Approved: 2/17/11
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on January 25, 2011, in Room 346-S of the Capitol.

All members were present except:
Representative Colloton
Representative Suellentrop

Committee staff present:
Jill Wolters, Office of the Revisor of Statutes
Matt Sterling, Office of the Revisor of Statutes
Tamera Lawrence, Office of the Revisor of Statutes
Lauren Douglass, Kansas Legislative Research Department
Robert Allison-Gallimore, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the Committee:
Judge Steve Leben, Kansas Judicial Council
Honorable Edward Larson, Kansas Judicial Council
Senator Jeff King

Others Attending:
See attached list.

Senator Jeff King addressed the committee, inviting them to attend the oral arguments in front of the Supreme Court that will be held in the "Old Supreme Court Room" on Thursday, January 27th, as part of the celebration of the State of Kansas' 150th birthday.

There were no bill introductions.

The Hearing on **HB 2027 – Rules and regulations filing act**, was opened.

Judge Steve Leben, Kansas Court of Appeals Judge and a member of the Judicial Council's Administrative Procedure Advisory Committee, spoke on behalf of the Kansas Judicial Council, as a proponent of the bill, which was drafted by the Council's Administrative Procedure Advisory Committee. He explained the purpose of the bill is to resolve confusion surrounding so-called "exempt" rules and regulations, to clarify the definition of rule and regulation, and to clarify the procedure used to adopt rules and regulations. He also stated the bill contains a provision designed to encourage agencies to advise the public of their current opinions and approaches by issuing non-binding guidance documents. (Attachment 1)

After questions and answers, and further discussion, Chairman Kinzer requested the staff contact the Kansas Corporation Commission (KCC), for their input and response with respect to " if their opinions are readily available" in accordance with the requirements of this bill, prior to the committee working this bill. Representative Pauls, the ranking Democrat on the Joint Committee on Rules and Regulations, added that Martha Coffman, Chief Advisory Counsel for the KCC, is also a member of the Administrative Procedure Advisory Committee.

There were no opponents.

The Hearing on **HB 2027** was closed.

The Hearing on **HB 2028 – Uniform trust code; insurable interest of trustee**, was opened.

Honorable Edward Larson, on behalf of the Kansas Judicial Council, appeared before the committee as a proponent of the bill. He provided the committee with some background information, advising the Judicial Council Probate Law Advisory Committee (PLAC) has had an interest in a particular case since 2005 when a Virginia Federal District Court applied Maryland law and held that a trust did not have an insurable interest in the life of the insured who was the settlor and the creator of a trust.

Minutes of the House Judiciary Committee at 3:30 p.m. on January 25, 2011, in Room 346-S of the Capitol.

At the annual meeting of the National Conference of Commissioners on Uniform State Laws, in July 2010, the Insurable Interest Amendment to the Uniform Trust Code was approved. The PLAC reviewed the proposed amendment and introduced this bill, which defines when a trustee of a trust has an insurable interest in the life of an individual insured under a life insurance policy that is owned by the trustee of the trust. (Attachment 2)

He also stated the amendment should have added a Section C to include the amendment be added to the Kansas Uniform Trust Code at K.S.A. 58-113.

Judge Larson also took a moment before the committee, and specifically to member Representative Annie Keuther, to give honorable mention of Professor John Keuther (deceased), stating he was a Professor at Washburn University, was considered the resident expert regarding Trusts and Probates, and would have been the person to be testifying on this bill if not for his early, unexpected death.

Chairman Kinzer requested the Revisor Staff prepare an amendment adding section C to add it to the Kansas Uniform Trust Code, for the committee to review when they work the bill.

There were no opponents.

The Hearing on **HB 2028** was closed.

The Hearing on **HB 2030 – Continuation of certain exceptions to disclosure under the open records act**, was opened.

Jill Wolters, Staff Revisor, presented an overview of the bill, as provided by Jason Thompson, Assistant Revisor. The detailed documentation provided a list of the 28 existing statutory exceptions to the Kansas Open Records Act that are scheduled for expiration in 2011, along with a summary of each section. (Attachment 3)

Ed Splichal, Acting Commissioner, for the Office of the State Bank Commissioner (OSBC), provided written testimony in support of this bill. (Attachment 4)

There were no opponents.

After some discussion, Chairman Kinzer requested the Staff Revisor prepare balloons for the following items, which were discussed by the interim committee:

1)Statute 12-5611, Amend to identify which type of actions are protected.

2)Statutes 44-1132, 75-457, and 75-723, Amend for some penalty provisions for breach of confidentiality.

The Hearing on **HB 2030** was closed.

The next meeting is scheduled for January 27, 2011. Chairman Kinzer reminded everyone the meeting will be held in the Docking Building, Room 784, instead of the usual Room 346-S in the Capitol.

The meeting was adjourned at 4:30p.m.

JUDICIARY COMMITTEE GUEST LIST

DATE: 1-25-11

NAME	REPRESENTING
Randy Hearrell	Judicial Council
Ed Larson	Judicial Council
Melissa Ward	Hein Law Firm
Wesley Kaufman	Kansas Securities Commr
Dustin Bradley	KDOT
Diane Bellquist	OSBC
Dina Fisk	VERIZON
Matt Casey	GBA
Joe Molina	KS BAR ASSN.
Natalie Haag	Security Benefit
Trudy Aron	Am Inst of Architects
Eric Stafford	KS Chamber
TOM WHITAKER	KMCA
Whitney Damron	KS Bar Assn.
Jeff Bottenberg	Polsinelli Shughart

KANSAS JUDICIAL COUNCIL

Kansas Judicial Center
301 S.W. Tenth Street, Suite 140
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

judicial.council@ksjc.state.ks.us
www.kansasjudicialcouncil.org

MEMORANDUM

TO: **House Judiciary Committee**

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

DATE: **January 25, 2011**

RE: **2011 HB 2027**

The Judicial Council recommends 2011 HB 2027, a bill amending the Kansas Rules and Regulations Filing Act, K.S.A. 77-415 *et seq.* The bill was drafted by the Council's Administrative Procedure Advisory Committee. The purpose of the bill is to resolve the confusion surrounding so-called "exempt" rules and regulations, to clarify the definition of rule and regulation, and to clarify the procedure used to adopt rules and regulations. The bill also contains a provision designed to encourage agencies to advise the public of their current opinions and approaches by issuing non-binding guidance documents. The rationale for the recommended amendments is set out in the attached report.

House Judiciary
Date 1-25-11
Attachment # 1

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

BACKGROUND

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

COMMITTEE MEMBERSHIP

The members of the Administrative Procedure Advisory Committee are:

Carol L. Foreman, Chair, Topeka; former Deputy Secretary of the Department of Administration

Yvonne Anderson, Topeka; General Counsel for the Kansas Department of Health and Environment

Martha Coffman, Lawrence; Chief Advisory Counsel for the Kansas Corporation Commission

Tracy T. Diel, Topeka; Director of the Office of Administrative Hearings

James G. Flaherty, Ottawa; practicing attorney

Jack Glaves, Wichita; practicing attorney

Hon. Steve Leben, Fairway; Kansas Court of Appeals Judge

Prof. Richard E. Levy, Lawrence; Professor at the University of Kansas School of Law

Camille A. Nohe, Topeka; Assistant Attorney General

Hon. Eric Rosen, Topeka; Kansas Supreme Court Justice

Steve A. Schwarm, Topeka; practicing attorney

John S. Seeber, Wichita; practicing attorney

Mark W. Stafford, Topeka; practicing attorney

Two additional persons with rulemaking expertise also served on a temporary basis during the study of rulemaking statutes:

Rep. Janice Pauls, Hutchinson; State Representative from the 102nd District and ranking Democrat on the Joint Committee on Rules and Regulations

Diane Minear, Tonganoxie; Legal Counsel for the Secretary of State

METHOD OF STUDY

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

COMMITTEE RECOMMENDATION

Exempt rules and regulations: the problem

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

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

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

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

The Solution: Recommended Amendments

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

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

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

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

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

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

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

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

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

Guidance documents

In Section 4 of the bill, the Committee recommends amending K.S.A. 77-438 to add a new guidance document provision to the Rules and Regulations Filing Act. The guidance document provision is designed to encourage agencies to advise the public of their current opinions and approaches by using guidance documents (also often called interpretive rules or policy statements). A guidance document, in contrast to a rule, lacks the force of law and is not binding. The section recognizes the agencies' need to use such documents to guide both agency employees and the public. The statutes and regulations an agency implements often require interpretation or entail discretion in their application, and the public has an interest in knowing the agency's position. Increasing public knowledge reduces unintentional violations and lowers transaction costs. For example, a company may find that an agency has a guidance document and that the company can reasonably comply with the document's interpretation of a statute or regulation. In that case, the company may proceed based on the guidance document rather than engaging in extensive legal consultations, regulatory proceedings, or even litigation.

Section 4 strengthens agencies' abilities to fulfill these legitimate objectives by explicitly excusing them from having to comply with formal rulemaking procedures before issuing nonbinding statements. Meanwhile, the section incorporates safeguards to ensure that agencies will not use guidance documents in a manner that would undermine the public's interest in administrative openness and accountability. The section also encourages broad public accessibility to guidance documents through agency websites.

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

KANSAS JUDICIAL COUNCIL

Kansas Judicial Center
301 S.W. Tenth Street, Suite 140
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

judicial.council@ksjc.state.ks.us
www.kansasjudicialcouncil.org

MEMORANDUM

TO: **House Judiciary Committee**
FROM: **Kansas Judicial Council - Hon. Edward Larson**
DATE: **January 25, 2011**
RE: **Judicial Council Testimony on 2011 HB 2028 Relating to the Insurable Interest Amendment to the Kansas Uniform Trust Code**

The Judicial Council Probate Law Advisory Committee (PLAC) has had an interest in the *Chawla ex rel Giesinger v. Transamerica Occidential Life Insurance Co.*, WL 405405 (E.D. Va. 2005) aff'd in part, vac'd in part, 440 F.3d 639 (4th Cir. 2006) case since 2005, when a Virginia Federal District Court applied Maryland law and held that a trust did not have an insurable interest in the life of the insured who was the settlor and the creator of a trust. This holding caused widespread concern among practitioners in the trust and estate planning areas, including the Judicial Council's PLAC. The PLAC initially agreed to study the subject and draft proposed legislation. However, the Committee decided to wait until the appellate process concluded to begin its study.

On appeal the Fourth Circuit affirmed the federal district court's decision on other grounds and vacated the portion of the federal district court's decision relating to the trust not having an insurable interest in the life of the settlor. However, it was noted by the PLAC and others who practice in the area that the Fourth Circuit did not question or criticize the district court's insurable interest analysis.

Before the PLAC started its study, the Committee became aware that the National Conference of Commissioners on Uniform State Laws was studying the issue and the PLAC decided to wait for the proposal of the Uniform Law Commission.

At the annual meeting of the National Conference of Commissioners on Uniform State Laws held in July of 2010 in Chicago, the Insurable Interest Amendment to the Uniform Trust Code was approved. The PLAC reviewed the proposed amendment and requested 2011 HB 2028 be introduced. The Probate Law Advisory Committee recommends the amendment be adopted and upon adoption be added to the Kansas Uniform Trust Code at K.S.A. 58-113.

House Judiciary
Date 1-25-11
Attachment # 2

A copy of the Uniform Law Commission's Comment to the Insurable Interest Amendment to the Uniform Trust Code is attached at pages 5 to 10.

Members of the Kansas Judicial Council Probate Law Advisory Committee:

Gerald L. Goodell, Chair	Topeka
Eric N. Anderson	Salina
Cheryl C. Boushka	Kansas City, MO
Hon. Sam K. Bruner	Overland Park
James L. Bush	Hiawatha
Tim Carmody	Overland Park
Martin B. Dickinson, Jr.	Lawrence
Mark Knackendoffel	Manhattan
Justice Edward Larson	Topeka
Philip D. Ridenour	Cimarron
Jennifer L. Stultz	Wichita
Willard B. Thompson	Wichita
Molly M. Wood	Lawrence

INSURABLE INTEREST AMENDMENTS TO THE UNIFORM TRUST CODE

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-NINETEENTH YEAR
IN CHICAGO, ILLINOIS
JULY 9-16, 2010

WITHOUT PREFATORY NOTE AND WITH COMMENTS

DRAFTING COMMITTEE ON INSURABLE INTERESTS AMENDMENTS TO THE UNIFORM TRUST CODE

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in drafting this Act consists of the following individuals:

ROGER C. HENDERSON, 5861 N. Paseo Niquel, Tucson, AZ 85718, *Chair*
TURNEY P. BERRY, 2700 PNC Plaza, Louisville, KY 40202
RICHARD C. HITE, 100 N. Broadway, Suite 950, Wichita, KS 67202
STANLEY C. KENT, 90 S. Cascade Ave., Suite 1210, Colorado Springs, CO 80903
NEAL OSSEN, 500 Mountain Rd.,West Hartford, CT 06117
STEPHEN C. TAYLOR, 810 1st St. NE, Suite 701, Washington, DC 20002
SUZANNE BROWN WALSH, P.O. Box 271820, West Hartford, CT 06127
ROBERT H. JERRY, Frederic G. Levin College of Law, SW 2nd Ave. at SW 25th St., Gainesville, FL 32611, *Reporter*

EX OFFICIO

ROBERT A. STEIN, University of Minnesota Law School, 229 19th Ave. South, Minneapolis, MN 55455, *President*
BRIAN K. FLOWERS, 1350 Pennsylvania Ave., NW, Suite 4, Washington, DC 20004, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

DAVID S. NEUFELD, 555 US Highway 1 South, Suite 230, Iselin, NJ 08830, *ABA Advisor*
DONALD O. JANSEN, 1301 McKinney St., Suite 5100, Houston, TX 77010-3095, *ABA Section Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.nccusl.org

Uniform Law Commission's Comment

Every state requires, either as a matter of statutory or common law, that a purchaser of life insurance on another individual have an insurable interest in the life of the insured. See generally Robert H. Jerry, II & Douglas R. Richmond, Understanding Insurance Law, §§ 40, 43 (LexisNexis Publishing, 4 ed., 2007), at 273-77, 293-98. The definition of insurable interest became a matter of widespread concern among trust and estate planners after *Chawla ex rel Giesinger v. Transamerica Occidental Life Insurance Co.*, 2005 WL 405405 (E.D. Va. 2005), aff'd in part, vac'd in part, 440 F.3d 639 (4th Cir. 2006), where a Virginia federal district court applying Maryland law held that a trust did not have an insurable interest in the life of the insured who was the settlor and the creator of the trust. This portion of the district court's decision was subsequently vacated by the Fourth Circuit when holding that the district court's decision should be affirmed on other grounds, but the appellate decision did not question or criticize the district court's insurable interest analysis. The Maryland legislature subsequently enacted a statute in the state's insurance code clarifying the circumstances when a trustee or trust has an insurable interest in another's life, and several other states have enacted various forms of statutory clarification designed to address the "*Chawla* problem." During this process, the American College of Trust and Estate Counsel, among others, expressed the opinion that it would be best if a uniform approach could be fashioned in resolving the matter.

Consequently, the Uniform Law Commission, after studying the issue, decided to clarify the issue with respect to the Uniform Trust Code (UTC) and established a drafting committee for that purpose. The drafting committee, consisting of knowledgeable Conference members, was assisted by representatives from the American Bar Association, the American College of Trust and Estate Counsel, and the American Council of Life Insurers, consumer advocates, and other interested parties. This amendment resulted from their efforts and is designed to be inserted at the end of Article 1 of the UTC as Section 113. In keeping with the charge to the committee, the purpose of the amendment is to clarify when, for purposes of the Code, a trustee has an insurable interest in an individual whose life is to be the subject of an insurance policy to fund the trust. Clarification of this area of law that was subjected to uncertainty by the *Chawla* decision will provide a reliable basis upon which trust and estate planning practitioners may draft trust instruments that involve the eventual payment of expected death benefits.

It should be noted that the entire amendment is placed in brackets to indicate that each state should consider whether it is needed or its adoption would be appropriate. In some states *Chawla* may not present serious problems under pre-existing insurable interest law because it may be clear that a trustee already has an appropriate insurable interest for estate planning purposes. In other states, *Chawla* would present problems but, as indicated above, the state may have already addressed the issue so that the amendment may not be needed. Currently there are at least ten states that have enacted legislation on the subject (Delaware, Florida, Illinois, Georgia, Maine, Maryland, Minnesota, South Dakota, Virginia, and Washington). In those states that do need to respond to *Chawla* (plus those that may want to revisit the matter) the amendment offers a reasonable solution that has the support of many in the estate planning field, as well as the life insurance industry.

With regard to language of the amendment, subsection (a) provides that the term "settlor" is limited to a person who *executes* the trust instrument. This is narrower than the UTC definition of "settlor," which, in addition to the person who executes the trust instrument, would include a person who merely contributes property to the trust. See UTC Section 103(15). As explained in the comment to Section 103(15), the broader definition serves a useful purpose in connection with the UTC generally; however, none of those situations relates to the issue of whose life should properly be the subject of a life insurance policy that is used to fund a trust. Moreover, to use the broader definition would needlessly complicate the issue of whose life should be the subject of insurance because it would be rare, if ever, that a life insurance policy used to fund a trust for estate planning purposes would be on the life of someone other than the settlor signing the trust or someone in whose life that settlor would have an insurable interest.
Because there are situations in which a trust instrument will be executed by a fiduciary or agent for the creator of the trust, subsection (a) also makes clear that in such circumstances the fiduciary or agent is deemed to be the equivalent of the settlor.

Subsection (b) carries forward the widely approved rule that the time at which insurable interest in a life insurance policy is determined is the date the policy is issued, otherwise understood as the inception of the policy. Thus, if on the date the policy is issued the trustee has an insurable interest in the individual whose life is insured, the policy is not subject to being declared void for lack of such an interest. Under the reasoning that an individual has an unlimited insurable interest in his or her own life, subsection (b) provides that a trustee has an insurable interest in the settlor's own life. If an individual, as settlor, has created a trust to hold a life insurance policy on his or her own life, has funded that trust with the policy or with money to pay its premiums, and has selected the trustee of the trust, it follows that the trustee should have the same insurable interest that the settlor has in his or her own life. Similarly, recognizing that an individual may purchase insurance on the life of anyone in whom that individual has an insurable interest up to, generally speaking, the amount of that interest, subsection (b) provides that the trustee has an insurable interest in an individual in whom the settlor has, or would have had if living at the time the policy was issued, an insurable interest.

Moreover, paragraph (1) of subsection (b) addresses the *Chawla* issue by referring to the jurisdiction's insurance code or other law regarding insurable interest as a separate, independent source of law for determining whether a trustee has an insurable interest in the life of an individual on whose life the trust has purchased insurance. This means that the trustee would be entitled to apply for and purchase an insurance policy not only on the life of a settlor but also on the life of any other individual in whom the settlor has an insurable interest, e.g., the spouse or children of the settlor, in the enacting jurisdiction. Exactly whose lives may be insured depends on the law of the enacting jurisdiction. In short, the amendment does not change the enacting jurisdiction's pre-existing law of insurable interest.

Paragraph (2) of subsection (b) addresses a somewhat different issue, although it also references the insurable interest law of the enacting jurisdiction. It is designed to ensure that irrevocable life insurance trusts (ILITs) are created to serve *bona fide* estate planning purposes by restricting who may be a beneficiary of insurance proceeds from a policy purchased to fund an ILIT. It establishes the requirement that the proceeds of such a life insurance policy used to

fund the trust be payable primarily to certain types of trust beneficiaries. As to the latter, paragraph (2) contains bracketed language designed to provide states with a choice with regard to who those beneficiaries might be.

One choice may be exercised by deleting all the brackets, and all the language contained within the brackets, in paragraph (2) of subsection (b). By doing so, the class of beneficiaries for whom the insurance proceeds must primarily benefit is limited to those who, in the enacting state, have an insurable interest in the life of the settlor. Depending on the law of the jurisdiction, this could mean that only those individuals traditionally recognized as having an insurable interest, such as spouses and their children, would qualify, or it could mean that additional family members, such as siblings, grandchildren, grandparents, and perhaps others, have an insurable interest in the life of the settlor. In some other jurisdictions, the law may not be clear on this point. In these jurisdictions, estate planners generally may be concerned that strictly tying the class of beneficiaries to the state's insurable interest law might unduly restrict their ability to provide appropriate legal services to their clients. To help alleviate this concern, an alternative is offered to clarify the law in these jurisdictions. To exercise this choice, the enacting jurisdiction need only remove the brackets while retaining the language contained therein, thereby adopting the language as part of the amendment.

Removing the brackets and retaining the bracketed language in paragraph (2) of subsection (b) clarifies and broadens to a limited extent the class of individuals for whom the insurance must primarily benefit. By including anyone who is related to the settlor or other insured by blood or law within the third degree, the amendment makes clear that not only parents and their children would fall in the required beneficiary category, but also that siblings, grandparents, grandchildren, great-grandparents, great-grandchildren, aunts, uncles, nephews, and nieces would also qualify. Lineal consanguinity, to use the more technical term for relation by blood, is the relationship between individuals when one directly descends from the other. Each generation in this direct line constitutes a degree. Collateral consanguinity refers to the relationship between individuals who descend from a common ancestor but not from each other. The civil law method of calculating degree of collateral consanguinity, which is used in most states, counts the number of generations from one individual, e.g., the insured, up to the common ancestor and then down to the other individual. See 1 RESTATEMENT (THIRD) OF PROPERTY (Wills and Other Donative Transfers) § 2.4 cmt. *k* (1999).

The following table identifies the relatives of an insured within three degrees of lineal and collateral consanguinity using the civil law method, with each row representing a generation.

			Great-Grandparents (3)
		Grandparents (2)	
	Parents (1)	Aunts and Uncles (3)	
INSURED	Sisters and Brothers (2)		
Children (1)	Nieces and Nephews (3)		
Grandchildren (2)			
Great-Grandchildren (3)			

The reference in subparagraph (B)(i) to relation by "law"–if that term is interpreted to have the same legal meaning as the term "affinity"–may extend the category of beneficiaries that must be primarily benefited to in-laws. If that is the case, degrees of relationship by law or affinity should be computed in the same manner as degrees of relationship by consanguinity. See State v. Hooper, 140 Kan. 481, 37 P.2d 52 (1934)(explaining, for example, that a husband has the same relation, by affinity, to his wife's blood relatives as she has to them by consanguinity, and vice versa). This would mean that a son- or daughter-in-law of the insured would be related in the first degree and a brother- or sister-in-law of the insured would be related in the second degree. A father- or mother-in-law would be related to the insured in the first degree, whereas an

aunt- or uncle-in-law would be related to the insured in the third degree. See State v. Allen, 304 N.W.2d 203, at 207 (Iowa 1981)(listing authorities on how to compute degrees of relation).

At the very least, the term "law" should be interpreted to include the relation between spouses and the relation between an adoptive parent and adopted child, if they were not already included under subparagraph (A). Additionally, in case there is any doubt as to whether an adopted grandchild, i.e., a child adopted by an insured's child, is sufficiently related to the insured, as a biological grandchild might be, to have an insurable interest under subparagraph (A), the reference in (B)(i) may ensure that the adopted grandchild falls within the required category of beneficiaries. This is because the adopted grandchild arguably would, at the very least, be related by affinity to the insured in the second degree, just as a biological child of the insured's child would be related by blood in the second degree to the insured. In other words, the adopted grandchild would be treated in the same manner as a biological grandchild for purposes of the amendment.

Stepchildren, who may not otherwise have an insurable interest in the life of the settlor or other insured under subparagraph (A) or who may not be included under subparagraph (B)(i), depending on the interpretation given to the term "law," are specifically included in subparagraph (B)(ii) to ensure that they occupy the same status as any other child of the settlor, biological or adopted.

The reason for the modifying language "if not already included under subparagraph (A)" found in subparagraph (B) of paragraph (2) of subsection (b) is to make it clear that there is no negative implication with regard to anyone related within the third degree to the insured and who would be included by virtue of the adopting jurisdiction's insurable interest law referred to in subparagraph (A). In other words, some of the people, but not all, included under subparagraph (A) will be related to the person whose life is insured within the third degree and the modifying language is designed to make it clear that subparagraph (B)(i) merely adds any others so related. The same reasoning applies to stepchildren. The adopting jurisdiction may already include them under its insurable interest law referred to in subparagraph (A). If not, however, subparagraph (B)(ii) makes sure they are included in the category of people for whom the insurance policy proceeds must primarily benefit.

Although estate planners expressed concern were a jurisdiction to delete subparagraph (B) because they felt doing so would unduly limit their ability to serve their clients' needs, there was a general consensus that including those identified in subparagraph (B) should suffice for the great majority of estate plans. Thus, estate planners strongly support the adoption of the language in subparagraph (B).

It should also be noted that, regardless of the decision relating to the choices presented by the bracketed language in paragraph (2) of subsection (b), the test concerning whether the beneficiaries designated in paragraph (2) are the primary beneficiaries of the policy proceeds takes place at the inception of the life insurance policy, i.e., when the policy is issued. The fact that there may be contingent trust beneficiaries or that the proceeds would be payable to different beneficiaries based on subsequent events or conditions is not relevant to the determination. One need only identify those trust beneficiaries that would receive the policy proceeds were the

insured life to expire immediately after the policy is issued and the trust were to terminate at the same time. Among these beneficiaries, the proceeds must be payable primarily to those specified in paragraph (2) of subsection (b). If that is so, the condition is satisfied and may not be challenged thereafter or on the basis that subsequent events might change who would receive the proceeds.

As for the term "primarily," it will often be the case that one is able to calculate that more than fifty percent of the policy proceeds will be payable to the required class of beneficiaries under paragraph (2), but this may not always be the situation. For example, if the purpose of the trust is to provide a lifetime benefit to a spouse or funds for children to obtain an education, the amount may be indeterminate. This, however, does not mean that the policy proceeds are not primarily for the benefit of these individuals if upon the inception of the policy they are the people who will immediately and mainly benefit from the trust, even though there are others not designated in paragraph (2) who may also benefit concurrently or benefit subsequently upon the satisfaction of some condition in the future. In short, the term is intended to be applied in a common sense manner rather than in a hyper-technical manner that would require that a precise dollar amount be payable to certain beneficiaries.

Finally, the amendment is drafted as it would appear in the UTC were it to be part of the Code when the latter is enacted or as it would appear as an amendment to a previously enacted version of the Code. In either case, since Section 1106 of the UTC, as originally drafted, already deals with the applicability of the UTC to trusts existing at the time of enactment, there may be no need to address that issue in this amendment. However, if an issue should arise regarding which trusts *and* life insurance policies are subject to the amendment, the following language may be helpful in resolving that issue:

> This section applies to any trust existing before, on, or after the effective date of this section, regardless of the effective date of the governing instrument under which the trust was created, but only as to a life insurance policy that is in force and for which an insured is alive on or after the effective date of this section.

Office of Revisor of Statutes
300 S.W. 10th Avenue
Suite 24-E, Statehouse
Topeka, Kansas 66612-1592
Telephone (785) 296-2321 FAX (785) 296-6668

MEMORANDUM

To: Special Committee on Judiciary

From: Jason Thompson, Assistant Revisor

Date: September 13, 2010

Subject: Kansas Open Records Act (KORA)

The committee is asked to conduct any statutorily required legislative review of existing exceptions to the Kansas Open Records Act (KORA) that are scheduled for expiration in 2011. In recent years, the Legislature has undertaken a comprehensive review of KORA in order to determine if any statutory exceptions to the law are unnecessary and could be discontinued. The 2010 Legislature extended the existence of 206 statutory exceptions to KORA until July 1, 2015.

K.S.A. 45-229 provides that all exceptions to disclosure in existence on July 1, 2000, shall expire on July 1, 2005, and any new exception created by the legislature or substantial amendment to an exception, shall expire five years after creation or amendment, unless the legislature acts to continue the exception. In the year prior to the expiration, the Revisor of Statutes is required to certify the language and citation of each exception to the Speaker of the House of Representatives and the President of the Senate.

Subsection (h) further requires the legislature to:

"(1) ...review the exception before its scheduled expiration and consider as part of the review process the following:
(A) What specific records are affected by the exception;
(B) whom does the exception uniquely affect, as opposed to the general public;
(C) what is the identifiable public purpose or goal of the exception;
(D) whether the information contained in the records may be obtained readily by alternative means and how it may be obtained;
(2) An exception may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An

identifiable public purpose is served if the legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exception and if the exception:
(A) Allows the effective and efficient administration of a governmental program, which administration would be significantly impaired without the exception;
(B) protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. Only information that would identify the individuals may be excepted under this paragraph; or
(C) protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.
(3) Records made before the date of the expiration of an exception shall be subject to disclosure as otherwise provided by law. In deciding whether the records shall be made public, the legislature shall consider whether the damage or loss to persons or entities uniquely affected by the exception of the type specified in paragraph (2)(B) or (2)(C) of this subsection (h) would occur if the records were made public."

Attachment A lists the 28 existing statutory exceptions to the Kansas Open Records Act that are scheduled for expiration in 2011 and Attachment B provides a summary of each section.

KANSAS OPEN RECORDS ACT REVIEW - 2010

K.S.A. 45-229; Certified for Calendar Year 2010; Exceptions Expire July 1, 2011

Substantially Amended Exceptions (2006)

22-4906	Criminal offender registration
22-4909	Criminal offender registration
44-1132	Discrimination in employment
60-3333	Environmental audit report
75-712c	Reports of missing persons

New Exceptions (2006)

12-5358	Audits of VoIP providers
12-5611	Topeka/Shawnee county riverfront authority
38-2310	Kansas juvenile justice code records
38-2311	Juvenile treatment records
38-2326	Juvenile offender information system
65-6154	Emergency medical services reports
71-218	Community colleges, employee evaluation documents
75-457	Substitute mailing addresses
75-723	AG abuse, neglect and exploitation of persons unit
75-7c06	Concealed firearms records

New Exceptions (2006) – Expiration by Separate Statute

9-513c	Money transmission business
40-2,118	Fraudulent insurance acts

Exceptions Listed in K.S.A. 45-229(j)

(continued in existence in section 1 of chapter 87 of the 2006 Session Laws)

1-501	Accounting firms, peer review documents
9-1303	Banking code, information sharing with commissioner
12-4516a	Expungement of city ordinance violations
38-1692	Repealed January 1, 2007 (Juvenile Justice Code revised)
39-970	Adult care home licensure act
40-4913	Insurance agents, termination reports and documents
65-525	Child care facilities, maternity centers, family day care homes
65-5117	Home health agency
65-6016	Infectious diseases, disclosure to corrections employees
65-6017	Medical tests or reports on offenders in custody
74-7508	Behavioral sciences regulatory board documents

KANSAS OPEN RECORDS ACT EXCEPTIONS SUMMARY - 2010

Section	Who exception covers (provides protection to):	Government program affected:	Type of information excepted:	Notes & comments:
1-501	firms that provide certain financial statement services	Board of Accountancy	any reports, statements, memoranda, transcripts, findings, records, or working papers prepared and any opinions formulated, in connection with any peer review	
9-513c	persons engaged in money transmission business	State Bank Commissioner	all information or reports obtained by the commissioner in the course of licensing or examining a person engaged in money transmission business	
9-1303	financial institutions	State Bank Commissioner	information sharing and exchange program with a functional regulatory agency that has overlapping regulatory jurisdiction with the department, with respect to all or part of an affiliated group that includes a financial institution	
12-4516a	persons with expunged city ordinance vioaltions	records custodians	whenever records have been expunged, custodian of the records of arrest, incarceration due to arrest or court proceedings related to the arrest, shall not disclose the arrest or any information related to the arrest, except as directed by the order of expungement or when requested by the person whose arrest record was expunged	

12-5358	VoIP providers (voice over internet protocol)	Secretary of Administration	information provided pursuant to the VoIP enhanced 911 act or the wireless enhanced 911 act treated as proprietary records withheld from the public upon request of the party submitting such records	
12-5611	Topeka/Shawnee county riverfront authority board	Topeka/Shawnee county riverfront authority	documents and records kept or prepared by the board for use in negotiations, actions or proceedings to which the authority is a party	
22-4906	certain juvenile offenders (sexually violent crime, but not off-grid or severity level 1)	sheriff's offices, KBI	court may order certain juvenile offenders to register with the sheriff, but such registration information shall not be open to inspection by the public or posted on any internet website	
22-4909	crime victims	sheriff's offices, KBI	name, address, telephone number, or other information that specifically/individually identifies victim of offender required to register, other than to law enforcement agencies	
38-1692				Repealed January 1, 2007 (with enactment of Revised Juvenile Justice Code)
38-2310	certain juveniles	law enforcement officers and agencies and municipal courts	limited disclosure of records when offender under 14; same disclosure as for adults when offender over 14; information identifying victims and alleged victims of sex offenses shall not be disclosed or open to public inspection under any circumstances; records, reports and information obtained as part of juvenile intake and assessment process shall be confidential	

38-2311	certain juveniles	courts	limited disclosure of diagnostic, treatment or medical records	
38-2326	juvenile offenders	law enforcement agencies, KBI	limited disclosure of juvenile offender information maintained in the juvenile offender information system	
39-970	applicants for employment in adult care homes	adult care home operators	criminal history record information received by operators	
40-2,118	insurers	Commissioner of Insurance	any antifraud plan, or any amendment thereof, submitted to the commissioner for informational purposes only	
40-4913	insurers	Commissioner of Insurance	any document, material or other information in the control or possession of the department that is furnished by an insurance entity or an employee or agent thereof acting on behalf of such insurance entity, or obtained by the insurance commissioner in an investigation	
44-1132	victims of domestic violence or sexual assault	employers	To the extent allowed by law, employer shall maintain the confidentiality of any employee requesting leave for certain purposes related to domestic violence or sexual assault, as well as the confidentiality of any supporting documentation provided by the employee to the employer relating to such leave	
60-3333	businesses	government employees and regulatory agencies	material that is included in an environmental audit report generated during an environmental audit (a voluntary, internal assessment, evaluation or review)	

3-6

65-525	child care facilities, maternity centers, family day care homes	Department of Health and Environment	records in the possession of the department of health and environment or its agents regarding child care facilities, maternity centers or family day care homes; records containing the name, address and telephone number of a child care facility, maternity center or family day care home in the possession of the department of health and environment or its agents	
65-5117	applicants for employment in home health agency	home health agency operators	criminal history record information received by operators	
65-6016	persons in custody of the commissioner of juvenile justice or the secretary of corrections	corrections employees and physicians	a physician performing medical or surgical procedures on a patient who the physician knows has an infectious disease or has had a positive reaction to an infectious disease test may disclose such information to corrections employees who have been or will be placed in contact with body fluid of such patient; information shall be confidential and shall not be disclosed by corrections employees except as may be necessary in providing treatment for such patient	
65-6017	persons in custody of the commissioner of juvenile justice or the secretary of corrections	corrections employees and courts	results of tests or reports, or information therein, obtained under court order when a corrections employee has been placed in contact with body fluid from one or more offenders while performing duties within the scope of such employee's duties as a corrections employee	

65-6154	persons using emergency medical services	Board of Emergency Medical Services	limited disclosure of emergency medical services information provided to the board	
71-218	full-time employees of community colleges	board of trustees of a community college	Except by order of a court of competent jurisdiction, evaluation documents and responses thereto shall be available only to the evaluated employee, the board, the appropriate administrative staff members designated by the board, the community college attorney upon request of the board, the board and the administrative staff of any community college to which such employee applies for employment, and other persons specified, in writing, by the employee to the employee's board.	
74-7508	practitioners of the behavioral sciences	behavioral sciences regulatory board	limited disclosure of any complaint or report, record or other information relating to a complaint which is received, obtained or maintained by the behavioral sciences regulatory board	
75-457	victims of domestic violence, sexual assault, trafficking or stalking	Secretary of State	any records in a program participant's file except: if requested by a law enforcement agency; if directed by a court order; or if requested by a state or local agency, to verify the participation of a specific program participant, in which case the secretary may only confirm participation in the program	

75-712c	victims of domestic violence or sexual assault	law enforcement agencies	The law enforcement agency investigating the report shall not give information to the reporting party if the law enforcement agency has reason to believe the missing person is an adult or an emancipated minor and is staying at or has made contact with a domestic violence or sexual assault program and does not expressly consent to the release of this information	
75-723	abused, neglected, exploited persons	Attorney General; abuse, neglect and exploitation of persons unit	the information obtained and the investigations conducted by the unit shall be confidential as required by state or federal law	
75-7c06	licensees under the personal and family protection act	Attorney General	persons applying for licenses or persons who have had a license denied shall be confidential and shall not be disclosed in a manner which enables identification of any such person	

700 S.W. Jackson
Suite 300
Topeka, KS 66603-3796

Kansas

phone: 785-296-2266
fax: 785-296-0168
www.osbckansas.org

Edwin G. Splichal, Acting Commissioner

Office of the State Bank Commissioner

Sam Brownback, Governor

January 25, 2011

SPECIAL COMMITTEE ON JUDICIARY

Mr. Chairman and Members of the Committee:

I am Ed Splichal, Acting Commissioner, for the Office of the State Bank Commissioner (OSBC) and I offer this written testimony in favor of continuing the exception to the Kansas Open Records Act in K.S.A. 9-513c as proposed in House Bill No. 2030.

The OSBC is responsible for enforcing the Money Transmitter Act (Act), K.S.A. 9-508 through K.S.A. 9-513d. Pursuant to K.S.A. 9-513c, all information or reports obtained through the enforcement of the Act shall be confidential and may not be disclosed except to other state or federal agencies that have supervisory authority over money transmission, to law enforcement agencies, and to prosecutorial agencies.

The information that may be obtained during examinations of money transmitter businesses may include individual customer information that could increase the risk of identity theft, loss or other damage to customers. Additionally, the licensing and/or examination process may include a money transmitter's business plan, strategic plan, financial status, and internal policies. This information is proprietary and the public sharing of such information could create a competitive advantage or disadvantage, depending on who is privy to the information. If information regarding the financial status of a money transmitter were released to the general public it could erode the business advantage and jeopardize the money transmitter's position in the marketplace.

Maintaining the confidentiality of the information gathered and created during examinations is important to the effective and efficient regulation of money transmission. This exception to the Kansas Open Records Act provides an identifiable public purpose, the exception is no broader than necessary, and it is sufficiently compelling to overcome the public policy in favor of open government. I would respectfully request the above referenced statutory exception be continued as proposed.

Respectfully,

Ed Splichal
Acting Commissioner

House Judiciary
Date 1-25-11
Attachment # 4