OFFICE OF THE
KANSAS SECURITIES COMMISSIONER

Securities Administrative Procedure Manual

An Overview of Administrative Hearings before the Office of the Kansas Securities Commissioner

Kansas
Office of the Securities Commissioner

Securities Administrative Procedure Manual

Fall 2014 – 1st Edition

The mission of the Office of the Kansas Securities Commissioner (KSC) is to protect and inform Kansas investors; to promote integrity, fairness, and full disclosure in financial services; and to foster capital formation.

The information contained in this guide is provided solely for educational and informational purposes, and may not be construed or relied upon as individual legal counsel or to supersede any procedural provision in the Kansas Uniform Securities Act, Regulations, or the Administrative Procedure Act. Statutory citations are included herein and should be reviewed independently for any amendments or deletion. You should retain counsel if you have questions about the statutes involved or the information contained in this manual.

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More information is available at our website: ksc.ks.gov

Letter from the Commissioner

Dear Reader:

The Office of the Kansas Securities Commissioner (KSC) exists to ensure that investors and financial professionals alike reap the benefits of participating in a fraud-free market place. Since becoming the first state in the country to regulate the sale of securities 100 years ago, Kansas has been leading the way in providing important investor protections while fostering a growth-oriented environment where ethical markets, and the businesses and financial professionals who fuel them, can thrive.

My office strikes this important balance between investor protection and capital formation in part by providing a fair and impartial administrative hearing process for the resolution of investor complaints investigated and prosecuted by KSC staff. This Securities Administrative Procedure Manual has been compiled to provide a comprehensive overview of the rules, regulations, informal guidelines, and timelines that apply to administrative hearings conducted before the Kansas Securities Commissioner. Through this informational resource, it is my goal to provide complainants, respondents, and their respective counsel with a transparent and predictable hearing process so that complaints can be resolved in a timely and just manner.

Josh Ney
Kansas Securities Commissioner

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About the Office of the Kansas Securities Commissioner

Kansas Securities Regulation

In 1911, Kansas became the first state to pass a law regulating the sale of investments. According to J.N. Dolley, a driving force for the law's passage, it was an effort to prevent the sale of securities by promoters who promised rain, but delivered only "blue sky." In the next few years, other states passed similar laws and today, all states' securities laws are referred to as "blue sky laws". Following the great stock market crash of 1929, the federal government began to regulate investment activity with the passage of the Securities Act of 1933, and the creation of the U.S. Securities & Exchange Commission in 1934.

Role of the Office of the Kansas Securities Commissioner

The Office of the Kansas Securities Commissioner is an independent state agency funded entirely by industry fees. The agency regulates and monitors the offering of securities and financial services within Kansas by registering securities; broker-dealers and their agents, and investment advisers and; their representatives. Agency staff conduct periodic examinations to determine whether registered persons comply with industry, legal and accounting standards specified by the Kansas Uniform Securities Act (KUSA) and Kansas Administrative Regulations (KARs). Staff also investigate potential violations of statutes and regulations under KUSA, and Special Agents with law enforcement powers conduct criminal investigations of alleged frauds or other unlawful acts. The staff has the authority to investigate any investment-related activity that occurs in Kansas, even when companies or individuals from outside of the state are involved.

Assistance

Agency staff are available any time to assist you in understanding and complying with the provisions of the Kansas Uniform Securities Act or to make presentations to groups of industry professionals regarding regulatory issues pertaining to the securities industry in Kansas.

Administrative Overview

What is an Administrative Hearing?

Kansas law provides that some agencies can operate similar to a court under certain circumstances. An agency uses this authority to conduct administrative hearings. Administrative hearings have parties similar to the parties in Court. There is a "Judge," sometimes called the "presiding officer" or the "adjudicator." The presiding officer is appointed by the agency to oversee administrative hearings as a referee of sorts. Often, staff from the agency bring an action advocating for a specific result. The agency staff acting in this role are referred to as the "Petitioning Staff" and are sometime said to be "prosecuting" the action. Individuals or companies against whom an action is brought are called the "respondent(s)". Agencies with administrative hearing authority sometimes investigate, prosecute, and decide agency actions internally. These administrative decisions can be subject to judicial review after the agency makes a final determination.

In order for an agency to have the ability to conduct administrative hearings, the Kansas Legislature must grant the authority to the agency by passing a law. The law specifies who is subject to agency action and lays out the actions the agency is able to take. The Kansas Administrative Procedure Act (located at **K.S.A. 77-501** *et seq.*) can also dictate the administrative hearing process if the Kansas Legislature applies it to an agency action. Additionally, Kansas has an Office of Administrative Hearings (OAH). If an agency does not wish to hold hearings, the agency can instead appoint a hearing officer at the OAH to act as the presiding officer. Kansas law also dictates that OAH review certain administrative decisions in some circumstances.

This guide is intended to give some basic information about administrative proceedings conducted by the Office of the Kansas Securities Commissioner (KSC). It is not intended to provide information about administrative hearings in front of other agencies. Each agency that has administrative hearing authority can operate differently from other agencies with similar authority so it is important to review the particular rules for each agency.

What is a Security?

The KSC regulates securities, which begs the question: "What is a Security?" A Security is basically an investment. **K.S.A. 17-12a102(28)** provides the definition of a security. The definition is very broad and includes those things commonly known as securities, such as notes, stocks, bonds, and options, but also includes much broader concepts through the inclusion of the term "investment contract". Generally speaking, if a financial instrument is considered an "investment" it is likely a security. All Securities sold in Kansas must be registered with the KSC unless the securities or transactions are exempt. See K.S.A. 17-12a301 through 17-12a306. Additionally, those who sell securities or advise in the purchase or sale of securities in Kansas must be registered unless they comply with an

exemption. See **K.S.A. 17-12a401** through **K.S.A. 17-12a406**.

There are numerous exemptions contained in KUSA so one should consult with counsel or the KSC when attempting to determine if registration is required. KSC administrative actions can come about if the KSC detects the sale of unregistered securities, unregistered persons, fraud in the sale of securities, or other violations of KUSA. Often times people deal with securities without thinking of them as such. Sometimes people are merely trying to raise capital for a small business and may not be aware of the laws related to securities or that they are operating under an exemption. However, it is easy to stray into illegal territory when dealing with securities and there are very significant penalties for doing so. The KSC attempts to educate and assist individuals and companies in complying with the law. At the same time, it is up to each person to know the law and operate in accordance with it at all times.

KSC Administrative Hearings

KSC Administrative proceedings have the parties and function similar to a judicial proceeding but there are quite a few differences. There are three types of hearings: (1) Summary Hearings; (2) Conference Adjudicatory Hearings ("Conference Hearings"); and (3) Formal Adjudicatory Hearings ("Formal Hearings"). Summary Hearings are reserved primarily for granting registration matters and are not conducted in an adversarial situation. See **K.A.R. 81-11-4**. Conference Hearings are expedited hearings that do not allow for discovery and only the parties speak at the hearing. This booklet deals mostly with formal hearings because they are the most complex and have the most procedural steps. Conference Hearings and Formal Hearings are discussed in more detail in the "Hearings" Section of this booklet.

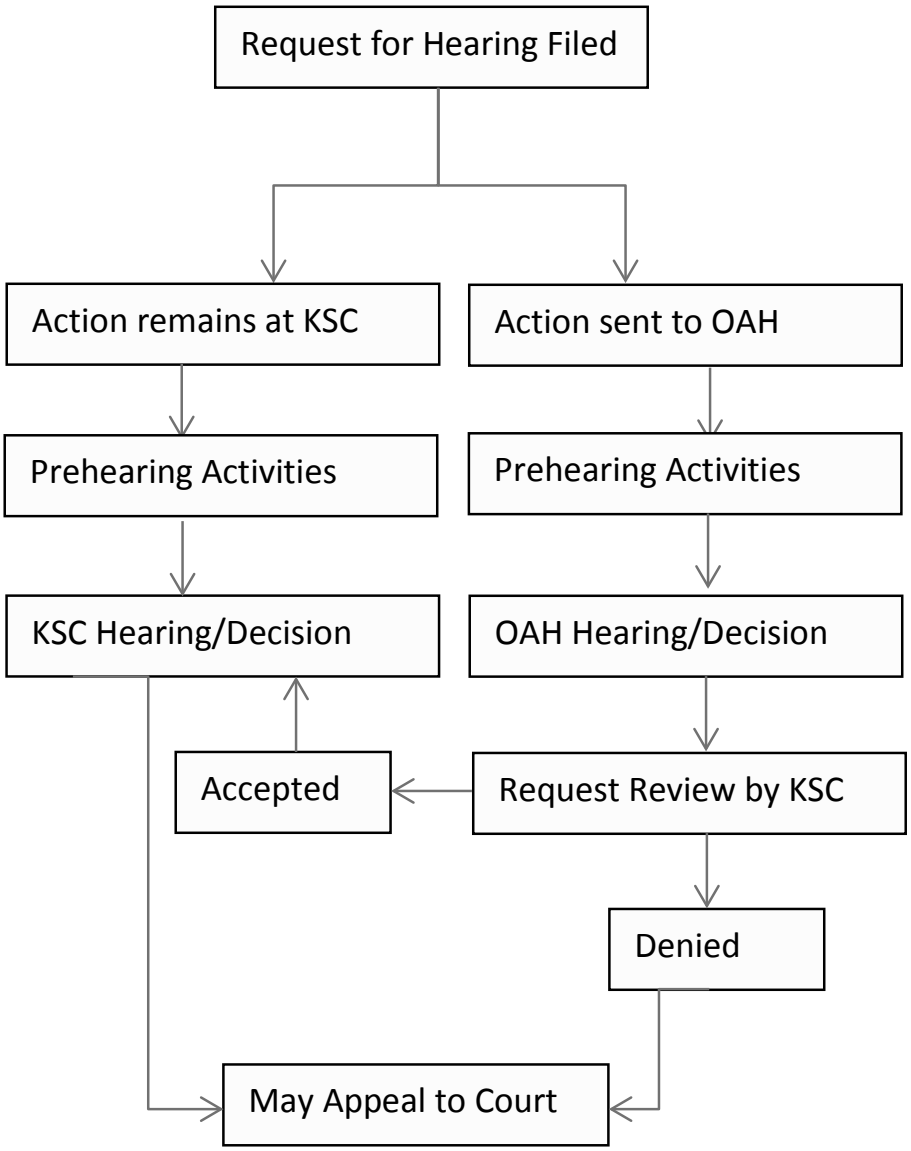
The Kansas Securities Commissioner (also, referred to as the "Administrator") is the head of the KSC and the final agency decision-maker for KSC administrative actions. It is the Administrator's role to referee the administrative proceedings and ultimately issue a decision. The Administrator may or may not have his own counsel who will generally be an employee of the KSC. Additionally, KSC staff will petition the Administrator for various remedies. In Formal Adjudicative Hearings, the KSC Staff may put on witnesses, such as investigators, who are also employees of the KSC. Finally, the individuals and companies that are subject to administrative action are parties to KSC administrative actions. Although various parties in KSC Administrative Proceedings may be employed by the KSC, there are rules that govern what can be discussed between the parties without all parties present. These are called "ex parte" communications, or, communications without all parties present. Other than situations provided by law, KSC Staff on the investigative and petitioning side will not communicate with the Administrator on substantive issues about the matter outside of hearings and pre-hearing conferences. While communications about logistical matters may be discussed, generally, the Administrator's counsel, if one is appointed, will handle these

communications. The Administrator will remain an unbiased adjudicator on the action until he or she renders an ultimate decision.

That being said, the Kansas Uniform Securities Act grants the Administrator the authority to issue a Cease and Desist Order (C&D) if he believes that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of the KUSA. See **K.S.A. 17-12a604(a)**. A C&D may be issued *ex parte* on the Administrator's own initiative or in response to a petition filed by KSC Staff. No hearing is required prior to the issuance of this initial order, however, a party will have an opportunity to request a hearing before the order becomes final. The C&D is effective at the time of its issuance but may be vacated after a hearing if the Administrator determines that the complaint is without merit after receiving evidence. A C&D may also contain a Notice of Intent (NOI) to pursue further action. Because the NOI is also issued *ex parte*, the further action disclosed in the NOI may not occur until respondents are given notice and an opportunity to request a hearing. After that opportunity expires, the action disclosed in the NOI may be taken and a final order may be issued. As long as respondents are given notice of the action and decline to request a hearing in the time allowed, it is possible that a final binding order can be issued *ex parte.* It is, therefore, important that parties be aware of their rights and responsibilities.

In some circumstances, the Administrator, may send administrative cases to OAH for determination. OAH is an agency independent of the KSC with its own hearing officers that preside over numerous types of administrative proceedings. If the Administrator sends an action to OAH, the rules and procedures generally used by OAH will govern the proceedings, although specific KSC statutes and regulations will also have an impact. If OAH decides an action, the respondents can request that the Kansas Securities Commissioner review OAH's decision. The Kansas Securities Commissioner can accept or decline this request. Regardless of whether a decision is rendered by OAH or the Kansas Securities Commissioner, the decision is reviewable in District Court pursuant to the Kansas Act for Judicial Review. See **K.S.A. 17-12a609** and **K.S.A. 77-601** *et seq*.

OAH v. KSC Processes

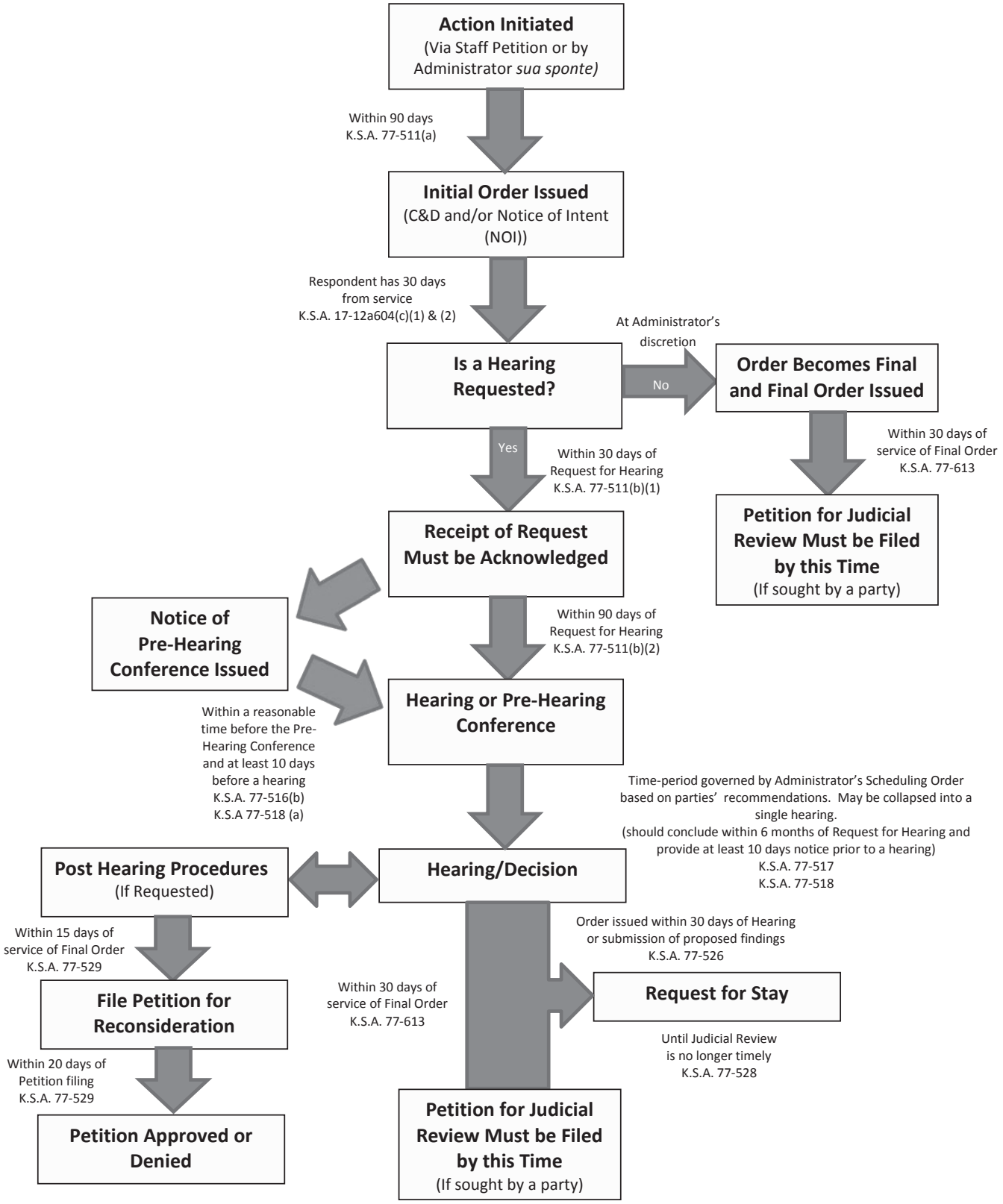


According to the Kansas Uniform Securities Act (KUSA), the Kansas Administrative Procedure Act (KAPA) applies to certain aspects of KSC Administrative proceedings. See **K.S.A. 17-12a604(c)**. Additionally, there are regulations that specifically govern administrative actions before the KSC. See **K.A.R. 81-11-2** *et seq*. However, the Administrator may waive any of the procedural regulations in the interest of promoting justice. See **K.A.R. 81-11-2(b)**.

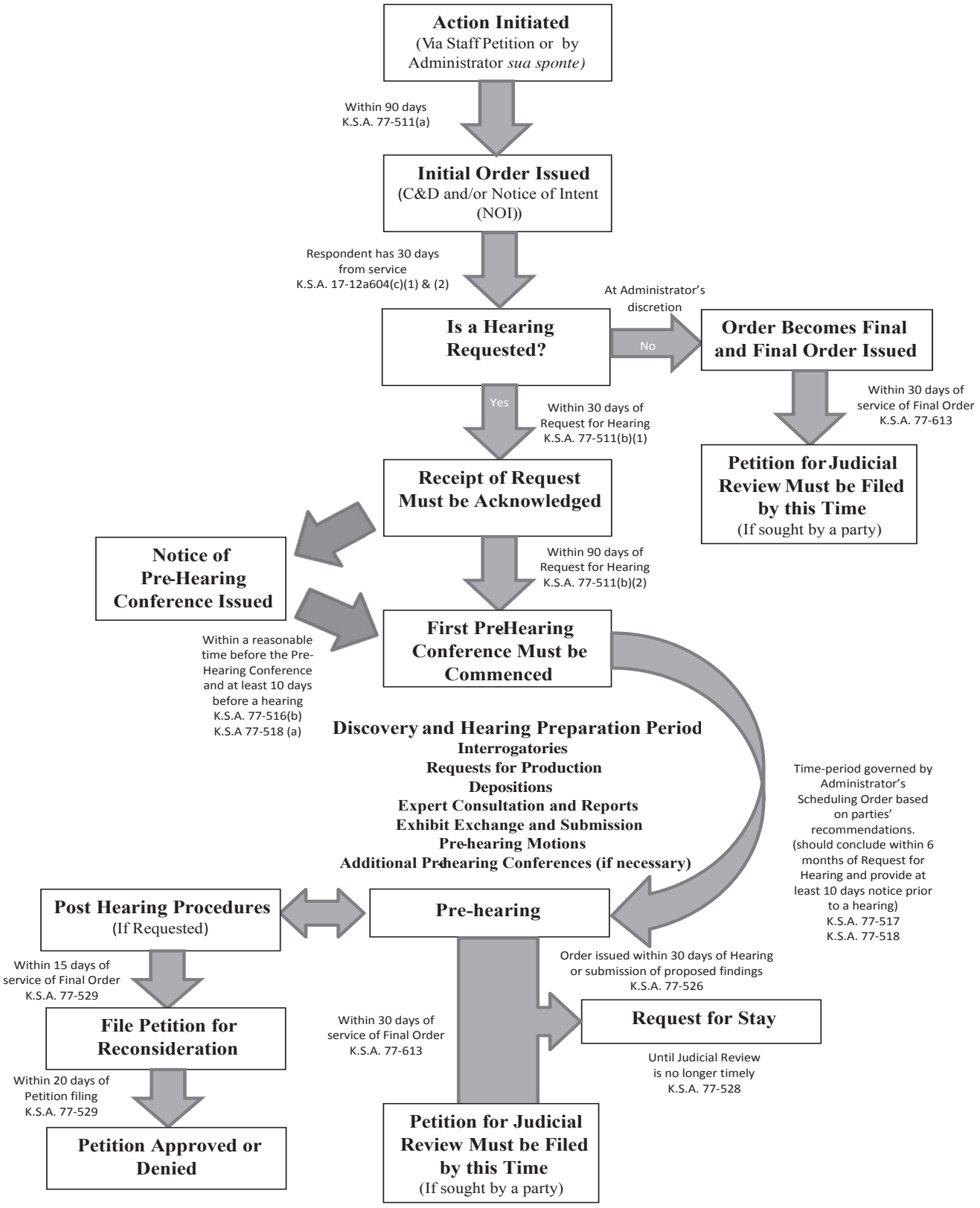
Pursuant to KUSA, KAPA, and the KSC administrative regulations, KSC administrative hearings operate similar to a Court proceeding. KSC administrative cases allow for discovery mechanisms to be used and allow for the administrator to issue subpoenas if a Formal Hearing is requested. Because these mechanisms are possible, the length of a KSC administrative case and the mechanisms used might vary greatly depending on the subject matter and the parties involved. In some cases, experts might be used but other cases might rest solely on legal questions that can be decided on a Motion for Summary Judgment without an evidentiary hearing. In other cases, the parties might agree to the facts but argue how the law applies to the facts. To organize a proceeding, the administrator will hold a prehearing conference to lay out deadlines in the case and to ensure that the administrative case moves forward. After requesting a hearing, the first communication a party will generally receive back from the KSC is a Notice of the date and time of a Pre-Hearing Conference. The purpose of this conference is to create a scheduling order to govern the timelines in the case. The parties should pay special attention to this order as it will serve as a roadmap for the rest of the proceedings.

Below are diagrams of an administrative case with a formal hearing and a conference hearing, including statutory deadlines. Although not all cases will necessarily follow all of these time frames, most administrative adjudicatory hearings should follow one of these two models:

Conference Hearing



Formal Hearing



Filing, Service, and Time Computation

Documents and pleadings to be filed at the KSC should be sent by mail to the Commissioner's assistant, who serves as a clerk for administrative hearings and maintains the official record of the proceedings. It is appreciated if the documents are also submitted electronically by email, however, the officially filed copy is the one submitted by mail. The address for filing documents is as follows:

> Office of the Kansas Securities Commissioner
> Attn: Administrative Clerk
> 109 SW 9th, Suite 600
> Topeka, Kansas 66612
> clerk@ksc.ks.gov

In addition to filing documents with the KSC, parties must also send filings to all other parties in the case. This is called "service" of the documents or "serving" the other parties. Remember, just because the staff operating as the "petitioner" or the "petitioning staff" in administrative cases are employees of the KSC, it is still necessary to independently serve them with papers even though they are filed with the administrator. The attorney and necessary contact information involving your case will be listed on the "certificate of service" attached to any Order or Notice of Intent you received as the case began. In administrative cases, service is complete when a document is placed in the mailbox. In part, **K.S.A. 77-531** governs service in administrative cases, it reads:

> 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.

Additionally, because administrative cases involve securities, KUSA has provisions that relate to the service of documents in administrative cases and provide additional means to serve documents. In certain situations, service may be obtained by serving the administrator. Generally, this option is reserved for individuals who are registered with the KSC but cannot be located, however, registration is not necessary for this type of service. **K.S.A. 17-12a611**.

Because KAPA applies to administrative cases before the KSC, time computation is governed by **K.S.A. 77-503(c)**, which reads:

In computing any period of time prescribed by this act, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. As used in this act, unless otherwise specified, "day" means calendar day and not business day; therefore, intermediate Saturdays, Sundays and legal holidays shall be included in the computation. As used in this act, "business day" means any day that is not a Saturday, Sunday or legal holiday. "Legal holiday" includes any day designated as a holiday by any statute or regulation of this state. If a state agency is inaccessible on the last day of any period of time prescribed by this act, the time period shall be extended until the next business day on which the agency is open for business.

The deadlines and time periods discussed in this booklet are very important. Missing these deadlines or incorrectly calculating a due date may have enormous implications. Accordingly, it is advised that counsel is consulted when setting dates and actions are completed early whenever possible. If a deadline or date cannot be met, it is important to contact opposing counsel and the administrator, however, some of the deadlines listed in this booklet cannot be moved, even by the administrator because they are statutorily imposed and the administrator was not given the authority to alter them.

Contact Information

Because the KSC administrative actions involve communications between the parties and the Administrator, it is imperative that all parties involved with an action ensure that the Administrative Clerk has current contact information. If this information changes, it is important that you notify the Administrative Clerk. As discussed above, it is possible that service on a party may be achieved through service on the Administrator. If the Administrative Clerk does not have current contact information for the relevant parties, it is possible that action could be taken against a party without the party's knowledge. Accordingly, please submit current contact information, including phone numbers and email addresses, in administrative filings, including, most importantly, a Request for Hearing.

First Steps

Types of Actions and Remedies/Sanctions Sought

If you find yourself subject to KSC administrative action, the first step is to determine the type of action and the remedy that the petitioners are seeking. There are basically two types of administrative actions by the KSC: (1) an Order; or (2) a Notice of Intent (NOI) to impose sanctions or issue a remedy. Your case may involve one or both of these actions.

Order: There are three types of orders. The first and most common is a Cease & Desist Order (C & D). **K.S.A. 17-12a604(a)(1)**. A C & D commands an individual to stop an action such as stop selling securities or a certain type of security. These are emergency orders that can be issued quickly if a fraud is detected or if violations of the KUSA are actively ongoing. Second, is an Order dealing with registered individuals and companies such as broker-dealers (BDs) or Investment Advisors (IAs). **K.S.A. 17-12a604(a)(2)**. These orders can revoke or suspend exemptions for a BD or IA or otherwise affect the ability of a respondent to do business in the State of Kansas. Third, is an order related to revoking an exemption in relation to a security offering or transaction. **K.S.A. 17-12a604(c)(3)**. Orders affect what a party may do going forward and are effective on the day they are issued. **K.S.A. 17-12a604(c)(2)**. Because they can be done quickly and ex parte, Orders when they are issued are preliminary. A party has 30 days to request a hearing or the Order becomes final. If a party disputes the facts or law contained in an order, they may request a hearing and oppose the entry of a final order. **K.S.A. 17-12a604(c)(2)**.

Notice of Intent: The KSC has the authority to impose sanctions and use certain remedies if the circumstances warrant. However, a party must be given notice and the opportunity to request a hearing before remedies or sanctions are imposed. **K.S.A. 17-12a604(c)(1)**. If a party does not request a hearing within 30 days, the Commissioner may issue an order imposing the sanctions or modify the previous order to include sanctions or other remedies. **K.S.A. 17-12a604** lists the sanctions and other remedies that may be imposed. They are as follows:

- 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;

- A bar or suspension from association with a broker-dealer or investment adviser registered in this state;

- 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

- An order charging the person with the actual cost of the investigation or proceeding.

Depending on the type of action being taken, you may decide a hearing is not necessary. For example, if a C & D has been issued but there is no NOI to impose further sanctions, a person may decide to cease an action and not request a hearing. However, if there are substantial sanctions looming, you may want to request a hearing and oppose the action. Knowing the type of action being taken and the implications is the first step is deciding how to proceed.

Representation

Once you understand the action being taken, you can decide whether or not to retain counsel in the administrative proceeding. KAPA provides that respondents in administrative cases can employ legal counsel to represent them in administrative cases at their own expense. **K.S.A. 77-515**. A corporation or other business entity may be represented by a duly authorized representative if allowed by the KSC. However, depending on the circumstances at issue, the KSC may require a corporation or other business entity to participate by legal counsel. If you desire to represent a corporation or other business entity without legal counsel, it is best to state this in your Request for Hearing and ask for a determination on how to proceed. Additionally, **K.A.R. 81-11-7** applies to administrative actions before the KSC. It states:

> (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.

Whether or not you wish to employ legal counsel and incur the expense to do so is your decision. However, there are substantial sanctions that are possible through KSC administrative actions. Legal counsel may be very helpful in navigating the administrative process and explaining securities law, which is an area of the law that can be fairly complicated. Given these factors, it is recommended that you retain counsel for administrative proceedings before the KSC.

Pro Hac Vice

As in Kansas courts, an attorney not admitted to practice law in Kansas may not represent clients in administrative proceedings before the KSC or OAH. However, Kansas Supreme Court Rule 116 also applies so that out-of-state attorneys can apply to practice in front of the KSC if they meet the eligibility criteria enumerated in the Rule. The request to be admitted to practice *Pro Hac Vice* should be made in the form of a written motion in accordance with Rule 116. This motion should be filed in the same way as other motions described in the "Motions" Section of this booklet.

Requesting a Hearing

After reviewing the initiating documents from the KSC, you may wish to request a hearing to dispute the facts, the law or how the law is applied to the facts, or to object to sanctions or remedies being pursued. There are a number of things you should be aware of when requesting a hearing. First of all, you should be aware that there are strict timelines for you to request a hearing after you receive an order or an NOI. You must request a hearing within 30 days of service of the NOI or Order. Remember, in administrative cases, service is complete upon mailing. However, pursuant to **K.S.A. 77-531**, an additional 3 days may be granted if the initiating documents were mailed. As discussed above, be sure to use the definitions in **K.S.A. 77-503** when computing time and determining when a Request for hearing is due.

Secondly, you should be aware of the regulatory requirements related to pleadings in administrative proceedings before the KSC and the requirements particular to filing a Request for Hearing.

- Each written request, motion, notice, and other pleading filed in any proceeding shall contain the caption "BEFORE THE SECURITIES COMMISSIONER OF THE STATE OF KANSAS," the title of the proceeding, the docket number and the name of the pleading, and shall be in substantial compliance with K.S.A. 1984 Supp. 60-2702a, Rule No. 111.

- Any oral statement or request not given on the record during a proceeding and any letter, memo, or note not in substantial compliance with the form of pleading requirement above shall not constitute a filing in the proceeding.

As incorporated above, Supreme Court Rule 111, states:

> Unless the court permits otherwise, every pleading, brief, and other paper filed with the court must be in black type or print on one side only of an 8 ½" x 11"

sheet. It must include the name, address, telephone number, fax number, and e-mail address of the person filing it. A paper filed by an attorney must include the attorney's Kansas registration number after the attorney's name. Text must be double-spaced, except that single spacing may be used for a subparagraph, legal description of real estate, itemization, quotation, and similar subsidiary portion of the paper.

In addition to the general requirements above that apply to all filings in KSC administrative proceedings, there are specific requirements that apply to Requests for Hearing, which are imposed by **K.A.R. 81-11-5**. Those requirements are as follows:

(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.

When requesting a hearing, it is important to follow these requirements to avoid the possibility of a denial by the Administrator. For your convenience, a sample Request for Hearing pleading can be found in the "Forms" Section of this manual. Additionally, it is important to follow the relevant deadlines. If you miss these deadlines, you should consult with legal

counsel to determine your options, however, it is possible that you have foregone your opportunity to request a hearing.
Thirdly, you should determine what type of hearing you would like to request. Unless a formal hearing is requested, the default hearing will be a Conference Hearing. Conference Hearings are much simpler and do not involve numerous topics discussed in this booklet such as discovery, witnesses, etc. It is basically an opportunity for a respondent to sit down with the Administrator and the Petitioning Staff to present the Respondent's side of the story. Because the Respondent is generally given the investigative file and the initiating documents, in some cases further discovery may not be necessary. Additionally, depending on the complexity of a case, witnesses may not have to be called to explain the situation. In these situations, a Conference Hearing may be desirable for all parties. However, if the opposite is true and a Formal Hearing is needed, it is imperative that you put this in your Request for Hearing. **If you fail to specify a Formal Hearing is requested, you may waive your right to a Formal Hearing.**

After filing your Request for Hearing, the KSC will send you a letter notifying you that they have received your request. In the next few weeks you will receive a Notice of a Prehearing Scheduling Conference where the remainder of the hearing and timelines will be discussed. Following that conference, a Scheduling Order will be issued by the Administrator. This Notice will come from the KSC or OAH depending on which office the Administrator has decided will hear the matter. If your matter is assigned to OAH, you should refer to them for the rules and procedures that will apply to your hearing, although some of the subjects in this booklet could still apply.

Prehearing Activity

Scheduling Conferences

After a Request for Hearing is submitted, the next step in an administrative proceeding is organizing and setting timelines for the rest of the case. This is accomplished through a prehearing scheduling conference or an informal scheduling conference, depending on the nature of the case involved. Although there is generally at least one Scheduling Conference in Conference Hearings, this step may not necessarily occur if you did not request a Formal Hearing. Before a prehearing scheduling conference, you will receive a notice that includes the following information:

- The names and mailing addresses of all parties and other persons to whom notice is being given by the presiding officer;
- The name, official title, mailing address and telephone number of any counsel or employee who has been designated to appear for the state agency;
- The official file or other reference number, the name of the proceeding and a general description of the subject matter;

- A statement of the time, place and nature of the prehearing conference;

- A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

- The name, official title, mailing address and telephone number of the presiding officer for the prehearing conference;

- A statement that at the prehearing conference the proceeding, without further notice, may be converted into a conference hearing or a summary proceeding for disposition of the matter as provided by this act; and

- A statement that a party who fails to attend or participate in a prehearing conference, hearing or other stage of an adjudicative proceeding may be held in default under this act.

- The notice may include any other matters that the presiding officer considers desirable to expedite the proceedings.

See **K.S.A. 77-516(c) & (d)**. The Notice should be read carefully because it may contain additional important information and instructions. With the Notice, you will receive a questionnaire. You can find a sample of this questionnaire in the "Forms" Section of this Booklet. Please spend whatever time that is necessary in order to fill out the questionnaire. It is intended to give the Administrator information about the complexity of the case and how long the case should take to process. It will also give information to the Administrator about what motions might be expected and any disputes that may hamper the progress of the case. The questionnaire should be submitted prior to the Pre-hearing scheduling conference and will help you think about the issues that will be discussed at the conference. Based on your answers to the questionnaire, you should begin to develop a schedule in your mind about how long you believe the case will take and the amount of time you will need to perform certain tasks, such as draft motions, perform discovery, prepare for hearing, etc. You should also become aware of the facts which are not in dispute. In many KSC administrative cases, the parties can agree to certain facts and issues by providing a stipulation. A stipulation can greatly expedite a hearing if it can be reached by the parties. The questionnaire will help the parties begin to think about this possibility.

Generally, the KSC conducts Pre-hearing Scheduling Conferences by phone and the Notice will include instructions on who will initiate the call and how to provide contact information to the call initiator. During the conference, various dates and deadlines will be discussed and the parties will be given an opportunity to present their views on the subjects being discussed. The parties should be prepared to discuss if and how long they need to perform discovery, draft motions, find experts, produce reports, and otherwise prepare for the hearing. If you have additional issues you would like to discuss at the Pre-hearing Scheduling Conference, be sure to include those subjects on the questionnaire. The administrator will generally take up those subjects at the

beginning of the Pre-hearing Scheduling Conference if he determines the subjects to be appropriate.

Depending on the simplicity of a case and the opinions of the parties, it is possible for the Administrator to convert a Pre-Hearing Conference into an actual Hearing or a Summary Proceeding. This is exceptionally rare in securities cases in front of the KSC, however, the option does exist. If you feel this option would be helpful in your case, please include this information in the questionnaire.

In some cases, an informal organizational meeting will be conducted to expedite proceedings prior to a pre-hearing scheduling conference. These informal meetings will generally be conducted by someone other than the administrator to streamline the process. If this type of meeting is scheduled you will receive a Notice that clearly states that an informal organizational meeting is being scheduled. You may decline this step in the process by following the instructions in the Notice. These informal organizational meetings are conducted in a similar fashion as Pre-hearing Scheduling Conferences and the same subjects will be discussed. A report will be issued after one of these meetings is conducted but the report is not binding on the parties until the Administrator adopts it in a report, if the Administrator chooses to do so. Regardless of whether or not an informal organizational meeting is conducted, the Administrator will likely still have pre-hearing conferences but hopefully the issues in these conferences will be limited based on the previous organizational meetings.

Discovery

This Section only applies if a Formal Hearing has been requested. The process by which parties exchange information in a legal proceeding is called "discovery". Discovery is only available in formal adjudicatory proceedings. The Administrator may issue subpoenas to facilitate this process. See **K.S.A. 17-12a602 & 77-522** see also **K.A.R. 81-11-9**. The Discovery process can be complicated and significantly slow the progression of a case. Additionally, discovery disputes can erupt if parties do not fully cooperate in the process and work together to provide information to the opposing side. For these reasons, you are strongly encouraged to retain counsel if your case will entail significant discovery and you plan to seek the use of various discovery tools.

KAPA allows certain discovery in administrative cases to the extent permitted by the presiding officer. See **K.S.A. 77-522**. The Administrator generally allows some discovery in KSC administrative cases, however, the discovery process may be limited. Because of the existence of multiple discovery mechanisms and numerous discovery issues that could arise, this manual merely seeks to generally discuss the discovery process in administrative cases before the KSC. If you have questions or would like more information regarding the discovery process or how to use the discovery mechanisms that are available, you should retain legal counsel to assist you. **K.S.A. 77-522** governs discovery in KSC administrative cases. It reads as follows:

(a) Discovery shall be permitted to the extent allowed by the presiding officer or as agreed to by the parties. Requests for discovery shall be made in writing to the presiding officer and a copy of each request for discovery shall be served on the party or person against whom discovery is sought. The presiding officer may specify the times during which the parties may pursue discovery and respond to discovery requests. The presiding officer may issue subpoenas, discovery orders and protective orders in accordance with the rules of civil procedure.

(b) Subpoenas issued by the presiding officer may be served by a person designated by the presiding officer or any other person who is not a party and is not less than 18 years of age or may be served by certified mail, return receipt requested. Service shall be at the expense of the requesting party. Proof of service shall be shown by affidavit.

(c) Subpoenas and orders issued by the presiding officer may be enforced pursuant to the provisions of the Kansas judicial review act.

Upon request, the KSC petitioning staff will turn over the investigative file to the respondents in a KSC administrative action. This is generally done as a matter of course and is not considered a discovery mechanism. The investigative file can be requested by sending a letter to the petitioning attorneys listed on the Certificate of Service attached to the originating documents. The investigative file is generally provided electronically on a CD. If either party feels there additional relevant information to be discovered, the use of discovery mechanisms can be requested. This can be done by requesting the use of discovery mechanisms on the pre-hearing questionnaire. These requests will be discussed at the Pre-hearing scheduling conference and included in a subsequent Scheduling Order if they are approved.

In the past, the Administrator has allowed the following discovery mechanisms to be used in KSC administrative cases:

- Interrogatories. See **K.S.A. 60-233**.
- Requests for the Production of Documents. **K.S.A. 60-234**.
- Requests for Admissions. **K.S.A. 60-236**.
- Depositions. **K.S.A. 60-230**.

The list above is not exhaustive and the use of the above mechanisms is not guaranteed in every administrative case depending on the circumstances in question. Rather, the use of any discovery mechanism should be requested by the parties as described above. Although they are not necessarily binding in KSC administrative hearings, the Kansas Rules of Civil Procedure cited above can be used as a reference to understand how the discovery mechanisms listed above operate. However, the timelines listed in the Kansas Rules of Civil Procedure may not apply. You should refer to the Administrator's Scheduling Order to determine when the responses are due to discovery requests.

Parties are encouraged to work together to complete the discovery process. If discovery disputes do arise, the parties may file motions asking the Administrator to resolve the dispute. If a party still does not comply with the Administrator's order compelling an action, judicial intervention may be prompted in accordance with the Kansas Act on Judicial Review.

It is helpful to apply Bates Numbers to the documents you produce so that they can easily be identified. The KSC Petitioning Staff uses the prefix KSC at the beginning of their Bates Numbers. Additionally, the KSC uses 6 digits for its numbers. For example, the first document would be numbered KSC000001 with the following documents labeled KSC000002, KSC000003, and so on. The Respondents should choose a three letter prefix that will be unique for the documents that respondent produced and add a similar numbering convention as they produce documents to the KSC. If you do not have the capability to apply Bates Numbers to the documents you produce, contact the Petitioning Staff to determine a solution or request that the Petitioning Staff apply Bates numbers upon the receipt of the documents produced. You need only submit your discovery responses and requested documents to the Petitioning Staff. They need not be filed with the administrator. The relevant documents will be marked as exhibits and produced at hearing for the Administrator. This process is discussed later in this booklet.

Motions

Motions and other pleadings are allowed in KSC administrative proceedings pursuant to **K.S.A. 77-519**, which states:

> (a) The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, objections and motions, including, but not limited to, motions to dismiss and motions for summary judgment.
>
> (b) The presiding officer, at appropriate stages of the proceedings, may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law and proposed initial or final orders.
>
> (c) A party shall serve copies of any filed item on all parties, by mail or any other means prescribed by state agency rule and regulation or by the presiding officer.

Motions are filed as was discussed in the "Filing" Section above. Remember, Respondents must serve their motions on the Petitioning KSC Staff as well as filing the motion with the Administrator. Along with the Motion, parties should submit a Proposed Order granting their Motion in in electronic "Microsoft Word" format. Generally, these are sent to the Administrator's Clerk at the address listed above. It is best if the language of the Proposed Order is agreed to by all the parties. If this has occurred, please include this fact in your Motion. Particularly with Motions for Summary Judgment, it is important that the moving party submit a statement of uncontroverted facts or an agreed stipulation as to the facts. These documents will lay out the facts that are not in dispute so that the Administrator

can apply the law to a specific set of facts and the parties can focus their arguments on legal issues. This Statement can be included with the Motion or submitted as part of the Proposed Order.

As was discussed in the statute quoted above, motions will be allowed at appropriate times which will be designated in the Scheduling Order. Additionally, the questionnaire will ask about what motions the Administrator should expect throughout the course of the proceedings. As with the discovery process, there are numerous legal issues related to motion practice, so if your case will have a significant number of motions, you should retain counsel to assist you. Additionally, the Kansas Rules of Civil Procedure are informative on how various motions and pleadings operate, although the Rules are not necessarily binding in KSC administrative actions. See e.g. **K.S.A. 60-212; 60-241**; and **60-256**.

Final Pre-Hearing Preparation

While preparing for the hearing, you will need to decide which documents you would like to use as evidence in your case. After you have selected these documents, you should designate them as exhibits to be used at the hearing. Before the hearing, the parties should have exchanged exhibit books and submitted copies to the Administrator. The Scheduling Order issued for the case will determine the due date for the exhibit exchange and submission to the Administrator. The Exhibits that are submitted to the Administrator should be numbered and organized into Binders. These numbers are separate and in addition to the Bates Numbers that should have already been included on the documents.

In KSC administrative hearings when the parties have exchanged exhibits, all exhibits are automatically admitted into evidence at the hearing unless one of the party objects within the timeframe allowed by the scheduling order. Generally, parties are given a week or two to review the exhibits offered by the other side and submit an objection to the Administrator.

In addition to preparing your exhibits, you should also determine who you would like to use as witnesses at your hearing, if you have any witnesses. If you would like subpoenas issued to help ensure your witnesses attend the hearing, you must request the subpoenas be issued prior to the deadline set for this activity by the Scheduling Order. A Subpoena Request form can be found in the "Forms" Section of this booklet.

Settlement

KAPA allows settlements. See **K.S.A. 77-505**. At any time, the parties can reach a settlement if they can agree on the terms. Settlements are negotiated with the Petitioning Staff but must be approved by the Administrator. If agreeable terms are reached, the Petitioning Staff can draft a Consent Order that will be approved by the parties and submitted to the Administrator for his signature. The questionnaire will inquire into whether or not a settlement offer has been made. Likely, settlement will be discussed at pre-hearing conferences. Many KSC Administrative cases are resolved through a consent order.

Hearings

Hearing Procedure

Except for the situations that may be conducted by a summary adjudicated proceeding pursuant to **K.A.R. 81-11-4**, the KSC will hold a conference adjudicatory proceeding pursuant to **K.A.R. 81-11-6** unless a formal adjudicative proceeding is requested in the Request for Hearing.

Formal Adjudicatory Proceeding

K.S.A. 77-513 through 532 governs the procedure in Formal Adjudicative Proceedings except where altered by KUSA or regulation. Most of these differences have already been discussed in this booklet. Formal adjudicative proceedings are organized in trial format pursuant to **K.A.R. 81-11-8(a)** meaning that the parties may present opening statements first, the petitioning staff presents their case, and then the respondent the respondent presents, and then closing arguments are allowed. The Administrator may announce a decision at that time or take it under advisement. **K.S.A. 77-523** specifies the procedure in this type of hearing. It states:

> (a) The presiding officer shall regulate the course of the proceedings.
>
> (b) To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order.
>
> (c) The presiding officer may, and when required by statute shall, give nonparties an opportunity to present oral or written statements. If the presiding officer proposes to consider a statement by a nonparty, the presiding officer shall give all parties an opportunity to challenge or rebut it and, on motion of any party, the presiding officer shall require the statement to be given under oath or affirmation.
>
> (d) The presiding officer may conduct all or part of the hearing by telephone or other electronic means, if each participant in the hearing has an opportunity to participate in the entire proceeding while it is taking place.
>
> (e) The presiding officer shall cause the hearing to be recorded at the state agency's expense. The state agency is not required, at its expense, to prepare a transcript, unless required to do so by a provision of law. Any party, at the party's expense and subject to such reasonable conditions as the state agency may establish, may cause a person other than the state agency to prepare a transcript from the state agency's record, or cause additional recordings to be made during the hearing.
>
> (f) The hearing is open to public observation, except to the limited extent,

> as determined by the presiding officer, that it is necessary to close parts of the hearing pursuant to a provision of law requiring confidentiality or expressly authorizing closure. Notwithstanding any other provision of law to the contrary, any hearing held pursuant to this act shall not be deemed a meeting pursuant to **K.S.A. 75-4317a**, and amendments thereto.

Although provision (d) above mentions the possibility of conducting the hearing by telephone, that option is generally not permitted in KSC administrative proceedings at the discretion of the Administrator. **K.A.R. 81-11-8(b)** states, "[n]o witness shall testify by telephone or other electronic means unless by agreement of the parties." Additionally, **K.A.R. 81-11-7(d)** states, "[t]he 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." Because of these provisions, it is rare that a respondent not personally appear in a KSC administrative proceeding.

The KSC generally records audio in administrative proceedings but from time to time a court reporter is also used.

<u>Conference Adjudicatory Proceeding</u>

Unless a formal adjudicatory proceeding is requested and material facts in the initiating documents are disputed, the KSC may hold a conference adjudicatory proceeding. See **K.A.R. 81-11-4**. **K.S.A. 77-534** governs the process for conference adjudicatory proceedings. It reads as follows:

> The procedures of this act pertaining to formal hearings apply to a conference hearing, except to the following extent:
>
> (a) The provisions of **K.S.A. 77-522** (involving discovery), and amendments thereto, do not apply to conference hearings insofar as those provisions authorize the issuance and enforcement of subpoenas and discovery orders, but do apply to conference hearings insofar as those provisions authorize the presiding officer to issue protective orders at the request of any party or upon the presiding officer's motion.
>
> (b) Paragraphs (a), (b) and (c) of **K.S.A. 77-523** (Formal Hearing Procedure – cited above), and amendments thereto, do not apply; but (1) the presiding officer shall regulate the course of the proceedings; (2) only the parties may testify and present written exhibits; and (3) the parties may offer comments on the issues.

Pursuant to this provision, evidence may not necessarily be submitted in a conference proceeding and witnesses may not be called. Only the parties may speak at a Conference Hearing. Unlike a Formal Hearing, it is more likely that the Administrator may allow parties to appear by telephone phone or other electronic means in a Conference

Hearing. The Administrator has some discretion on how to conduct a Conference Proceeding.

If it appears that the case is more complicated or that facts are in dispute, the Administrator may convert the proceedings into a Formal Hearing pursuant to **K.S.A. 77-535**, which states:

> (a) If during a conference hearing the presiding officer has reason to believe that material facts are in dispute, the presiding officer may require any party to state the identity of the witnesses or other sources through whom the party would propose to present proof if the proceeding were converted to a formal hearing, but if disclosure of any fact, allegation or source is privileged or expressly prohibited by any provision of law, the presiding officer may require the party to indicate that confidential facts, allegations or sources are involved, but not to disclose the confidential facts, allegations or sources.
>
> (b) If during a conference hearing a party has reason to believe that essential facts must be obtained in order to permit an adequate presentation of the case, the party may inform the presiding officer regarding the general nature of the facts and the sources from whom the party would propose to obtain those facts if the proceeding were converted to a formal hearing.

In addition to the statute above, **K.S.A. 77-506** also authorizes the conversion of proceedings from one type to another type. Except for the situations that may be conducted by a summary adjudicated proceeding pursuant to **K.A.R. 81-11-4**, the KSC will hold a conference adjudicatory proceeding pursuant to **K.A.R. 81-11-6** unless a formal adjudicative proceeding is requested in the Request for Hearing.

Evidence

The Rules of Evidence can be substantially different in administrative proceedings than judicial proceedings. KAPA contains a provision that governs evidence in administrative cases and the KSC process incorporates this statute into its procedures. **K.S.A. 77-524** states:

> (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.

The KSC also has regulations that govern evidence in KSC proceedings. **K.A.R. 81-11-10** states:

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.

As described above, evidence may be submitted in various ways. In a Formal Hearing, witnesses may testify and documents, such as affidavits, may be submitted to the administrator. In a Conference Hearing, evidence may or may not be received. Generally, parties who wish to submit documentary evidence in a Formal Proceeding in front of the KSC will exchange exhibits well before the hearing. If there is no objection to the proposed

exhibits, they will likely be admitted at the hearing. Additionally, evidence and related procedures will likely be discussed at a Pre-Hearing Conference and be notated in a Scheduling Order.

Default

You should be aware that you could waive certain rights if you fail to appear at a Hearing or Pre-Hearing Conference. If a party does not show up to a proceeding, it is possible for the Administrator to find the party in "Default" and issue a "Default Order." **K.S.A. 77-520** governs this process. It states:

> (a) If a party fails to attend or participate in a prehearing conference, hearing or other stage of an adjudicative proceeding, the presiding officer may serve upon all parties written notice of a proposed default order, including a statement of the grounds.
>
> (b) Within seven days after service of a proposed default order, the party against whom it was issued may file a written motion requesting that the proposed default order be vacated and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the presiding officer may adjourn the proceedings or conduct them without the participation of the party against whom a proposed default order was issued, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings.
>
> (c) The proposed default order shall become effective after expiration of the time within which the party may file a written motion under subsection (b) unless a written motion to vacate the order is filed with the agency within such time. Upon receipt of a motion to vacate a proposed default order, the presiding officer shall either vacate the proposed order or issue the default order as proposed. If the presiding officer issues a default order as proposed, the order shall become effective upon service.
>
> (d) After a default order becomes effective, the presiding officer shall conduct any further proceedings necessary to complete the adjudication without the participation of the party in default and shall determine all issues in the adjudication, including those affecting the defaulting party. The presiding officer in lieu of determining the issues affecting the defaulting party may, unless otherwise prohibited by law, dismiss such party's application for an adjudicative proceeding.
>
> (e) If the presiding officer is the agency head, or has been designated under **K.S.A. 77-514**, and amendments thereto, to issue a final order, the order shall be deemed a final order. If the presiding officer is not the agency head, and has not been designated to issue a final order under **K.S.A. 77-514**, and amendments thereto, the order shall be deemed an initial order.

It is important that you review any Notices or Scheduling Orders issued in your case and calendar relevant dates to ensure you meet required deadlines. Failure to attend

various stages in the proceeding could subject you to a Default Order in accordance with this section of Kansas law.

Decisions and Review

Order Issued by the KSC

After hearing evidence and arguments, the Administrator will issue a Final Order. Often the Administrator will request that the parties submit proposed findings of fact and conclusions of law in electronic "Microsoft Word" format. Generally, these are emailed to the Administrator's Clerk at the address listed above. Final Orders and proposed findings in KSC administrative proceedings are governed by **K.S.A. 77-526**, which states in relevant part:

> (a) If the presiding officer is the agency head or designated in accordance with subsection (g) of **K.S.A. 77-514**, and amendments thereto, the presiding officer shall render a final order.
>
> (b) If the presiding officer is neither the agency head nor designated in accordance with subsection (g) of **K.S.A. 77-514**, and amendments thereto, the presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with **K.S.A. 77-527** and amendments thereto.
>
> (c) A final order or initial order shall include, separately stated, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings. The order shall also include a statement of the available procedures and time limits for seeking reconsideration, administrative review or other administrative relief. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order. If the presiding officer has been designated in accordance with subsection (g) of **K.S.A. 77-514**, and amendments thereto, the final order shall so state. Any final order, for which a petition for reconsideration is not a prerequisite for seeking judicial review, and any initial order, for which further administrative review is not available, shall state the agency officer to receive service of a petition for judicial review on behalf of the agency.
>
> (d) Findings of fact shall be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.
>
> (e) If a substitute presiding officer is appointed pursuant to **K.S.A. 77-514** and amendments thereto, the substitute

presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice.

(f) The presiding officer may allow the parties a designated amount of time after conclusion of the hearing for the submission of proposed findings.

(g) A final order or initial order pursuant to this section shall be rendered in writing and served within 30 days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) unless this period is waived or extended with the written consent of all parties or for good cause shown. If extended for good cause, such good cause shall be set forth in writing on or before expiration of the 30 days.

(h) The presiding officer shall cause copies of the order to be served on each party and, if the order is an initial order, on the agency head in the manner prescribed by **K.S.A. 77-531** and amendments thereto.

Once a Final Order is issued by the KSC, the parties may determine whether or not they wish to pursue relief in District Court or seek other post-hearing relief as described below.

Order Issued by OAH

If your case was sent to OAH and a decision is issued, it is considered an Initial Order and you may request that the Administrator Review the Initial Order pursuant to **K.S.A. 77-527**, which reads:

(a) The agency head, upon its own motion may, and upon petition by any party or when required by law shall, review an initial order, except to the extent that: (1) A provision of law precludes or limits state agency review of the initial order; or (2) the agency head (A) determines to review some but not all issues, or not to exercise any review, (B) delegates its authority to review the initial order to one or more persons, unless such delegation is expressly prohibited by law, or (C) authorizes one or more persons to review the initial order, subject to further review by the agency head.

(b) A petition for review of an initial order must be filed with the agency head, or with any person designated for this purpose by rule and regulation of the state agency, within 15 days after service of the initial order. If the agency head on its own motion decides to review an initial order, the agency head shall give written notice of its intention to review the initial order within 15 days after its service. If the agency head determines not to review an initial order in response to a petition for review, the agency head shall, within 20 days after filing of the petition for review, serve on each party an order stating that review will not be exercised.

(c) The petition for review shall state its basis. If the agency head on its own motion gives notice of its intent to review an initial order, the agency head shall identify the issues that it intends to review.

(d) Subject to **K.S.A. 77-621**, and amendments thereto, in reviewing an

initial order, the agency head or designee shall exercise all the decision-making power that the agency head or designee would have had to render a final order had the agency head or designee presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the agency head or designee upon notice to all parties. In reviewing findings of fact in initial orders by presiding officers, the agency head shall give due regard to the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The agency head shall consider the agency record or such portions of it as have been designated by the parties.

(e) The agency head or designee shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

(f) The agency head or designee shall render a final order disposing of the proceeding or remand the matter for further proceedings with instructions to the person who rendered the initial order. Upon remanding a matter, the agency head or designee may order such temporary relief as is authorized and appropriate.

(g) A final order or an order remanding the matter for further proceedings shall be rendered in writing and served within 30 days after receipt of briefs and oral argument unless that period is waived or extended with the written consent of all parties or for good cause shown.

(h) A final order or an order remanding the matter for further proceedings under this section shall identify any difference between this order and the initial order and shall state the facts of record which support any difference in findings of fact, state the source of law which supports any difference in legal conclusions, and state the policy reasons which support any difference in the exercise of discretion. A final order under this section shall include, or incorporate by express reference to the initial order, all the matters required by subsection (c) of **K.S.A. 77-526**, and amendments thereto.

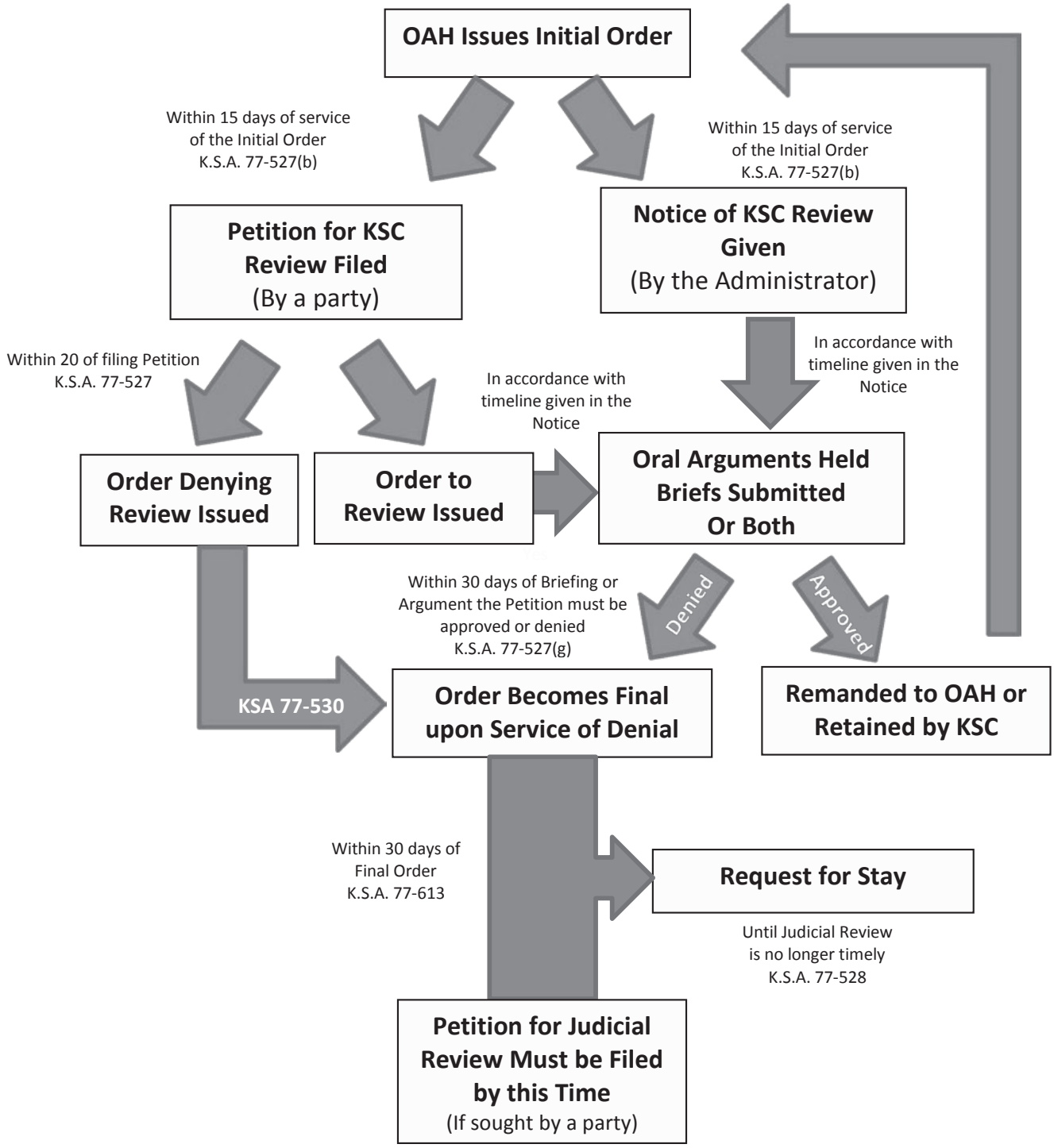
(i) The agency head shall cause copies of the final order or order remanding the matter for further proceedings to be served on each party in the manner prescribed by **K.S.A. 77-531**, and amendments thereto.

(j) Unless a petition for reconsideration is a prerequisite for seeking judicial review, a final order under this section shall state the agency officer to receive service of a petition for judicial review on behalf of the agency.

The above process only comes into play if the Administrator sends your case to OAH. Otherwise, the Order issued by the Administrator is considered final and starts the timeline for Judicial Review. For KSC cases at OAH, the Judicial Review timeline begins when the Administrator serves his Denial to Review OAH's decision (sometimes called an Order Declining to Review or reviews the decision and issues a Final Order after the review. The post-review Final Order from the Administrator

may come after additional briefing or oral arguments. You should review any Order Accepting Review of the OAH decision to determine what steps are involved in the review and the applicable timelines. Below is a diagram of the Review process for OAH decisions.

Post-Order Procedures



Service and Effectiveness of an Order

Orders and Notices are served on the parties by mail as described by the Filing, Service, and Time Computation Section of this Booklet. See **K.S.A. 77-531**. For this reason it is imperative that you keep your address up to date. Otherwise, Provisions of KUSA allow the Administrator to accept service on behalf of those who file Consents to Accept Service with his office or those who violate the KUSA. See **K.S.A. 17-12a611**. Basically, the law allows for flexible service on individuals so it is important that you keep your address up to date so that you will receive Orders.

C&Ds are effective upon issuance pursuant to **K.S.A. 17-12a611(c)(2)**. Any Order must allow for notice and an opportunity to be heard before it is effective pursuant to **K.S.A. 17-12a611(c)(1)**, however, this is accomplished if the Administrator includes an NOI and the timeframe to request a hearing passes. **See K.S.A. 17-12a611(c)(3)**.

Post-Hearing Relief

As described in the diagrams in the Overview Section of this booklet, there are a few possible actions that can be taken after a Final Order is issued. There are two main options prior to Petitioning for Judicial Review: (1) A Petition to Stay the Final Order Pending Judicial Review; or (2) a Motion to Reconsider. Neither of these actions must be taken to exhaust administrative remedies.

Motion for Stay: Generally, this relief is requested when a party anticipates the pursuit of judicial review. If granted, this Motion will put any relief issue in the Final Order on hold until a District Court can review the decision. This process is governed by **KSA 77-528**, which reads:

> Until the time at which a petition for judicial review would no longer be timely, a party may submit to the presiding officer or agency head a petition for stay of effectiveness of an initial or final order, unless otherwise provided by statute or stated in the initial or final order. The presiding officer or agency head may take action on the petition for stay, either before or after the effective date of the initial or final order.

Even if your action has been reviewed by OAH, you should submit a Motion for Stay to the Administrator. This action can be taken anytime before the opportunity to seek Judicial Review expires.

Motion for Reconsideration: A party can ask the Administrator or OAH Hearing Officer to reconsider a decision made pursuant to **K.S.A. 77-529**, which reads:

> (a)(1) Except as otherwise provided by paragraph (2), any party, within 15 days after service of a final order, may file a petition for reconsideration with the agency head, stating the specific grounds upon which relief is requested. The filing of the petition is not a prerequisite for seeking administrative or judicial review except as provided in **K.S.A. 44-1010** and 44-1115, and amendments thereto, concerning orders of the Kansas human rights commission, **K.S.A. 55-606** and

66-118b, and amendments thereto, concerning orders of the corporation commission and **K.S.A. 74-2426**, and amendments thereto, concerning orders of the state court of tax appeals.
(2) Any party applying for an exemption under: (A) Section 13, of article 11 of the Kansas Constitution, or (B) **K.S.A. 79-201a** Second, and amendments thereto, for property constructed or purchased, in whole or in part, with the proceeds of revenue bonds under the authority of K**.S.A. 12-1740** to 12-1749, inclusive, and amendments thereto, may file a petition for reconsideration with the state court of tax appeals within 30 days after service of a final order.

(b) Within 20 days after the filing of the petition, the agency head shall render a written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further proceedings. An order on reconsideration altering a prior order shall be in writing and shall include findings of fact, conclusions of law and policy reasons for the decision. In proceedings before the Kansas corporation commission, the petition is deemed to have been denied if the agency head does not dispose of it within 30 days after the filing of the petition.

An order under this section shall be served on the parties in the manner prescribed by **K.S.A. 77-531**, and amendments thereto.

(c) If there are multiple parties to an agency adjudication and one party files a petition for judicial review, the agency retains jurisdiction to act on a timely petition for reconsideration filed by another party.

(d) Any order rendered upon reconsideration or any order denying a petition for reconsideration shall state the agency officer to receive service of a petition for judicial review on behalf of the agency.

(e) For the purposes of this section, "agency head" shall include a presiding officer designated in accordance with subsection (g) of **K.S.A. 77-514**, and amendments thereto.

As is stated in this statute, there are short timeframes in which this Motion can be made. **K.S.A. 77-529(a)** states that you have 15 days from the service of the Order in question, therefore, it is imperative that you take this action as quickly as possible if you want to pursue this option. This option does not need to be taken in order to seek Judicial Review.

Judicial Review

KSC actions are subject to Judicial Review under the Kansas Judicial Review Act pursuant to **K.S.A. 17-12a609**. The Kansas Judicial Review Act is located in Article 6 of Chapter 77 of the Kansas Statutes. Administrative Orders are not entitled to Judicial Review until they are final and all administrative remedies are exhausted. A Judicial Review Action is initiated by filing a Petition for Judicial Review and docket fee with the appropriate court which is generally the Shawnee County District Court in KSC actions, unless the Order

was entered in another County, which would be unusual. See **K.S.A. 77-609**. The timing to request Judicial Review is governed by **K.S.A. 77-613**. You should review this statute to determine the due date for filing a Petition in your case, however, generally, a Petition must be filed within 30 days of the service of the agency's order. The initiation of such an action is governed by **K.S.A. 77-610** and the contents of the Petition are governed by **K.S.A. 77-614**, which states that the Petition should contain the following:

- The name and mailing address of the petitioner;
- the name and mailing address of the agency whose action is at issue;
- identification of the agency action at issue, together with a duplicate copy, summary or brief description of the agency action;
- identification of persons who were parties in any adjudicative proceedings that led to the agency action;
- facts to demonstrate that the petitioner is entitled to obtain judicial review;
- the petitioner's reasons for believing that relief should be granted; and
- a request for relief, specifying the type and extent of relief requested.

After the Petition is filed with the Clerk of the District Court, the Petition must be served on the Administrator in accordance with **K.S.A. 77-613(e)**. See **K.S.A. 77-615**. After the KSC receives the Petition, it will prepare the agency record pursuant to **K.S.A. 77-620**. If relevant, transcripts will be prepared of hearings held before the KSC, if they have not already been created. Pursuant to **K.S.A. 77-620**, the cost of preparing the transcript will be paid by the appellant.

You should be aware that there are limitations on the new issues that can be raised on Judicial Review. See **K.S.A. 77-617**. Additionally, the disputed facts are limited to the information contained in the agency record pursuant to **K.S.A. 77-618**. The only exceptions to this rule can be found in **K.S.A. 77-619**.

Because Judicial Review can be a complicated process and may involve the significant analysis of legal issues, it is advisable that you retain counsel to help you navigate the process if you decide to petition for judicial review. This is particularly true if the review proceeds to a higher court pursuant to **K.S.A. 77-623**.

I. Request for Hearing

BEFORE THE SECURITIES COMMISSIONER
OF THE STATE OF KANSAS

In the Matter of:

[NAME OF RESPONDENT], Docket No. [See Order/NOI]

Respondent. KSC No. [See Order/NOI]

_____/

Pursuant to K.S.A. 17-12a604

[NAME OF PARTY]'S REQUEST FOR HEARING

COMES NOW, [Respondent] to request a hearing in the above-captioned matter pursuant to K.S.A. 17-12a604 and in accordance with K.A.R. 81-11-5. The Respondent hereby requests [type of hearing desired if other than a Conference Hearing]. In support of this request, the Respondent submits the following:

1. [Identify each disputed paragraph by # in the Order/NOI and reason disputed].
2. [Identify each disputed paragraph by # in the Order/NOI and reason disputed].
3. [Identify each disputed paragraph by # in the Order/NOI and reason disputed].
4. [Identify each disputed paragraph by # in the Order/NOI and reason disputed].
5. [Identify each disputed paragraph by # in the Order/NOI and reason disputed].
6. [Identify each disputed paragraph by # in the Order/NOI and reason disputed].

Respectfully Submitted by,

_____

[Submitter's name] [Bar No., if applicable]
[Street Address]
[City, State Zip Code]
[Phone Number]
[Fax Number]
[E-mail address]

VERIFICATION

STATE OF [Insert State])
) ss:
COUNTY OF [Insert County])

[Respondent's Name], of lawful age, being first duly sworn on oath and under penalty of perjury, states that the above information is verified as true and correct.

_____
[Respondent's Printed Name]

SUBSCRIBED AND SWORN to me on [Insert Date]

(SEAL)

_____
[Printed Name of Notary Public]

CERTIFICATE OF SERVICE

I hereby certify that on [insert date], copies of the foregoing was served by way of U.S. Mail, postage prepaid, to:

Office of the Kansas Securities Commissioner
Attn: Administrative Clerk
109 SW 9th, Suite 600
Topeka, Kansas 66612
clerk@ksc.ks.gov

[Insert Other Parties, if applicable]

_____
[Name of person mailing]

II. Entry of Appearance

BEFORE THE SECURITIES COMMISSIONER
OF THE STATE OF KANSAS

In the Matter of:

[NAME OF RESPONDENT], Docket No. [See Order/NOI]

Respondent. KSC No. [See Order/NOI]

_____/

Pursuant to K.S.A. 17-12a604

ENTRY OF APPEARANCE

COMES NOW, [counsel's name] and enters [his/her] appearance on behalf of [Respondent].
Respectfully Submitted by,

_____
[Respondent's counsel] [Counsel's Bar No.]
[Street Address]
[City, State Zip Code]
[Phone Number]
[Fax Number]
[E-mail address]

CERTIFICATE OF SERVICE

I hereby certify that on [insert date], copies of the foregoing was served by way of U.S. Mail, postage prepaid, to:

Office of the Kansas Securities Commissioner
Attn: Administrative Clerk
109 SW 9th, Suite 600
Topeka, Kansas 66612
clerk@ksc.ks.gov

[Insert Other Parties, if applicable]

_____
[Name of person mailing]

III. Pre-Hearing Questionnaire

BEFORE THE SECURITIES COMMISSIONER
OF THE STATE OF KANSAS

In the Matter of:

[NAME OF RESPONDENT], Docket No. [See Order/NOI]

Respondent. KSC No. [See Order/NOI]

_____/

Pursuant to K.S.A. 17-12a604

PREHEARING QUESTIONNAIRE

(Instructions: This questionnaire should be completed by the parties and copies mailed to the Office of Administrative Hearings and the other party at least one week prior to the prehearing conference. All questions must either be answered or indicated as not applicable. If the space provided is not sufficient for your answers, you may type your own questionnaire and answers in accordance with this format.)

1. Present Date:

2. Name of the party you represent:

3. Your name and address:

4. Amount involved:

5. Agency action you are appealing or defending:

6. Theory of your case:

7. Stipulations: List any related facts that are not disputed:

8. Questions of law, regulations, policy statements, etc., on which evidence is to be presented:

9. Please specify discovery contemplated:

10. Motions: Please list any motions now pending or anticipated:

11. State any procedural problems which you have:

12. List all witnesses you intend to call at the hearing and be prepared to state essence of testimony: (If more witnesses become necessary after submission of the questionnaire, notice all parties of such in writing.)

13. List all exhibits you intend to offer at the hearing:

14. Have any settlement offers been made:

15. How much time will you require at the hearing to present your case and are there any unique problems the presiding officer should be aware of at this time:

Respectfully Submitted by,

_____

[Submitter's name] [Bar No., if applicable]
[Street Address]
[City, State Zip Code]
[Phone Number]
[Fax Number]
[E-mail address]

CERTIFICATE OF SERVICE

I hereby certify that on [insert date], copies of the foregoing was served by way of U.S. Mail, postage prepaid, to:

Office of the Kansas Securities Commissioner
Attn: Administrative Clerk
109 SW 9th, Suite 600
Topeka, Kansas 66612
clerk@ksc.ks.gov

[Insert Other Parties, if applicable]

_____

[Name of person mailing]

IV. General Caption

BEFORE THE SECURITIES COMMISSIONER
OF THE STATE OF KANSAS

In the Matter of:

[NAME OF RESPONDENT], Docket No. [See Order/NOI]

Respondent. KSC No. [See Order/NOI]

_____/

Pursuant to K.S.A. 17-12a604

[NAME OF PLEADING]

[Insert Content of Pleading]

Respectfully Submitted by,

_____

[Submitter's name] [Bar No., if applicable]
[Street Address]
[City, State Zip Code]
[Phone Number]
[Fax Number]
[E-mail address]

CERTIFICATE OF SERVICE

I hereby certify that on [insert date], copies of the foregoing was served by way of U.S. Mail, postage prepaid, to:

Office of the Kansas Securities Commissioner
Attn: Administrative Clerk
109 SW 9th, Suite 600
Topeka, Kansas 66612
clerk@ksc.ks.gov

[Insert Other Parties, if applicable]

_____
[Name of person mailing]

V. Request for Subpoenas

BEFORE THE SECURITIES COMMISSIONER
OF THE STATE OF KANSAS

In the Matter of:

[NAME OF RESPONDENT], Docket No. [See Order/NOI]

Respondent. KSC No. [See Order/NOI]

_____/

Pursuant to K.S.A. 17-12a604

[NAME OF PARTY]'S REQUEST FOR SUBPOENAS

COMES NOW, [Respondent], and respectfully requests that subpoenas be issued in the above-captioned matter to the following:

a. [Insert name of person to be subpoenaed]
[Insert persons address and any other contact information]

b. [Insert name of person to be subpoenaed]
[Insert persons address and any other contact information]

c. [Insert name of person to be subpoenaed]
[Insert persons address and any other contact information]

d. [Insert name of person to be subpoenaed]
[Insert persons address and any other contact information]

e. [Insert name of person to be subpoenaed]
[Insert persons address and any other contact information]

f. [Insert name of person to be subpoenaed]
[Insert persons address and any other contact information]

Respectfully Submitted by,

_____

[Submitter's name] [Bar No., if applicable]
[Street Address]
[City, State Zip Code]
[Phone Number]
[Fax Number]
[E-mail address]

CERTIFICATE OF SERVICE

I hereby certify that on [insert date], copies of the foregoing was served by way of U.S. Mail, postage prepaid, to:

Office of the Kansas Securities Commissioner
Attn: Administrative Clerk
109 SW 9th, Suite 600
Topeka, Kansas 66612
clerk@ksc.ks.gov

[Insert Other Parties, if applicable]

_____

[Name of person mailing]

VI. Exhibit List

BEFORE THE SECURITIES COMMISSIONER
OF THE STATE OF KANSAS

In the Matter of:

[NAME OF RESPONDENT], Docket No. [See Order/NOI]

Respondent. KSC No. [See Order/NOI]

_____/

Pursuant to K.S.A. 17-12a604

[NAME OF PARTY]'S WITNESS AND EXHIBIT LIST

COMES NOW, [Respondent], and respectfully requests that subpoenas be issued in the above-captioned matter to the following:

WITNESSES

[Respondent] intends to call the following witnesses in Respondent's case in chief:

a. [Insert name of witness]
[Insert witness's address and any other contact information]

b. [Insert name of witness]
[Insert witness's address and any other contact information]

c. [Insert name of witness]
[Insert witness's address and any other contact information]

EXHIBITS

[Respondent] intends to offer the following exhibits in Respondent's case in chief. Copies of the following have been provided to opposing counsel and the Administrator in accordance with the Scheduling Order dated [insert date of applicable Scheduling Order]:

a. [Identify Exhibit by Name, if applicable] [Identify Exhibit by Bates No. or range]

b. [Identify Exhibit by Name, if applicable] [Identify Exhibit by Bates No. or range]

c. [Identify Exhibit by Name, if applicable] [Identify Exhibit by Bates No. or range]

Respectfully Submitted by,

_____

[Submitter's name] [Bar No., if applicable]
[Street Address]
[City, State Zip Code]
[Phone Number]
[Fax Number]
[E-mail address]

CERTIFICATE OF SERVICE

I hereby certify that on [insert date], copies of the foregoing was served by way of U.S. Mail, postage prepaid, to:

Office of the Kansas Securities Commissioner
Attn: Administrative Clerk
109 SW 9th, Suite 600
Topeka, Kansas 66612
clerk@ksc.ks.gov

[Insert Other Parties, if applicable]

_____

[Name of person mailing]

109 SW 9th, Suite 600
Topeka, Kansas 66612
Phone: 785-296-3307
Fax: 785-296-6872
Website: ksc.ks.gov
Email: ksc@ksc.ks.gov