also are eligible for scholarship consideration.

The Kansas Military Service Scholarship covers tuition and fees for certain active duty servicemembers and honorably discharged (or generally discharged under honorable conditions) veterans who deployed or received hostile fire pay for at least 90 days after September 11, 2001. The 90-day requirement may be waived if the servicemember was injured during such military service.

The Kansas National Guard Educational Assistance Program was changed significantly by 2018 HB 2541. The program now provides tuition and fees assistance for enlisted personnel in the Kansas Air or Army National Guard who are not under a suspension of favorable action flag, currently on the unit unfavorable information file, have a high school diploma or GED, and have not already obtained a bachelor's or higher academic degree. The assistance is in an amount not to exceed 15 credit hours a semester with an aggregate total not to exceed 150 percent of the total credit hours required to complete their educational program. The availability of this tuition assistance is subject to appropriations for the program. Kansas also offers free tuition

and fees to dependents and unmarried widows and widowers of servicemembers killed in action while serving on or after September 11, 2001; dependents of those who are prisoners of war or missing in action; and dependents of those who died as a result of service-connected disabilities suffered during the Vietnam conflict. Obligations to the State for taking certain types of state scholarships can be postponed for military service.

Kansas also offers ROTC scholarships at KBOR institutions, Washburn University, and community colleges for students interested in becoming commissioned officers in the armed forces.

More information about educational resources available to veterans and military families can be found at:

- [http://myarmybenefits.us.army.mil/Home/Benefit\\_Library/State\\_Territory\\_Benefits/Kansas.html](http://myarmybenefits.us.army.mil/Home/Benefit_Library/State_Territory_Benefits/Kansas.html); and
- <http://www.kansasregents.org/students/military>.

**Military Interstate Children's Compact Commission.** Kansas has been a member of the Military Interstate Children's Compact Commission since 2008. The Compact addresses educational transition issues military families face when relocating to new duty stations. The Compact assists military families with enrollment, placement, attendance, eligibility, and graduation.

Active duty servicemembers' children, National Guard and Reserve servicemembers on active duty orders, and servicemembers or veterans who are medically discharged or retired for one year are eligible for assistance under the Compact.

More information and points of contact are available at <http://mic3.net/Kansas.html>.

### Emergency Financial Assistance

The Adjutant General may extend grants and interest-free loans to Kansas National Guard servicemembers, members of the reserve forces, and their families to assist with financial

emergencies. Individuals may contribute to the Military Emergency Relief Fund by checking the designated block on their individual income tax return forms.

### **Employment**

**Veterans' preference.** The veterans' preference applies to initial employment and first promotion with state government and with counties and cities in "civil service" positions. Veterans are to be preferred if "competent," which is defined to mean "likely to successfully meet the performance standards of the position based on what a reasonable person knowledgeable in the operation of the position would conclude from all information available at the time the decision is made."

Veterans' preference applies to veterans who have been honorably discharged from the armed forces. The veterans' preference will also extend to spouses of veterans who have 100 percent service-connected disability, surviving spouses (who have not remarried) of veterans killed in action or died as result of injuries while serving, or the spouses of prisoners of war. Veterans' preference does not apply to certain types of jobs, such as elected positions, city or county at-will positions, positions that require licensure as a physician, and positions that require the employee to be admitted to practice law in Kansas.

The hiring authority is required to take certain actions, including noting in job notices that the hiring authority is subject to veterans' preference, explaining how the preference works, and explaining how veterans may take advantage of the preference.

For more information regarding veterans' preference, visit <https://admin.ks.gov/services/state-employment-center/veterans>.

**Private veterans' preference.** Private employers may establish a veterans' hiring preference in Kansas. The veterans' preference must be in writing and must be consistently applied. Veterans are required to provide the employer with proof of military service and discharge under honorable conditions.

**Pensions and life insurance.** State pension participants away from state jobs for military service may be granted up to five years of state service credit for their military service. An employee may buy up to six years of service credit that is not granted, and purchased service need not be preceded or followed by state employment.

Additionally, an absence for extended military service is not considered termination of employment unless the member withdraws accumulated contributions.

Basic life insurance, worth 150 percent of annual salary, continues while the employee is on active duty. An employee may continue to have optional life insurance by paying the premiums for 16 months; after such time, the policy may be converted to an individual policy.

**Position reinstatement.** An officer or employee of the state or any political subdivision does not forfeit that position when entering military service; instead, the job has a "temporary vacancy," and the original jobholder is to be reinstated upon return. Anyone called or ordered to active duty by this state, or any other states' reserve compartment, and who gives notice to his or her public or private employer and reports back to that employer within 72 hours of discharge is to be reinstated to the former position (unless it was a temporary position). A state employee who returns to classified service within 90 days after an honorable discharge is to be returned to the same job or another job comparable in status and pay in the same geographic location. A state employee's appointing authority may grant one or more pay step increases upon return.

**Professional licenses—credit for military education and training.** Statutes direct state agencies issuing professional licenses to accept from an applicant the education, training, or service completed in the military. The education, training, or service must be equal to the existing educational requirements established by the agency. The license may be granted even if the servicemember was discharged under less than honorable conditions.

While this rule generally does not apply to the Board of Nursing, the Board of Emergency Medical Services, or the practice of law, there are special provisions for nurses and emergency medical technicians. Statutes authorize the Board of Nursing to waive the requirement that an applicant graduate from an approved school of practical or professional nursing if the applicant passed the National Council Licensure Examination for Practical Nurses, has evidence of practical nursing experience within the U.S. military, and was separated from service with an honorable discharge or under honorable conditions.

Statute also mandates the granting of an attendant's certificate to an applicant who holds a current and active certification with the National Registry of Emergency Medical Technicians (NREMT) and who completed emergency medical technician training as a member of the U.S. military. For these provisions to apply, the applicant must have received an honorable discharge or have been separated under honorable conditions. Additionally, Kansas has enacted the Interstate Compact for Recognition of Emergency Medical Personnel Licensure allowing Kansas to consider active and former servicemembers, in addition to their spouses, who hold a current valid and unrestricted NREMT certification, as having the minimum training and examination requirements for EMT licensure.

Kansas also allows a person to receive a license to practice barbering if they have been certified in a related industry by any branch of the U.S. military and completed a course of study in a licensed Kansas barber college or school.

**Professional licenses—maintaining license while serving.** A state license issued to engage in or practice an occupation or profession is valid while the licensee is in military service and for up to six months following release without the licensee paying a renewal fee, submitting a renewal application, or meeting continuing education or other license conditions. (This provision does not apply to licensees who engage in the licensed activity outside of the line of duty while in military service.) No such license may be revoked, suspended, or canceled for failure

to maintain professional liability insurance or failure to pay the surcharge to the Health Care Stabilization Fund.

**Expedited professional licenses—military servicemembers' nonresident military spouses.** Kansas professional licensing bodies are required to grant professional licenses to nonresident military spouses and servicemembers who hold professional licenses in other states, if the licensees meet certain requirements. These licenses must be issued within 60 days after a complete application is submitted.

**Probationary licenses—servicemembers and military spouses.** A servicemember or military spouse may have a license on a probationary basis for up to six months when the licensing body does not have licensure, registration, or certification by endorsement, reinstatement, or reciprocity and the servicemember or military spouse meets certain criteria.

**Temporary Bar admission for military spouses.** Kansas Supreme Court Rule 712A grants applicants temporary admission to the Kansas Bar without a written examination if they are currently married to a military servicemember stationed in Kansas and have been admitted to the practice of law upon a written examination by the highest court of another state or in the District of Columbia.

**Military leave for state employees.** Benefits-eligible state employees who are members of a reserve component of the military are eligible for 30 working days of military leave with pay for active duty within a 12-month period beginning October 1 and ending on September 30 the following year.

**State employee direct payment benefits.** Benefits-eligible state employees who are on military leave as activated reserve component uniformed military personnel may be eligible for one-time activation payments of \$1,500.

Additionally, benefits-eligible state employees who are called to full-time military duty and are mobilized and deployed may receive the difference between their military pay, plus most



allowances, and their regular State of Kansas wages, up to \$1,000 per pay period.

### **Highways and Bridges**

The State of Kansas honors veterans by designating portions of highways in their name. The Kansas Department of Transportation provides a Memorial Highways and Bridges Map at <http://www.ksdot.org/maps.asp>.

### **Housing and Care**

Certain veterans, primarily those with disabilities, are eligible for housing and care at the Kansas Soldiers' Home near Fort Dodge and the Kansas Veterans' Home in Winfield. The KCVAO states priority for admission of veterans will be given on the basis of severity of medical care required. For more information, see:

- <https://kcva.ks.gov/veteran-homes/fort-dodge-home>; and
- <https://kcva.ks.gov/veteran-homes/winfield-home>.

### **Insurance**

**Personal insurance.** No personal insurance shall be subject to cancellation, non-renewal, premium increase, or adverse tier placement for the term of a deployment, based solely on that deployment.

**Private health insurance.** A Kansas resident with individual health coverage, who is activated for military service and therefore becomes eligible for government-sponsored health insurance, cannot be denied reinstatement to the same individual coverage following honorable discharge.

### **Judicial Benefits Diversion Considerations**

A prosecutor may consider combat service-related injuries when considering whether to enter into a diversion agreement with a defendant. The injuries considered include major depressive disorder, polytrauma, post-traumatic stress disorder, and traumatic brain injury.

### **Sentencing Considerations**

Judges may consider combat service-related injuries (including major depressive disorder, polytrauma, post-traumatic stress disorder, and traumatic brain injury) as mitigating factors when sentencing a defendant.

### **Court-ordered Treatment Considerations**

A judge may consider combat service-connected injuries (including major depressive disorder, polytrauma, post-traumatic stress disorder, and traumatic brain injury) when ordering a defendant to treatment. There is no requirement that a defendant have a discharge under honorable conditions to qualify for court-ordered treatment.

Treatment in this program is an alternative for a defendant who meets the criteria for court-ordered treatment, but cannot receive treatment through a military treatment facility or veterans' treatment facility.

### **Taxes**

**Income tax—check-off provisions.** Taxpayers may contribute income tax refunds or additional money to the Kansas Military Emergency Relief Fund, to be used to help military families defray costs of necessities while a family member is on active duty or for other services to support military families, and the Kansas Hometown Heroes Fund, to be used solely for veterans services programs of the KCVAO.

**Income tax refund—certain veterans.** HB 2147 (2018) created a process for certain Native American military veterans to apply for a refund of state personal income taxes improperly withheld from their federal military income between 1977 and 2001 in the amount of income taxes paid plus interest. If the veteran is deceased, the refund may be sought on behalf of their estate by a surviving spouse or any heir-at-law. No refunds will be issued after June 30, 2020.

**Property tax—deferral.** An active duty servicemember who has orders to deploy, or is currently deployed, outside of the United States

for at least six months may defer payment of taxes on real property for up to two years. A claim for the deferral must be filed with the county clerk.

**Property tax—homestead.** Certain disabled veterans and surviving spouses who do not remarry are eligible for the Homestead Property Tax Refund Program. Disabled veterans are those Kansas residents who have been honorably discharged from active duty in the armed forces or Kansas National Guard and who have been certified to have a 50 percent or more permanent service-connected disability.

**Motor vehicle taxes.** Active duty servicemembers who are Kansas residents are not required to pay motor vehicle taxes for their first two vehicles if they maintain vehicles outside of the state and are absent from the state on military orders on the date the registration payment is due.

### ***Vehicle-related Benefits***

**Driver's license requirements—waiver.** The Director of Vehicles and Kansas Department of Revenue may waive the skills test for an applicant for a commercial driver's license, if that applicant provides evidence of certain military commercial vehicle driving experience.

The applicant's military driving experience must meet the requirements of 49 CFR 383.77. The applicant must have military experience operating a vehicle similar to the commercial motor vehicle the applicant expects to operate. The applicant must not have been convicted of any offense (such as driving under the influence of alcohol or a controlled substance) that would disqualify a civilian commercial driver. An applicant will be required to pass the Kansas knowledge test for driving a commercial motor vehicle. Also, some state requirements for written and driving testing may be waived for an applicant for a Class M (motorcycle) driver's license who has completed motorcycle safety training in accordance with U.S. Department of Defense requirements.

**“Veteran” designation on driver's licenses and identification cards.** A veteran may have “VETERAN” printed on the front of a State-issued driver's license or a non-driver identification card

by showing proof of military service in the form of a DD214 or equivalent form. The veteran must have received an honorable discharge or general discharge under honorable conditions.

The Secretary of Revenue may provide names and addresses from motor vehicle records to the KCVAO for the purpose of assisting the KCVAO in notifying veterans of the facilities, benefits, and services available to veterans in the State of Kansas.

**License plates.** Kansas has several distinctive license plates available for veterans and family members. In some cases, those license plates may be provided at no cost. HB 2559 (2018) allows for the creation of distinctive license plates for several new specified military operations, including the Korean War, Operation Desert Storm, Operation Iraqi Freedom, and Operation Enduring Freedom. More information on military-related license plates is available at <https://www.ksrevenue.org/dovplates.html>. Additionally, several decals depicting medals or combat ribbons are available to display on certain veterans license plates, and a wheelchair emblem decal may be affixed to a distinctive license plate to indicate the vehicle transports a person with a permanent disability, providing an alternative to the Disabled Veteran distinctive tag.

### ***Vietnam War Era Medallion Program***

The Vietnam War Era Medallion Program provides eligible veterans with a medallion, a medal, and a certificate of appreciation. The Medallion Program is open to veterans who served in the United States or in a foreign country, regardless of whether the veteran was under 18 years of age at the time of enlistment.

Eligible veterans are those who served on active duty in the U.S. military between February 28, 1961, and May 7, 1975; are legal residents of Kansas or were legal residents at the time they entered military service, the time they were discharged from military service, or at the time of their death; and were honorably discharged, are still on active duty in an honorable status, or were on active duty at the time of their death.

## **Voting Opportunities**

Overseas military personnel and their family members may vote a full ballot for all elections. The ballots will be mailed 45 days before an election. The military servicemember or family member may submit a ballot to the county election office before polls close by mail, e-mail, or fax. For more information, see <http://www.voteks.org/when-you-vote/how-will-i-vote.html>.

## **Parking Privileges for Disabled Veterans**

Veterans with disabled veterans license plates or wheelchair emblem decals may exercise free parking privileges in spaces reserved for disabled persons in public parking facilities and parking lots that employ parking attendants.

## **Other Benefits**

**Anti-discrimination towards military personnel.** Kansas law prohibits discrimination on the basis of military status. Alleged violations are a civil matter.

**Permits and licensing.** Several types of hunting and fishing permits and licensing benefits are available to military personnel and veterans. More information about these benefits is available at:

- <https://ksoutdoors.com/Hunting/Applications-and-Fees>; and
- <http://ksoutdoors.com/Fishing/Fishing-Application-and-Fees>.

**Concealed carry licenses.** Active duty military personnel and their dependents residing in Kansas may apply for a concealed carry handgun license without a Kansas driver's license or a Kansas non-driver's license identification card.

Upon presenting proof of active duty status and completing other requirements for a concealed carry permit, the servicemember or dependent would be granted a license under the Personal and Family Protection Act and issued a unique license number.

Active duty military personnel stationed outside of Kansas can also apply for a concealed carry

license if they provide evidence of completion of a course offered in another jurisdiction determined by the Attorney General to have training requirements that are equal to or greater than those required in Kansas.

**Military burials.** Certain veterans and their eligible dependents may be buried in state veterans' cemeteries. Cemeteries are located in Fort Dodge, Fort Riley, WaKeeney, and Winfield.

The final disposition of a military decedent's remains would supersede existing statutory listing of priorities for such remains. The provision applies to all active duty military personnel and gives priority to the U.S. Department of Defense Form 93 in controlling the disposition of the decedent's remains for periods when members of the U.S. Armed Forces, the Reserve, or National Guard are on active duty. A certified copy of an original discharge or other official record of military service may be filed with the Adjutant General, who will provide copies free of charge if they are needed to apply for U.S. Department of Veterans Affairs benefits.

**Consumer protection.** The Kansas Consumer Protection Act (KCPA) defines members of the military and their immediate family members, as well as veterans and their surviving spouses, as "protected consumers" under the KCPA (KSA 2018 Supp. 50-676, as amended by 2017 SB 201). The KCPA protects consumers from deceptive business practices.

**Alternate death gratuity.** If federal funding is not available during a federal government shutdown, the Adjutant General will pay a death gratuity of \$100,000 for any eligible Kansas military servicemember. The Adjutant General will secure federal reimbursements after the government reopens.

## **Additional Benefits Information**

The U.S. Army's official benefits website provides a general overview of military and veterans' benefits in Kansas, along with contact information for some state agencies: [http://myarmybenefits.us.army.mil/Home/Benefit\\_Library/State\\_Territory\\_Benefits/Kansas.html](http://myarmybenefits.us.army.mil/Home/Benefit_Library/State_Territory_Benefits/Kansas.html).

The KBOR website lists scholarships available for military personnel, veterans, and spouses, along with the requirements for each scholarship: <http://www.kansasregents.org/students/military>.

The KCVAO's website includes several resources for veterans and military personnel. The following links cover federal and state benefits, employment resources, and educational resources:

- <http://www.kcva.org>;
- <http://kcva.ks.gov/veteran-services/federal-benefits>;
- <http://kcva.ks.gov/veteran-services/state-benefits>;
- <http://kcva.ks.gov/kanvet>;
- <http://kcva.ks.gov/kanvet/employment-resources>; and
- <https://kcva.ks.gov/kanvet/education-resources>.

The U.S. Department of Veterans Affairs' Kansas website includes links for veterans health administration offices, veterans benefits

administrations offices, and national cemetery administration offices: [https://www.va.gov/landing2\\_locations.htm](https://www.va.gov/landing2_locations.htm).

The U.S. Department of Labor's website lists the contact information for the Kansas Director of Veterans' Employment and Training, as well as Kansas employment resources for veterans and federal resources for veterans: <https://www.dol.gov/vets/aboutvets/regionaloffices/chicago.htm#ks>. The Adjutant General's Department's Kansas Military Bill of Rights website lists benefits and services that Kansas provides to veterans and military personnel: <http://kansastag.gov/NGUARD.asp?PageID=346>.

Additional information, including statutory citations when appropriate, is available at <http://www.kslegresearch.org/KLRD-web/VeteransMilitary&Security.html>.

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