Supplemental Materials:

Administrative Enforcement and Procedures

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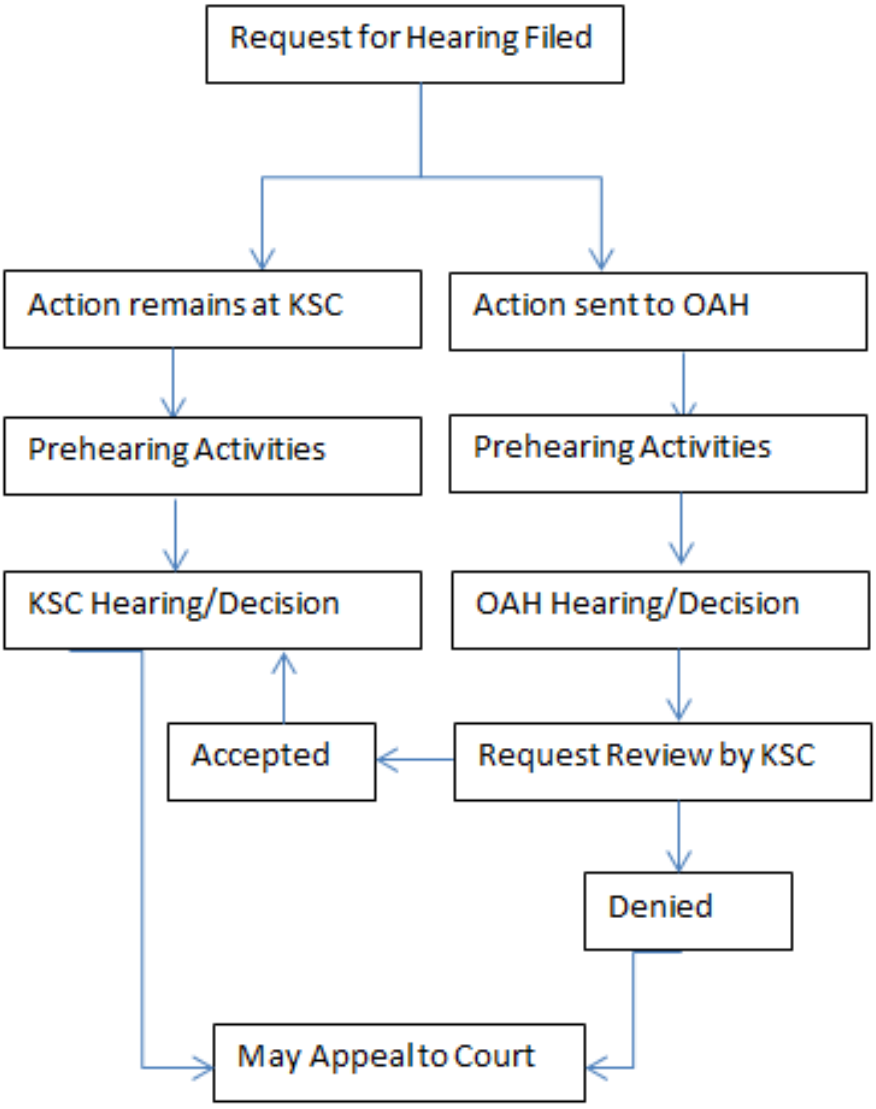
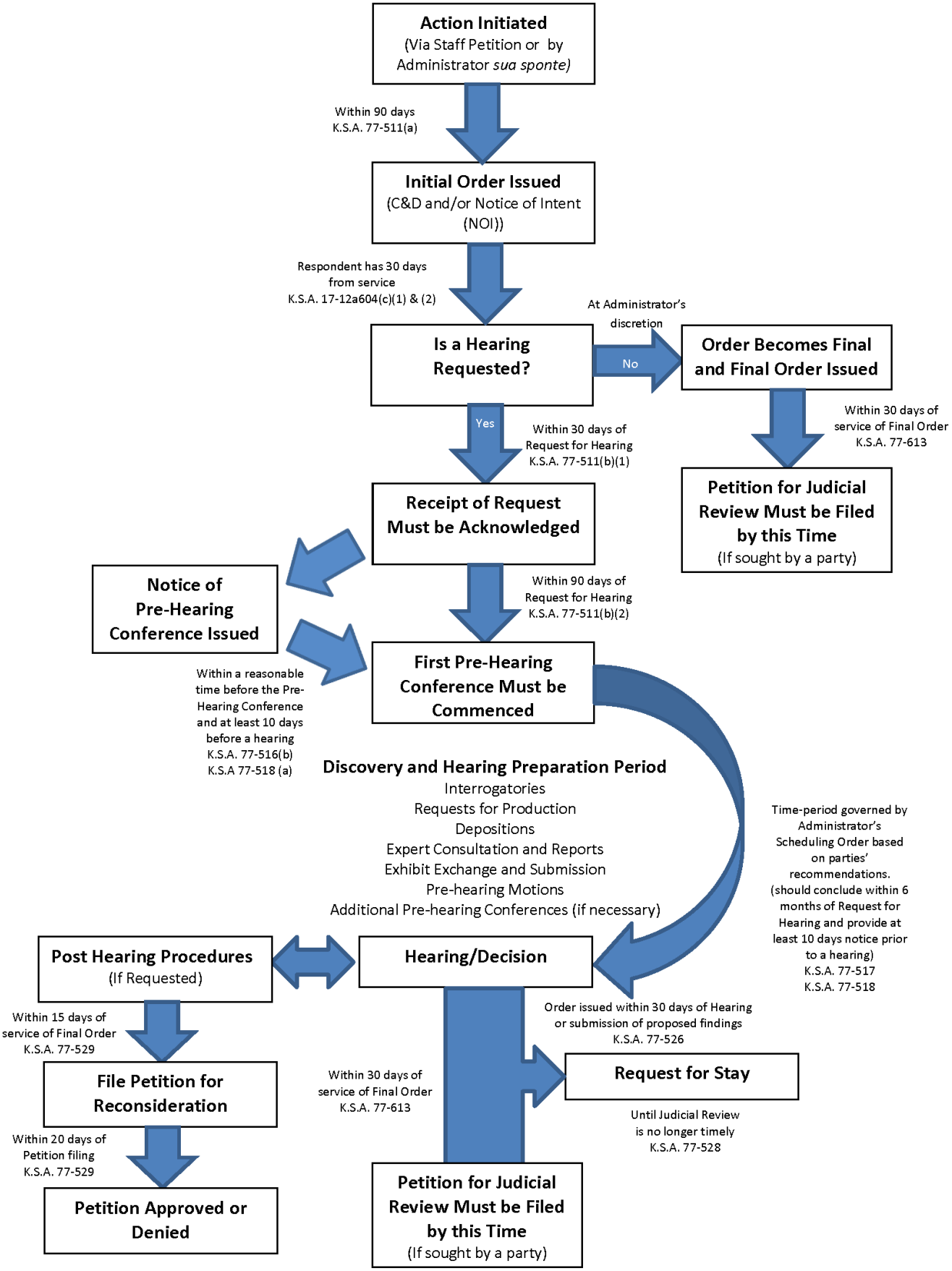
Kansas
Office of the Securities Commissioner

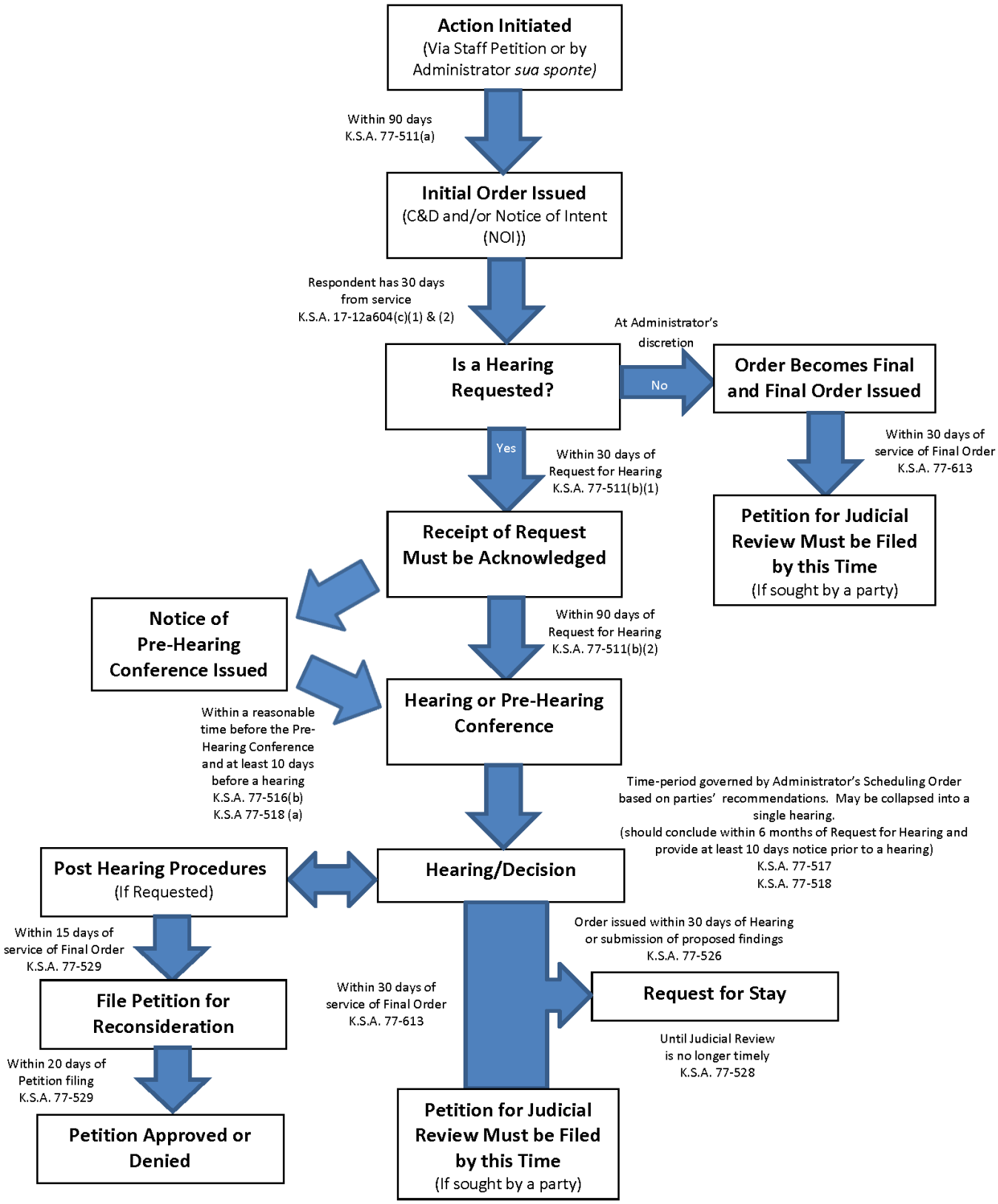
OAH v. KSC Processes



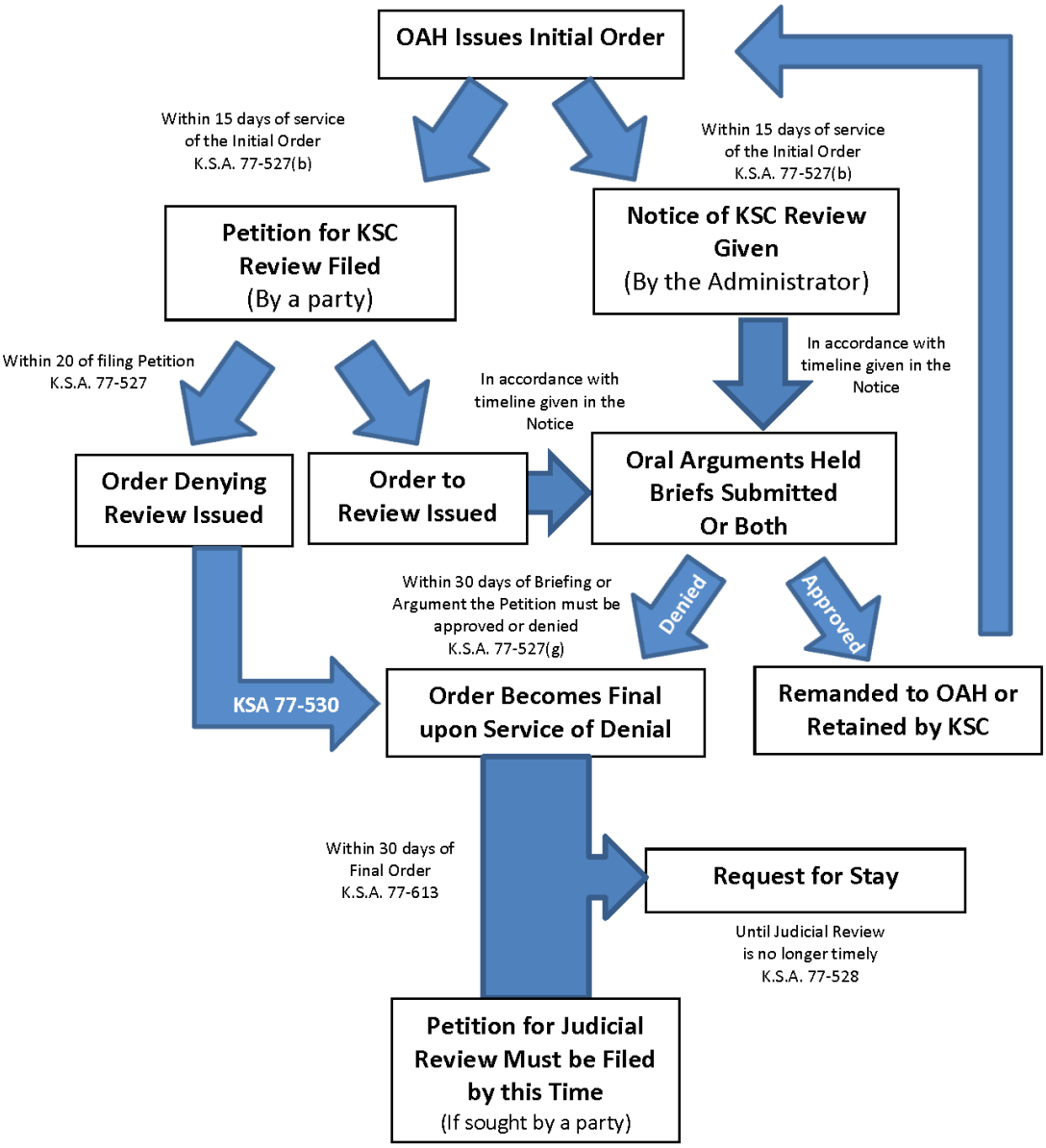
Formal Hearing



Conference Hearing



Interaction with OAH and Post-Order Procedures



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Excerpts from Kansas Statutes Governing Administrative Procedure

K.S.A. 17-12a604. Administrative Enforcement. (a) *Cease and desist order.* If the administrator finds that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act, the administrator may: (1) Issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary or appropriate to comply with this act; (2) issue an order denying, suspending, revoking, or conditioning the exemptions for a broker-dealer under K.S.A. 17-12a401(b)(1)(D) or (F), and amendments thereto, or an investment adviser under K.S.A. 17-12a403(b)(1)(C), and amendments thereto; or (3) issue an order under K.S.A. 17-12a204, and amendments thereto.

(b) *Additional administrative sanctions and remedies.* If the administrator finds, by written findings of fact and conclusions of law, that a person has violated this act or a rule adopted or order issued under this act, the administrator, in addition to any other power granted under this act, may enter an order against the person containing one or more of the following sanctions or remedies: (1) A civil penalty up to $25,000 for each violation. If any person is found to have violated any provision of this act, and such violation is committed against elder or disabled persons, as defined in K.S.A. 50-676, and amendments thereto, in addition to any civil penalty otherwise provided by law, the administrator may impose an additional penalty not to exceed $15,000 for each such violation. The total penalty against a person shall not exceed $1,000,000; (2) a bar or suspension from association with a broker-dealer or investment adviser registered in this state; (3) an order requiring the person to pay restitution for any loss or disgorge any profits arising from the violation, including, in the administrator's discretion, the assessment of interest from the date of the violation at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto; or (4) an order charging the person with the actual cost of the investigation or proceeding.

(c) *Procedures for orders.* (1) An order under subsection (b) shall not be entered unless the administrator first provides notice and opportunity for hearing in accordance with the provisions of the Kansas administrative procedures act. (2) An order under subsection (a) is effective on the date of issuance. Upon issuance of the order, the administrator shall promptly serve each person subject to the order with a copy of the order. The order must include a statement of the reasons for the order and notice that upon receipt of a written request the matter will be set for a hearing which shall be conducted in accordance with the provisions of the Kansas administrative procedures act. If a person subject to the order does not request a hearing and none is ordered by the administrator within 30 days

after the date of service of the order, the order becomes final as to that person by operation of law. If a hearing is requested or ordered, the administrator, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend it until final determination. (3) An order under subsection (a) may contain a notice of the administrator's intent to seek administrative sanctions or remedies under subsection (b). If the person subject to the order does not request a hearing and none is ordered by the administrator within 30 days after service of the order, the administrator may modify the order to include sanctions or remedies under subsection (b). If a hearing is requested or ordered, the administrator, after notice and opportunity for hearing, shall by written findings of fact and conclusions of law vacate, modify, or make permanent the order, and the administrator may modify the order to include sanctions or remedies under subsection (b).

(d) *Filing of certified final order with court; effect of filing.* If a petition for judicial review of a final order is not filed in accordance with K.S.A. 17-12a609, and amendments thereto, the administrator may file a certified copy of the final order with the clerk of a court of competent jurisdiction. The order so filed has the same effect as a judgment of the court and may be recorded, enforced, or satisfied in the same manner as a judgment of the court.

(e) *Enforcement by court; further civil penalty.* If a person does not comply with an order under this section, the administrator may petition a court of competent jurisdiction to enforce the order. The court may not require the administrator to post a bond in an action or proceeding under this section. If the court finds, after service and opportunity for hearing, that the person was not in compliance with the order, the court may adjudge the person in civil contempt of the order. The court may impose a further civil penalty against the person for contempt in an amount not greater than $25,000 for each violation and may grant any other relief the court determines is just and proper in the circumstances.

K.S.A. 17-12a610. Jurisdiction. (a) *Sales and offers to sell.* K.S.A. 17-12a301, 17-12a302, 17-12a401(a), 17-12a402(a), 17-12a403(a), 17-12a404(a), 17-12a501, 17-12a506, 17-12a509, and 17-12a510, and amendments thereto, do not apply to a person that sells or offers to sell a security unless the offer to sell or the sale is made in this state or the offer to purchase or the purchase is made and accepted in this state.

(b) *Purchases and offers to purchase.* K.S.A. 17-12a401(a), 17-12a402(a), 17-12a403(a), 17-12a404(a), 17-12a501, 17-12a506, 17-12a509, and 17-12a510, and amendments thereto, do not apply to a person that purchases or offers to purchase a security unless the offer to purchase or the purchase is made in this state or the offer to sell or the sale is made and accepted in this state.

(c) *Offers in this state.* For the purpose of this section, an offer to sell or to purchase a security is made in this state, whether or not either party is then present in this state, if the offer: (1) Originates from within this state; or (2) is directed by the offeror to a place in this state and received at the place to which it is directed.

(d) *Acceptances in this state.* For the purpose of this section, an offer to purchase or to sell is accepted in this state, whether or not either party is then present in this state, if the acceptance: (1) Is communicated to the offeror in this state and the offeree reasonably believes the offeror to be present in this state and the acceptance is received at the place in this state to which it is directed; and (2) has not previously been communicated to the offeror, orally or in a record, outside this state.

(e) *Publications, radio, television or electronic communications.* An offer to sell or to purchase is not made in this state when a publisher circulates or there is circulated on the publisher's behalf in this state a bona fide newspaper or other publication of general, regular and paid circulation that is not published in this state, or that is published in this state but has had more than two-thirds of its circulation outside this state during the previous 12 months or when a radio or television program or other electronic communication originating outside this state is received in this state. A radio or television program, or other electronic communication is considered as having originated in this state if either the broadcast studio or the originating source of transmission is located in this state, unless: (1) The program or communication is syndicated and distributed from outside this state for redistribution to the general public in this state; (2) the program or communication is supplied by a radio, television or other electronic network with the electronic signal originating from outside this state for redistribution to the general public in this state;
(3) the program or communication is an electronic communication that originates outside this state and is captured for redistribution to the general public in this state by a community antenna or cable, radio, cable television or other electronic system; or (4) the program or communication consists of an electronic communication that originates in this state, but which is not intended for distribution to the general public in this state.

(f) *Investment advice and misrepresentations.* K.S.A. 17-12a403(a), 17-12a404(a), 17-12a405(a), 17-12a502, 17-12a505, and 17-12a506, and amendments thereto, apply to a person if the person engages in an act, practice, or course of business instrumental in effecting prohibited or actionable conduct in this state, whether or not either party is then present in this state.

K.S.A. 17-12a611. Service of Process. (a) *Signed consent to service of process.* A consent to service of process required by this act must be signed and filed in the form required by a rule or order under this act. A consent appointing the administrator the person's agent for service of process in a noncriminal action or proceeding against the person, or the person's successor or personal representative under this act or a rule adopted or order issued under this act after the consent is filed, has the same force and validity as if the service were made personally on the person filing the consent. A person that has filed a consent complying with this subsection in connection with a previous application for registration or notice filing need not file an additional consent.

(b) *Conduct constituting appointment of agent for service.* If a person, including a nonresident of this state, engages in an act, practice, or course of business prohibited or

made actionable by this act or a rule adopted or order issued under this act and the person has not filed a consent to service of process under subsection (a), the act, practice, or course of business constitutes the appointment of the administrator as the person's agent for service of process in a noncriminal action or proceeding against the person or the person's successor or personal representative.

(c) *Procedure for service of process.* Service under subsection (a) or (b) may be made by providing a copy of the process to the office of the administrator, but it is not effective unless: (1) The plaintiff, which may be the administrator, promptly sends notice of the service and a copy of the process, return receipt requested, to the defendant or respondent at the address set forth in the consent to service of process or, if a consent to service of process has not been filed, at the last known address, or takes other reasonable steps to give notice; and (2) the plaintiff files an affidavit of compliance with this subsection in the action or proceeding on or before the return day of the process, if any, or within the time that the court, or the administrator in a proceeding before the administrator, allows.

(d) *Service in administrative proceedings or civil actions by administrator.* Service pursuant to subsection (c) may be used in a proceeding before the administrator or by the administrator in a civil action in which the administrator is the moving party. In an administrative proceeding under this act, service of process may also be made in accordance with the Kansas administrative procedure act.

(e) *Opportunity to defend.* If process is served under subsection (c), the court, or the administrator in a proceeding before the administrator, shall order continuances as are necessary or appropriate to afford the defendant or respondent reasonable opportunity to defend.

K.S.A. 77-531. Service of Order or Notice. Service of an order or notice shall be made upon the party and the party's attorney of record, if any, by delivering a copy of the order or notice to the person to be served or by mailing a copy of the order or notice to the person at the person's last known address. Service shall be presumed if the presiding officer, or a person directed to make service by the presiding officer, makes a written certificate of service. Delivery of a copy of an order or notice means handing the order or notice to the person or leaving the order or notice at the person's principal place of business or residence with a person of suitable age and discretion who works or resides therein. Service by mail is complete upon mailing. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or order and the notice or order is served by mail, three days shall be added to the prescribed period.

K.A.R. 81-11-5. Request for Hearing. (a) When the commissioner has entered any emergency or summary order or given notice of intent to issue any order, an aggrieved party may file a written request for a hearing. The request shall be filed in the office of the commissioner within 30 days of service of the order or notice of intent.

(b) The request for hearing shall contain the following: (1) the title of the matter as written on the commissioner's order or notice; (2) the docket number of the matter; (3) a request for a hearing and if allegations of the commissioner's staff are disputed and the aggrieved party desires a formal adjudicatory proceeding, a statement to that effect; (4) a detailed statement of what allegations in the staff's pleadings are disputed by the aggrieved party. All allegations not disputed in the request shall be found to be admitted by the aggrieved party; (5) the name, address, and phone number of any local and any foreign counsel; and (6) a sworn verification by the requesting party that the contents of the request are true. If the aggrieved party is an individual, the verification shall be signed by the individual. If the aggrieved party is a corporation, the verification shall be signed by the president or the chairman of the board of directors. If the aggrieved party is a partnership, the verification shall be signed by a general partner. If the aggrieved party is a governmental unit, the verification shall be signed by the highest official in the unit or a deputy.

(c) Failure of an aggrieved party to file a request for hearing in substantial compliance with this section shall constitute grounds for denial of the request.

(d) No hearing shall be granted to an aggrieved party unless a timely request for hearing has been filed, but the commissioner may grant a hearing upon the commissioner's own motion or upon the request of the commissioner's staff.

K.A.R. 81-11-6. Conference adjudicative proceedings. Unless an aggrieved party has requested a formal adjudicatory proceeding in accordance with K.A.R 81-11-5(b) (3) and has disputed staff allegations in accordance with K.A.R. 81-11-5(b) (4), or unless another type of proceeding is ordered or otherwise required, any proceeding granted shall be a conference adjudicative proceeding.

K.A. R. 81-11-7. Appearances. (a) The filing of a request for hearing shall constitute a general appearance before the commissioner by the requesting party and shall act as an acknowledgment that service of the order or notice was complete upon the requesting party. No special appearance shall be recognized.

(b) If an aggrieved party appears in any proceeding with an attorney, service upon the aggrieved party is complete upon service of the attorney.

(c) Any attorney who will appear with an aggrieved party and who was not named in the request for hearing, shall file a written appearance stating the attorney's name, address and telephone number, and specifying whom the attorney will represent in the proceeding.

(d) The person who signed the verification on the request for hearing shall appear personally at the hearing. Failure to so appear shall constitute grounds for default against the aggrieved party who filed the request for hearing. Appearance by attorney only or by another controlling person shall be insufficient unless permitted by the commissioner for

good cause shown. Any person so permitted to appear shall verify an amended request for hearing.

K.S.A. 77-524. Evidence; Official Notice. (a) A presiding officer need not be bound by technical rules of evidence, but shall give the parties reasonable opportunity to be heard and to present evidence, and the presiding officer shall act reasonably without partiality. The presiding officer shall give effect to the rules of privilege recognized by law. Evidence need not be excluded solely because it is hearsay.

(b) All testimony of parties and witnesses shall be made under oath or affirmation and the presiding officer shall have the power to administer an oath or affirmation for that purpose.

(c) Statements presented by nonparties in accordance with paragraph (c) of K.S.A. 77-523 may be received as evidence.

(d) Any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party.

(e) Documentary evidence may be received in the form of a copy or excerpt. Upon request, parties shall be given an opportunity to compare the copy with the original if available.

(f) Official notice may be taken of (1) any matter that could be judicially noticed in the courts of this state, (2) the record of other proceedings before the state agency, (3) technical or scientific matters within the state agency's specialized knowledge, and (4) codes of standards that have been adopted by an agency of the United States, of this state or of another state or by a nationally recognized organization or association. Parties shall be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on matters or material noticed, of the specific matters or material noticed and the source thereof, including any staff memoranda and data, and be afforded an opportunity to contest and rebut the matters or material so noticed.

K.A.R. 81-11-10. Evidence. The presiding officer may relax the rules of evidence if it will aid in ascertaining the facts. The presiding officer shall admit hearsay evidence not otherwise admissible:

(a) unless a party objects to the proffered evidence and states that; (1) the party knows that a fact contained therein and offered to prove the truth of the matter is false; or (2) the party does not know whether a fact contained therein and offered to prove the truth of the matter is true and the presiding officer finds that after being given a reasonable time the party has been unable to ascertain the truth of the matter and has made a diligent effort to do so; or

(b) if the presiding officer finds that the evidence will aid in ascertaining the facts; or

(c) if the evidence proffered consists of answers to questionnaires directed to persons allegedly solicited to purchase or sell securities who are so numerous that it is impractical to call them as witnesses, all answers to questionnaires which were returned to the questioning party are proffered, and the evidence is offered to show a pattern in the alleged solicitations or in the class of persons allegedly solicited. The presiding officer may allow any other party a reasonable time to direct cross-examination questionnaires to and receive answers from such or similar persons allegedly solicited.