

# *Legislative Performance Audit* **Committee**

FOR IMMEDIATE RELEASE

CONTACT: Senator Dan Watermeier, (402) 471-2733

September 3, 2015

## **Nebraska Administrative Procedure Act: Review of Selected Agencies and Best Practices**

An audit of the Department of Correctional Services, the Department of Health and Human Services, and the Department of Revenue's use of the Nebraska Administrative Procedure Act (APA), released Thursday by the Legislative Performance Audit Committee, found that the existing language of the APA does not provide adequate guidance to agencies about what must be promulgated and does not reflect current best practices. Due to this, the Committee believes that the Act should be amended to clarify which policies must be promulgated as regulations and which may be developed outside of the regulation process.

Performance Audit Committee members, prompted by a recommendation in the final report of the 2014 Department of Correctional Services Special Legislative Investigative Committee, authorized an audit of the corrections department in February. In addition to reviewing actions of the Department of Correctional Services, the Committee also directed the Audit Office to audit rules and regulations procedures at the Department of Health and Human Services and the Department of Revenue, as concerns had been raised regarding these agencies rulemaking processes as well.

The main audit question was whether any of the internal policies of the selected agencies should have been promulgated through the APA process. The audit also described APA definitions and procedures nationwide, including the Model State Administrative Procedure Act, the Federal Administrative Procedure Act, and individual state Administrative Procedure Acts.

Sen. Dan Watermeier, chairman of the Performance Audit Committee said, "our Committee plans to work with state agencies to craft legislation to add clarification regarding which policies need to be promulgated and which do not. Such clarity will benefit both agencies and the public. The Committee believes decisions about which policies may be developed outside the promulgation process should begin from the premise that nearly all agency actions have the potential to impact the public. Consequently, of those policies exempted from the promulgation process, many may need to be available to the public and contain a mechanism for public input when appropriate."

In drafting this legislation, the Committee will consider permitting agencies to develop policies outside of the APA process that provide guidance to the public by amending the APA to allow for guidance documents. The audit found that exemptions for guidance

documents are common in other states' Administrative Procedure Acts. The Committee also plans to look into adding time-limited emergency rule provisions to the APA, which are allowed in every state except Nebraska.

The audit also found that more than half of states exempt all or part of corrections department policies from the Administrative Procedure Act process. However, the Committee stated that it did "not believe that any additional agencies should be added to those currently exempted from the definition of 'agency' in the Administrative Procedure Act."

The report, including the agencies' responses, is available on the Legislature's Web site, [nebraskalegislature.gov](http://nebraskalegislature.gov), in "Reports" > "Performance Audit," and hard copies are available in the Legislative Audit Office on the 11<sup>th</sup> Floor of the State Capitol.



**Nebraska Administrative  
Procedure Act: Review of Selected  
Agencies and Best Practices**

**Performance Audit Committee  
Nebraska Legislature**

September 2015

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***I. Committee Recommendations***



# **Audit Summary and Committee Recommendations**

## **Audit Summary**

The Nebraska Administrative Procedure Act (APA, or the Act) dictates the process for state agencies to use in promulgating rules that clarify and define the processes and requirements outlined in state law. The process ensures that draft rules are subject to a public hearing, and that the Attorney General certifies that final rules comply with state law and the State Constitution. Additionally, final rules must be filed with the Secretary of State so they are available to the public.

In contrast, policies an agency develops without going through the APA process—which we refer to as “internal policies”—do not have the force of law. Additionally, there are no requirements for public input, an Attorney General’s review of the draft policies, or of public availability of the final policies. Agencies *may* take these steps in developing internal policies but they are not required to do so.

Section I of the audit report discusses the provisions of the Nebraska Administrative Procedure Act and reviews the regulation practices of the selected agencies. The Legislative Performance Audit Committee’s main question in this audit was whether any of the internal policies of the selected agencies should have been promulgated through the APA process, and we found examples of such policies at each agency. At the same time, we found that the existing language of the APA does not provide adequate guidance to agencies about what must be promulgated and does not reflect current best practices.

Section II describes APA definitions and procedures nationwide. During the course of the audit, we reviewed the Model State Administrative Procedure Act, the Federal Administrative Procedure Act, and surveyed state Administrative Procedure Acts to determine how states handle “internal management rules.” In the course of that review, we identified three other exemptions common in other states—guidance documents, emergency rules, and corrections—that may be of interest to Nebraska policymakers.

## **Committee Recommendations**

Following are the Performance Audit Committee's specific recommendations for this report. The individual findings may be grouped by subject matter, with discussion at the end of each group.

### *Section I: Agency Practice Under the Nebraska Administrative Procedure Act*

**Finding #1:** The plain language of the Administrative Procedure Act exemption for internal management policies suggests that it should be interpreted narrowly to include only personnel policies that do not affect the public in any way. (pg. 7)

**Finding #2:** Agencies' internal policies on issues other than agency personnel matters are arguably in violation of the Administrative Procedure Act, although such a strict reading of the law may be unreasonable. (pg. 8)

**Finding #7:** Internal management exceptions are common in other states' statutes and only a few contain a more detailed definition than does Nebraska's Administrative Procedure Act. (pg. 20)

**Discussion:** Our reading of the plain language of the internal management exemption to the Administrative Procedure Act (APA) rule suggests that it includes only personnel policies that do not affect the public in any way: at the most basic level, human resource topics like how to make a leave request or overtime policies. As discussed in Section I, this may be overly burdensome to agencies. Promulgating all such policies would likely be prohibitively expensive and time consuming, and could result in agencies choosing not to offer such interpretive clarifications to the public.

Additionally, the current rule definition would require an agency to make somewhat trivial distinctions between types of documents that serve the same function in order to ensure APA compliance. The Committee believes that the Act should be amended to clarify which policies must be promulgated as regulations and which may be developed outside of the regulation process. The Committee believes decisions about which policies may be developed outside the promulgation process should begin from the premise that nearly all agency actions have the potential to impact the public. Consequently,

of those exempted from the promulgation process, many may need to be available to the public and contain a mechanism for public input when appropriate.

**Recommendation:** The Committee will introduce legislation to amend the APA to clarify the distinctions between policies where formal promulgation is necessary and those where promulgation would not be required.

**Finding #3:** Although the Department of Correctional Services does not have a written policy regarding when to go through the Administrative Procedure Act, the agency only uses that process for a narrow set of circumstances. The organization of the internal policies is clear. (pg. 9)

**Discussion:** The Department of Correctional Services (DCS) has no written policy that outlines the process for determining whether a standard should be promulgated through the APA or created through the internal agency process. Despite the lack of an explicit policy, DCS does follow a standard process as the agency only engages in APA rulemaking when a statute specifically requires promulgation, or if private rights are affected.

**Recommendation:** DCS should adopt a formal policy regarding which policies should be promulgated through the APA and which can be created through an internal process and make such policy available to the public.

**Finding #4:** The Department of Health and Human Services does not have written process for determining which policies should be promulgated through the Administrative Procedure Act process and it is not clear from their practice how those decisions are made. While the Legal Division provides input upon request, it appears that the decisions are otherwise left to individual Division Directors. (pg. 11)

**Finding #5:** The structure and organization of the Department of Health and Human Services' internal policies is unclear. (pg. 11)

**Recommendation:** The Department of Health and Human Services (DHHS) should develop and adopt a formal policy regarding which policies should be promulgated through the APA and which can be created through an internal process and make such policy available to the public. DHHS should also develop a clear, agency-wide organization of their

internal documents, so the names and types of policies and procedures are the same across all divisions.

**Finding #6:** The Department of Revenue does not have a written policy in place for determining when a policy should go through the Administrative Procedure Act, however, the agency does have a consistent system for how different policies or procedures are handled. (pg. 14)

**Recommendation:** The Department of Revenue should adopt a formal policy regarding which policies should be promulgated through the APA and which can be created through an internal process and make such policy available to the public.

**Discussion:** Although this performance audit focused on just three agencies, it is possible that other agencies do not have written policies regarding which policies should be promulgated through the APA.

**Recommendation:** The Committee will introduce legislation requiring state agencies to develop written policies to guide their decisions about which policies must be promulgated through the APA process.

## *Section II: Review of Administrative Procedure Acts Nationwide*

Most of the findings in this Section describe alternate definitions and processes under various administrative procedure acts. A general recommendation follows the last group.

**Finding #8:** Exemptions for guidance documents are common in other states' Administrative Procedure Acts. (pg. 23)

**Recommendation:** The Committee will consider introducing legislation to permit agencies to develop policies outside of the APA process that provide guidance to the public by amending the APA to allow for guidance documents. Best practices suggest that such a process should include 1) a clear explanation that guidance documents are advisory do not have the force of law (unlike rules); 2) a guidance document must be identified as such and explain that it is not binding on

any person outside the agency; and 3) provide affected parties a way to challenge the guidance document interpretation.

**Finding #9:** Unlike all other states, the Nebraska Administrative Procedure Act does not provide for regulations in emergency situations. (pg. 25)

**Recommendation:** The Committee will consider introducing legislation to amend the APA to authorize time-limited emergency regulations, which all other states allow.

**Finding #10:** More than half of states exempt all or part of corrections department policies from the Administrative Procedure Act process. (pg. 26)

**Recommendation:** The Committee does not believe that any additional agencies should be added to those currently exempted from the definition of “agency” in the Administrative Procedure Act.



***II. Legislative Audit Office Report***



*Legislative Audit Office Report*  
**Nebraska Administrative Procedure Act:  
Review of Selected Agencies and Best  
Practices**

***September 2015***

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***Prepared by***  
**Franceska Cassell**  
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## INTRODUCTION

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In 2014, the Nebraska Legislature adopted LR 424, which created the Department of Correctional Services Special Investigative Committee. One of the Committee's findings related to a program the Department of Correctional Services created by a memo issued by the former director, which the Committee believed should have been promulgated using the Administrative Procedure Act process. Based on that finding, the LR 424 Committee's final report recommended:

The Legislative Research Office and/or the Legislative Performance Audit Committee conduct an assessment/audit to determine which Administrative Regulations were promulgated in violation of the Administrative Procedures Act. ... If such an audit or assessment discloses the need for clarification of the Administrative Procedures Act, the Legislature should act.<sup>1</sup>

In response, the Legislative Performance Audit Committee (Committee) requested an Attorney General's opinion on this topic in January 2015. On February 6, 2015, the Committee directed the Legislative Audit Office (Office) to conduct an audit regarding the types of administrative regulations that need to be formally promulgated in accordance with the Administrative Procedure Act. At the time of release of this report, the Committee had not received an opinion from the Attorney General.

In addition to reviewing actions of the Department of Correctional Services, the Committee also directed the Office to audit rules and regulations procedures at the Department of Health and Human Services and the Department of Revenue, as concerns had been raised regarding these agencies rulemaking processes as well.

The Committee directed the Office to answer the following questions:

1. What are the current practices of the Department of Correctional Services, the Department of Health and

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<sup>1</sup> Department of Correctional Services Special Investigative Committee, LR 424 (2014), *Report to the Legislature*, December 15, 2014, p. 57. The LR424 report is available on the Legislature's web site at [http://nebraskalegislature.gov/pdf/reports/committee/select\\_special/lr424\\_2014/lr424\\_report.pdf](http://nebraskalegislature.gov/pdf/reports/committee/select_special/lr424_2014/lr424_report.pdf)

Human Services, and the Department of Revenue in determining which rules need to go through the formal rulemaking procedures? Do these practices conform to the Nebraska Administrative Procedure Act?

2. In regard to the types of rules that need to be promulgated, how does the Nebraska Administrative Procedure Act compare to other states' and the federal government's procedures, and to best practices as laid out in the Model State Administrative Procedure Act?

## **Rules and Regulations, Generally**

The following overview of the Nebraska regulations process is provided by the Secretary of State's Office on their website. That office is responsible for compiling regulations for publication and public inspection:

Just as the Nebraska Legislature passes laws under the authority granted to it by the Nebraska Constitution, state agencies adopt or promulgate regulations under the authority granted to them by the statutes passed by the Legislature. Regulations are adopted in order to clarify and define processes and requirements outlined in state law. Properly adopted regulations have the force of law.

For example, state law provides that it is illegal to drive with a blood alcohol level over .08 percent. Regulations define how testing for blood alcohol content is conducted.

Commonly referred to as "rules," "regulations" or "rules and regulations," the official name for the compiled rules and regulations of the state is the Nebraska Administrative Code.

A regulation is created, amended or repealed through the hearing and adoption process. This can take anywhere from weeks to months from start to finish. The purpose of the hearing and adoption process is to ensure that the public has an opportunity to participate in the rulemaking process and that the regulation is properly authorized by law. Unless there are special

circumstances, each proposed regulation goes through a mandatory adoption process.<sup>2</sup>

Section I of this report discusses the provisions of the Nebraska Administrative Procedure Act and reviews the regulation practices of the selected agencies. Section II describes Administrative Procedure Act definitions and procedures nationwide.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on the audit objectives.

We appreciate the cooperation and assistance of the Department of Correctional Services, the Department of Health and Human Services, and the Department of Revenue staff, as well as the Secretary of State's office, during the audit.

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<sup>2</sup> Nebraska Secretary of State's Office, *Overview of Regulations Process*, [http://www.sos.ne.gov/rules-and-regs/reg\\_process.html](http://www.sos.ne.gov/rules-and-regs/reg_process.html) (accessed April 29, 2015).



## **SECTION I: Agency Practice Under the Nebraska Administrative Procedure Act**

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In this section, we discuss relevant provisions of the Nebraska Administrative Procedure Act. We also report on our review of the practices of three selected agencies: the Department of Correctional Services, the Department of Health and Human Services, and the Department of Revenue.

The Legislative Performance Audit Committee's main question was whether any of the internal policies of our selected agencies should have been promulgated through the Administrative Procedure Act (APA) process, and we found examples of such policies at each agency.<sup>3</sup> At the same time, we found that the existing language of the APA does not provide adequate guidance to agencies about what must be promulgated and does not reflect current best practices.

Following is an overview of the breadth of internal policies at each agency as well as a review of areas of concern that have been raised regarding specific internal policies or types of internal policies.<sup>4</sup> In Section II, we suggest improvements to the APA that policymakers may wish to consider.

### **Nebraska Administrative Procedure Act**

The Nebraska Administrative Procedure Act (APA, or the Act) dictates the process for state agencies to use in promulgating rules that clarify and define the processes and requirements outlined in state law. The process ensures that draft rules are subject to a public hearing, and that the Attorney General certifies that final rules comply with state law and the State Constitution. Additionally, final rules must be filed with the Secretary of State so they are available to the public (*See*

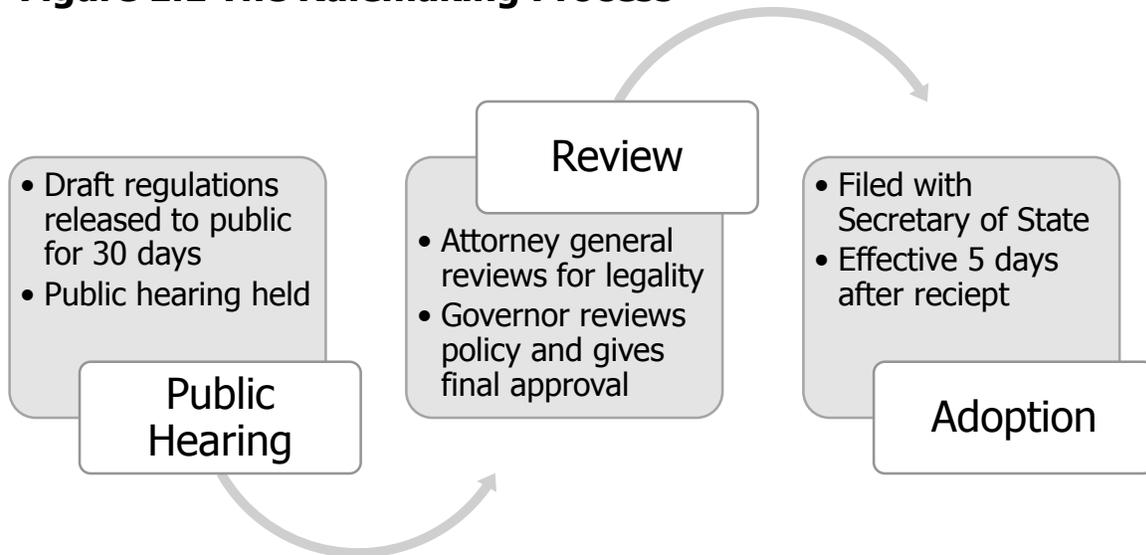
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<sup>3</sup> We did not evaluate all of these agencies' internal policies because the examples identified provide sufficient evidence upon which to base our findings and recommendations.

<sup>4</sup> The areas of concern are examples but they were not selected randomly and should not be used to generalize to all of one agency's policies or to the policies of all agencies.

Figure 1.1 for the key steps in the APA rulemaking process). Properly adopted regulations have the force of law.

### Figure 1.1 The Rulemaking Process



In contrast, policies an agency develops without going through the APA process—which we refer to as “internal policies”—do not have the force of law. Additionally, there are no requirements for public input, an Attorney General’s review of the draft policies, or of public availability of the final policies. Agencies *may* take these steps in developing internal policies but they are not required to do so.

To address the Performance Audit Committee’s concerns, we focused on the Act’s definition of the word “rule” because an agency’s interpretation of that term determines whether a policy is promulgated through the APA process or created internally.<sup>5</sup>

#### *Definition of “Rule” and Exemptions*

The Nebraska APA defines “rule or regulation” as: any rule, regulation, or standard issued by an agency—including amendments to or repeal of an existing rule—designed to implement, interpret or make specific a law the agency enforces or administers or that governs its organization or procedure. This definition is broad, and appears to cover virtually any action or policy developed by an agency to describe how it will interpret statutes.

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<sup>5</sup> Neb. Rev. Stat. § 84-901.

The Act contains some very specific exceptions to this definition, such as rate tariffs and certificates of public convenience, as well as a more general exemption for those policies “concerning the internal management of the agency not affecting private rights, private interests, or procedures available to the public”.<sup>6</sup>

However, the Act does not define the key terms in this exemption, such as “internal management” or “private interests.” Similarly, the Act includes a presumption that if a rule includes a penalty, it affects “private rights,” but the Act does not describe what those rights encompass. Additionally, the legislative history of the Act provided no additional insight as to how “internal management,” “private rights,” and “private interests” were to be defined.

In the absence of language defining the internal management exemption, our reading of the plain language suggests that it should be interpreted narrowly to include only personnel policies that do not affect the public in any way—for example, human resource topics such as overtime policies or how to make a leave request.

However, we caution that this narrow interpretation of the law could prove overly burdensome in practice, as it would require an agency to formally promulgate any and all non-personnel specific policies. Due to this, such a reading of the law may fail the “absurd result principle” of statutory interpretation. This principle “provides an exception to the rule that a statute be interpreted according to its plain meaning. ... [i]t authorizes a judge to ignore a statute’s plain words in order to avoid the outcome those words would require in a particular situation.”<sup>7</sup>

**Finding #1:** The plain language of the Administrative Procedure Act exemption for internal management policies suggests that it should be interpreted narrowly to include only personnel policies that do not affect the public in any way.

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<sup>6</sup> Neb. Rev. Stat. § 84-901(2).

<sup>7</sup> Veronica M. Dougherty, “Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation,” *American University Law Review*, Fall 1994, pp. 127-128.

**Finding #2:** Agencies' internal policies on issues other than agency personnel matters are arguably in violation of the Administrative Procedure Act, although such a strict reading of the law may be unreasonable.

## **Agency Reviews**

We asked each of our selected agencies whether they had a policy or procedure for identifying the policies that should be promulgated using the APA process. We also asked them to provide us with a description of the types of internal policies they have as well as copies of those policies. Finally, we discuss areas of concern within each agency's internal policies that were brought to the Performance Audit Committee and/or the Audit Office. By doing so, we present a range of different types of internal documents that are currently being put in place outside of the formal APA process.

### **Department of Correctional Services**

The Department of Correctional Services (DCS) oversees state adult correctional facilities, community correction centers, and adult parole.

DCS has no written policy that outlines the process for determining whether a standard should be promulgated through the APA or created through the internal agency process. Despite the lack of an explicit policy, DCS does follow a standard process as the agency only engages in APA rulemaking when a statute specifically requires promulgation, or if private rights are affected. Due to this, the majority of rules governing agency actions are created through the internal policy process.

Four levels of internal policies govern DCS actions. The policy level that applies most broadly across the department is the administrative regulation (AR). ARs are the agency's official policy and guide operations. All ARs are reviewed annually and updated to reflect changes in policy or law. The Department makes some ARs available to inmates in libraries and resource centers and to the public on their website, however, others are only available internally.

**DCS Administrative Regulation (AR) Availability**

Total ARs: 224  
Made available to inmates: 74 ARs  
Made available on website: 86 ARs  
Made available to inmates, but not on website: 3 ARs  
Made available on website, but not give to inmates: 15 ARs  
Not on DCS website, not available to inmates: 135 ARs  
Marked for limited release: 8 ARs

Source: DCS AR Table of Contents.

The second level is the operational memorandum (OM), which are also agency wide rules, but apply to specific institutions or programs. OMs are meant to be consistent with ARs and are revised each time an applicable AR is updated.

Third are post orders, which provide detailed guidance to staff about the responsibilities of a particular post within a specific institution. Finally, policy directives are rule changes issued by the DCS Director when he or she believes new policy must be implemented immediately rather than wait for the annual AR review. DCS internal rules require policy directives be incorporated into ARs during the annual review cycle.

**Finding #3:** Although the Department of Correctional Services does not have a written policy regarding when to go through the Administrative Procedure Act, the agency only uses that process for a narrow set of circumstances. The organization of the internal policies is clear.

*Areas of Concern*

Two areas of concern were raised in the LR 424 hearings regarding DCS’s internal policies, both of which involve the creation of programs without notice or a public hearing.

The first program is the Reentry Furlough Program (Reentry Program), created by an AR in 2008. Generally, the Reentry Program was created to incentivize inmates to behave well while incarcerated and in return, earn the opportunity serve part of their sentences in the community. Although Reentry Program participants are allowed to live in the community, the program is “not parole or a release from official custody. These offenders ... can be immediately transferred to an appropriate institution if they violate program rules.”<sup>8</sup>

As of February 9, 2015, the Reentry Program has been suspended by the DCS Director and the continuation of the program is under review.

<sup>8</sup> DCS, *Reentry Furlough Program*, accessed June 15, 2015, <http://www.corrections.nebraska.gov/reentry-furlough-program.html>

The second program in question is the Temporary Alternative Placement (TAP) program. The TAP program was developed via a memo by the former DCS Director, which is different from their usual system of administrative regulations and policy directives. According to DCS, making policy through memos is not a normal practice. The program was created in response to the discovery that several inmates had been incorrectly released early from prison. The Director's memo set forth criteria for offenders that would be allowed to serve the remainder of their terms under supervision in the community rather than be reincarcerated.

### **Department of Health and Human Services**

The Department of Health and Human Services (DHHS) is comprised of six divisions, each with a specific human service function:

- the Division of Behavior Health oversees state mental health, and substance abuse programs and services;
- the Division of Children and Family Services administers programs for child welfare, juvenile services, economic and family support, as well as child support enforcement;
- the Division of Developmental Disabilities manages services to individuals with developmental disabilities, including community based services and the Beatrice State Developmental Center;
- the Division of Medicaid and Long-Term Care administers Medicaid, the Children's Health Insurance Plan, and aging services;
- the Division of Public Health is charged with administration of preventive and community health programs, as well as licensure of health professions, and regulation of facilities, and services; and
- the Division of Veterans' Homes oversees veterans' homes in Bellevue, Norfolk, Grand Island, and Scottsbluff.

DHHS does not have a written process for determining the types of policies that should be promulgated through the APA. Division administrators stated that when a question arose, they would contact the DHHS Legal Division for guidance. Additionally, DHHS was unable to provide us with a comprehensive, agency-wide list of all types of internal policies.

In the absence of an agency-wide system of identifying different types of internal policies, each division has its own system. For example, the Medicaid division issues: 1) provider bulletins, which inform providers of regulation interpretations, provide procedural and process information, and/or communicate updates to providers such as regulatory changes, fee schedule changes, and implementation of new requirements; 2) policies, which are statements of an intended course of action or methodology based on defined criteria; and 3) procedures, which are action plans or a series of steps to comply with a policy or other requirements. The Division of Behavioral Health has division policies and procedures, as well as facility policies for the Regional Centers.

**Finding #4:** The Department of Health and Human Services does not have a written process for determining which policies should be promulgated through the Administrative Procedure Act process and it is not clear from their practice how those decisions are made. While the Legal Division provides input upon request, it appears that the decisions are otherwise left to individual Division Directors.

**Finding #5:** The structure and organization of the Department of Health and Human Services' internal policies is unclear.

### *Areas of Concern*

Several DHHS internal policies were brought to us by stakeholders as potential violations of the APA.

#### *Fee Changes*

In 2012, LB 1013 was introduced to make changes to Nebraska's APA. At the hearing for the bill, proponents raised numerous concerns about fees being changed by DHHS via provider bulletins—essentially, memos issued by the department—without public notice or hearing. Testifiers stated that changes to payments, types of services that could be delivered, and the manner in which these services could be delivered were made by provider bulletins on a regular basis.

Another fee change issue raised at the LB 1013 hearing was that DHHS had sent out notice of fee changes that were to be

made by regulation, but enforced the fee changes in advance of the regulations being formally approved through the APA process. An example of one such policy is the Aged and Disabled Waiver. In August 2013, families using the Aged & Disabled Waiver to pay for care for children with disabilities were informed that they would be charged a fee as of October 1st for routine child care costs. At the time the letter was sent to parents, no regulations had been promulgated. DHHS held a hearing on Nov. 7, 2013 and regulations were finalized June 16, 2014. As a result, individuals were charged a fee eight months prior to the adoption of a regulation that allowed DHHS to do so.

#### *Assistance to the Aged, Blind, and Disabled*

In October 2013, DHHS changed the way it transitioned individuals with disabilities from the state disability program (where eligibility lasts for only 12 months) to federal benefits under Assistance to the Aged, Blind, and Disabled. According to DHHS, changes were made because the Affordable Care Act required splitting economic assistance from medical assistance (economic assistance is housed in the Division of Children and Families, not Medicaid and Long-Term Care). Although these changes were made in October, notice of hearing was not filed with the Secretary of State until January 10, 2014.

#### *Prohibition Against Same-Sex Partners as Foster Parents*

Another issue raised with DHHS internal policies is the source of ongoing litigation. In January 1995, the DHHS Director issued an administrative memo stating that the policy of the agency was not to place foster children in the homes of “persons who identify themselves as homosexuals” or in a home where “unrelated, unmarried adults reside together”.<sup>9</sup> As this policy was an administrative memo and not a regulation, it did not have public notice or hearing.

The policy was challenged as unconstitutional in 2013, with the complaint alleging that it violated equal protection and due process rights of individuals. In March 2015, the Governor’s office stated that this policy was no longer being followed, although it has not been formally rescinded.

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<sup>9</sup> Nebraska Department of Social Services, *Administrative Memorandum—Human Services-#1-95*, January 23, 1995.

## Department of Revenue

The Department of Revenue (Revenue or Department in this subsection) is Nebraska’s tax administration agency and administers most major state tax programs. The agency is headed by the Tax Commissioner and is divided into six divisions: Compliance, Lottery and Charitable Giving, Gaming, Motor Fuels, Operations and Administrative Services, and Policy and Property Assessment. Lottery administration is exempt from the Administrative Procedure Act, as are certain documents issued by the Property Assessment Division.

Although they have a procedure guide available for how to promulgate a rule, Revenue does not have policy in place that helps guide them in whether to engage in formal rulemaking. In the absence of such written guidance, however, our review of their non-promulgated documents showed that Revenue does have a consistent system for how individual policies or procedures are handled. The Department issues policies, directives, and guidelines agency wide. Each division also has division specific internal policies (some of which are also called directives) to guide staff in their work (*See Figure 1.2 for the listing of Revenue internal policies for each division*).

**Figure 1.2 Department of Revenue Internal Policies**

<b>Department Wide</b>	<b>Compliance Division</b>	<b>Lottery and Charitable Gaming Division</b>
<ul style="list-style-type: none"> <li>•Policies</li> <li>•Technical Directives</li> <li>•Guidelines</li> </ul>	<ul style="list-style-type: none"> <li>•Policies</li> <li>•Technical Directives</li> <li>•Compliance Forms</li> <li>•Audit Manuals</li> <li>•Audit Programs</li> </ul>	<ul style="list-style-type: none"> <li>•Limited internal guidance relevant to substantive areas</li> </ul>
<b>Motor Fuels Division</b>	<b>Operations and Administrative Services Division</b>	<b>Property Assessment Division</b>
<ul style="list-style-type: none"> <li>•Procedures</li> <li>•Technical Directives</li> <li>•Audit Programs</li> </ul>	<ul style="list-style-type: none"> <li>•Technical Directives</li> <li>•Operations Manuals</li> <li>•Operations Procedures</li> </ul>	<ul style="list-style-type: none"> <li>•Limited internal guidance relevant to substantive areas</li> </ul>

Source: May 6, 2015 email to auditors

**Finding #6:** The Department of Revenue does not have a written policy in place for determining when a policy should go through the Administrative Procedure Act, however, the agency does have a consistent system for how different policies or procedures are handled.

### *Areas of Concern*

In our review of Revenue's policies and procedures, we paid particular attention to general information letters and revenue rulings as concerns had been raised regarding Revenue's practice of issuing these interpretative statements.

#### *General Information Letters and Revenue Rulings*

Revenue's website contains two types of internal policies, called general information letters (GILs) and revenue rulings. The department states that the difference between a GIL and a revenue ruling is that while GILs only recite current law, revenue rulings interpret the law and often deal with new situations.

GILs are published responses that describe a procedure to follow or a form to be completed. These letters can also point an interested party to the applicable statutes, regulations, or rulings. While GILs are often written in response to an inquiry from a taxpayer, they do not contain confidential taxpayer information and are intended to be generally applicable to the public.

A revenue ruling is a published statement initiated by the Department that interprets and applies tax law in general or to a specific set of facts. Revenue rulings often are prepared to give general guidance to taxpayers regarding new legislation, federal law, or policy changes, or to answer frequently asked questions. Revenue states that taxpayers can rely on the department to follow a revenue ruling until it is rescinded, superseded, or reversed by statutory changes or by court decisions.

As with the other areas of concern in this report, we believe that arguably revenue rulings should be promulgated using the APA process. However, Revenue department representatives told us they believe that issuance of revenue rulings is authorized under four statutes setting general duties of the agency and providing broad authority to the Tax

Commissioner. They also noted that at the federal level, the Internal Revenue Service (IRS) also issues revenue rulings.

We did not assess Revenue's authorizing statutes to determine whether we agree with their interpretation. We did, however, identify an important distinction between the federal APA, which governs IRS revenue rulings and the Nebraska APA. The federal APA allows for interpretive rules and policy statements to be created without promulgation as long as they are published. Nebraska's APA, however, requires promulgation of any standard that meets the definition of a rule.

GILs and revenue rulings also highlight an area of concern with the APA rule definition (as discussed earlier in this Section). The lack of clarity in the definition likely requires an agency to make somewhat trivial distinctions between types of documents that serve the same function in order to ensure APA compliance. While GILs are *recitations* of the law and revenue rulings *interpretations*, functionally, they serve a very similar purpose: to make an unclear area of law more understandable. However, in a strict application of the APA rule definition to both, we found that the statute requires us to treat them differently, as GILs would not meet the definition of a rule as they offer no interpretation or implementation of Revenue statutes and revenue rulings do.

The result of such a different classification means promulgation would be required simply because a revenue ruling takes a further step of interpreting and translating the statute into language that is easily understood. This disparate treatment of two functionally similar documents seems at odds with common sense, as well as Revenue's statutory charge to ensure that the process is efficient and effective for taxpayers.

Promulgating all such policies would likely be prohibitively expensive and time consuming for agencies, and could result in agencies choosing not to offer such interpretive clarifications to the public. In the next section of this report, we provide examples of best practices nationwide that could, if adopted by policymakers, help address the problems we found with the APA's definition.



## **SECTION II: Review of Administrative Procedure Acts Nationwide**

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In this section, we examine other approaches to rulemaking. During the course of the audit, we reviewed the Model State Administrative Procedure Act, the Federal Administrative Procedure Act, and surveyed state Administrative Procedure Acts to determine how states handle “internal management rules.” In the course of that review, we identified three other exemptions common in other states—guidance documents, emergency rules, and corrections—that may be of interest to Nebraska policymakers. Following a brief introduction of the various acts we reviewed, we lay out how these acts treat the selected issues.

### **Acts Reviewed**

The Model State Administrative Procedure Act is drafted by the Uniform Law Commission (ULC), which provides states with non-partisan legislation designed to bring clarity to “critical areas of state statutory law.”<sup>10</sup> The ULC has made available to states the Model State Administrative Procedure Act (Model Act) since 1946.<sup>11</sup>

By 1960, twelve states had adopted the 1946 Model Act. A 1961 revision of the Model Act was adopted by more than half of the states, including Nebraska, but a 1981 revision was less-widely utilized. The most recent revision was completed in 2010. While the Nebraska Administrative Procedure Act (Nebraska APA) has been amended for specific policy reasons over the years, it has not been amended to reflect Model Act revisions since the 1961 version.

The Federal Administrative Procedure Act (Federal APA) was enacted in 1946, a year after the Nebraska APA was adopted. The Federal APA was the result of 10 years of extensive study into administrative matters, as Congress was concerned with the rapid growth of, and power granted to, government agencies during and following the Great Depression.

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<sup>10</sup> Uniform Law Commission (ULC), *Revised Model State Administrative Procedure Act*, October 15, 2010, “About ULC” section.

<sup>11</sup> The ULC also provides “uniform” acts which are drafted for adoption as law by all states in an identical or similar fashion. However, due to the vast differences between individual state governments’ administrative acts, the ULC created “model” legislation and as such only suggests basic concepts to help guide the states, as opposed to a “uniform” act. ULC, *Revised Model State Administrative Procedure Act*, October 15, 2010, p. 1.

We also reviewed selected provisions of other states' administrative procedure acts as a source of potential best practices. Our review focused on exceptions for agency's internal policies similar to what exists in Nebraska's law.<sup>12</sup> Additionally, we contacted experts at the National Conference of State Legislatures (NCSL) and reviewed selected law review articles containing overviews of state APAs.

### **Internal Management Exemption**

As discussed in Section I, the Nebraska APA contains an exemption to the rulemaking process for subjects relating to an agency's "internal management" but does not clearly define what the Legislature intended the exemption to cover. We found such exemptions are common and only a few states have definitions more detailed than Nebraska's.

According to an NCSL representative who works on administrative law issues, the function of an internal exception is to ensure the separation of powers within government, which preserves the balance between the legislative and executive branches. The Legislature has a legitimate right to oversee rulemaking that implements the statutes it adopts. At the same time, executive branch agencies have a legitimate right to establish policies for agency operations without micromanagement by the Legislature.

Consequently, administrative procedure acts require administrative rules to be crafted in the open, allowing citizens and policymakers to understand agency actions affecting the public. The "internal management rule" exception prevents the Legislature from intervening in the day-to-day running of the agency.

#### *Model Act and Federal Administrative Procedure Act*

Like Nebraska, the Model Act creates an exception for internal management rules. Under the Model, a statement that concerns only the internal management of an agency and which does not affect private rights or procedures available to the public is not a rule and is not subject to rulemaking provisions.

In contrast, the Federal Administrative Procedure Act does not contain the "internal management rule" language.

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<sup>12</sup> See end of this section for additional notes about the methodology used.

Instead, it exempts “matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts”, as well as, “rules of agency organization, procedure, or practice”. There is nothing in the statute that clarifies what “matters relating to agency management” could mean outside of “rules of agency organization, procedure or practice”.<sup>13</sup>

Historically, however, the Federal APA did contain an exception to the Act’s publishing requirement for “any matter relating solely to the internal management of an agency”. This history provides some insight into the meaning of “internal management”. A 1947 manual from the US Attorney General explained that agencies were not required to publish “matters solely the concern of the agency” that did not affect the public “to any extent”. The manual suggested if there was any doubt as to whether or not a standard was an internal management rule, an agency should err on the side of making it available to the public.

#### *Other States*

We found that all states have rulemaking statutes that provide some sort of exception for day-to-day agency operations, 41 of which are nearly identical to Nebraska’s “internal management” exception.

A handful of states have exception language that is more specific than Nebraska’s. For example, the North Carolina statute clarifies that internal policies are excluded if they do not “directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency.”<sup>14</sup> Similarly, the New Mexico Administrative Procedure Act exempts internal management policies “not affecting the rights of, or the procedures available to, the public or any person except an agency’s members, officers or employees in their capacity as such member, officer or employee.”<sup>15</sup>

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<sup>13</sup> 79th Congress, *Administrative Procedure Act, Report of the House Judiciary Committee, No. 1989*, 1946. <http://www.justice.gov/sites/default/files/jmd/legacy/2014/06/09/houserept-1980-1946.pdf>

<sup>14</sup> North Carolina General Statutes § 150B-2.

<sup>15</sup> New Mexico Statutes § 12.8.2.

**Finding #7:** Internal management exceptions are common in other states' statutes and only a few contain a more detailed definition than does Nebraska's Administrative Procedure Act.

## Rules vs. Guidance Documents

Unlike the Nebraska APA, many other rule-making laws we reviewed contain exemptions for guidance documents that enable employees and the public to understand an agency's interpretation of statutes or rules. Often this information is in the form of bulletins, guidelines, or frequently asked questions. Because these documents are interpretive statements, the line between guidance documents and rules can be difficult to define. The sources we reviewed contained several approaches.

### *Uniform Law Commission Model Act*

The 2010 Model Act added provisions attempting to clarify the types of agency policies that can reasonably be excluded from the full promulgation process. Under the Act, "rules" must be developed through the full promulgation process because they have the force of law.<sup>16</sup> Other types of explanatory material, referred to in the Act as "guidance documents," do not have the force of law and therefore may be developed internally by the agency. However, the Act suggests that even the process for these internally created policies include some protections, including making all such documents readily available to the public and giving affected individuals the right to contest the interpretations in them.

#### **Uniform Law Commission Model Act Definitions**

**Rule:** The whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy or the organization, procedure, or practice requirements of an agency and has the force of law.

**Guidance document:** A record of general applicability developed by an agency which lacks the force of law but states the agency's current approach to, or interpretation of, law, or describes how and when the agency will exercise discretionary functions.

Source: Uniform Law Commission, *Revised Model State Administrative Procedure Act*, October 15, 2010.

The Model Act is less clear about the types of policies that can be developed as guidance documents. Under the Act's definitions, both rules and guidance documents are statements of "general applicability," meaning they apply beyond a single set of circumstances.<sup>17</sup> Additionally, both serve to interpret the law. The Model Act also contains a separate procedure for guidance documents, requiring

<sup>16</sup> Uniform Law Commission, *Revised Model State Administrative Procedure Act*, October 15, 2010, p. 10.

<sup>17</sup> This is in contrast to "orders" that apply only to the specific circumstances presented to the agency.

agencies to make these documents public and giving individuals the right to contest any guidance document.

### *Federal Administrative Procedure Act*

Under the Federal APA, any part of an agency statement is a rule if it is of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice of an agency. However, the Federal APA does not require notice or a public hearing for “interpretive rules, general statements of policy, or rules of agency organization procedure or practice”, but they must be published.

### *Other States*

According to a 2002 law review article, approximately 30 states either had statutory exceptions or had court rulings allowing guidance documents.<sup>18</sup> Many states do not use the term “guidance document,” and instead recognize such statements under the label “interpretive statement” or “policy statement.” The article notes that 12 states, including Nebraska, had no mechanism for guidance documents to be created outside of the formal rulemaking process.

In four states without statutory authorization for guidance documents, courts allowed guidance documents under an interpretation of the “internal management” exception. Most of these exceptions were made for procedure guides provided to employees or guidance documents governing inter-agency actions. However, in one Texas case the court held that a letter to a business requiring compliance with the law was not a rule. The court reasoned that informal agency actions should be considered under the internal management exception because to require all agency documents to be promulgated as rules would render the agency ineffective.<sup>19</sup>

### Examples of Guidance Document Statutes

Three states’ statutes stood out as particularly useful examples for guidance documents. First, a Washington statute creates two types of guidance documents that are not subject to rulemaking requirements, “interpretive

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<sup>18</sup> Michael Asimow, *Guidance Documents in the States: Toward a Safe Harbor*, 54 Admin. L. Rev. 631, 2001.

<sup>19</sup> *Brinkley v. Tex. Lottery Commission*, 986 S.W.2d 764, 768 (Tex. App. 1999).

statements” and “policy statements”.<sup>20</sup> The statute makes clear that guidance documents do not have the force of law, but encourages agencies to provide information to citizens:

An agency is encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only. To better inform and involve the public, an agency is encouraged to convert long-standing interpretive and policy statements into rules.<sup>21</sup>

Washington also allows citizens to petition agencies to turn guidance documents into rules. Agencies are required to respond to a request within sixty days and to notify the legislature’s administrative rules committee of the petition.<sup>22</sup>

Second, the Arizona Administrative Procedure Act calls guidance documents “substantive policy statements”.<sup>23</sup> Each substantive policy statement is required to be filed with the Secretary of State and published in an agency directory. Each actual document must provide notice that the document is a substantive policy statement:

This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona administrative procedure act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties you may petition the agency under section 41-1033, Arizona Revised Statutes, for a review of the statement.<sup>24</sup>

Finally, a Michigan statute requires its administrative agencies to give notice and a thirty five day comment period

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<sup>20</sup> Revised Code of Washington § 34.05.010.

<sup>21</sup> Revised Code of Washington § 34.05.230(1).

<sup>22</sup> Revised Code of Washington § 34.05.230(2).

<sup>23</sup> Arizona Revised Statutes Annotated § 41-1001(22).

<sup>24</sup> Arizona Revised Statutes Annotated § 41-1091.

during which interested parties may provide feedback on “guidelines” created outside of the rulemaking provisions of its Administrative Procedures Act.<sup>25</sup>

For reference, the language of the Washington, Arizona, and Michigan statutes is shown below.

**Finding #8:** Exemptions for guidance documents are common in other states’ Administrative Procedure Acts.

## Examples of Guidance Document Definitions from Other States

<b>Washington’s Guidance Document Definitions</b>
<b>Interpretive Statement:</b> A written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or other provision of law, of a court decision, or of an agency order.
<b>Policy Statement:</b> A written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implementation of a statute or other provision of law, of a court decision, or of an agency order, including where appropriate the agency's current practice, procedure, or method of action based upon that approach.

<b>Arizona’s Guidance Document Definition</b>
<b>Substantive Policy Statement:</b> A written expression which informs the general public of an agency's current approach to, or opinion of, the requirements of the federal or state constitution, federal or state statute, administrative rule or regulation, or final judgment of a court of competent jurisdiction, including, where appropriate, the agency's current practice, procedure or method of action based upon that approach or opinion. A substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents which only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties, confidential information or rules made in accordance with this chapter.

<b>Michigan’s Guidance Document Definition</b>
<b>Guideline:</b> An agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person.

### Emergency Rules

In Nebraska, if an agency believes that a rule must be enacted expeditiously, the agency can apply to the Governor to waive

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<sup>25</sup> Michigan Compiled Laws § 24.203(7), Michigan Compiled Laws § 24.224.

the APA requirement for notice of public hearing. The agency must prove to the Governor that there is good cause to waive the notice. Good cause may include extreme hardship to citizens of Nebraska, an emergency which requires immediate remedy, or a situation where filing was prevented by some unforeseeable event beyond the agency's control that will not cause material injury to anyone affected by the rule. Beyond the notice waiver, the Nebraska APA does not contain any provisions relating to emergency rules.

#### *Model Act and Federal Administrative Procedure Act*

Under the Model Administrative Procedure Act, emergency rulemaking occurs when an agency needs to immediately adopt a rule, due to "imminent peril to the public health, safety, or welfare or the loss of federal funding for an agency program." In these situations, the emergency rule is only in place for 180 days which allows the agency time to formally promulgate a rule through the typical process.

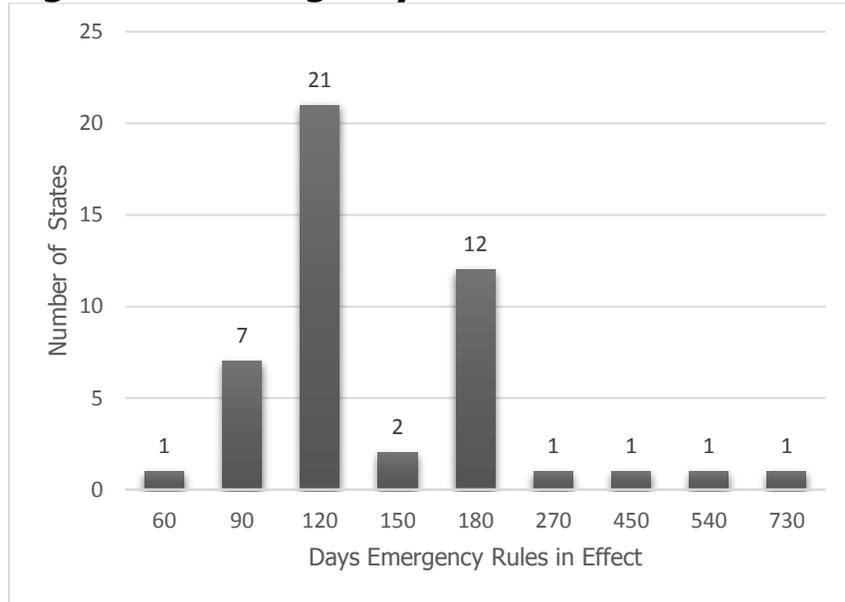
The Federal Administrative Procedure Act has emergency rule provisions, but differences between federal and state rulemaking procedures make them irrelevant to the discussion.

#### *Other States*

Unlike Nebraska, all other states have provisions in their administrative procedure acts that allow agencies to enact rules without going through the rulemaking process in the event of an emergency. Most states require an agency to provide, in writing, good cause as to why they cannot follow the usual procedure. Typically, agencies must determine that there is a public health, safety, or welfare reason for such action, although some states allow emergency rules if a change is necessary to prevent the loss of federal funds. Additionally, every other state limits the amount of time an emergency rule will be in effect.

Nearly all states limit emergency rules in days or months, however at least two states allow emergency rules to remain in effect until the next legislative session. Of the states that use a limit in days or months, the amount ranges from 60 days to 24 months. Almost all states limit emergency rules to between 90 and 180 days, and the most common limit is 120 days (*See Chart 2.1*).

**Figure 2.1 Emergency Rules in Other States**



Source: Chart prepared by Audit Office with data compiled from statutes.

**Finding #9:** Unlike all other states, the Nebraska Administrative Procedure Act does not provide for regulations in emergency situations.

### **Correctional Agency Exemptions**

As noted in the Introduction, this audit began in response to a Legislative report that raised concerns about whether the Nebraska Department of Correctional Services (DCS) had inappropriately developed a program outside of the APA process. Additionally, we found that DCS narrowly interprets the types of policies it believes must be developed using the APA process.

In reviewing other states’ statutes, we found 28 states exempt all or part of their prison or correctional services agencies. Twenty-three states completely exempt their corrections departments and five states exempt a portion of their correctional rules and regulations, or other corrections-specific processes, from promulgation.

Of the five states that exempt a portion of their correctional rules and regulations, or other corrections-specific processes, Oregon, South Dakota and West Virginia exempt only a portion of their rules. Oregon exempts rules of conduct for prisoners but not those which, if violated, could result in segregation for more than seven days, institutional transfer,

or certain disciplinary procedures.<sup>26</sup> Alternatively, South Dakota exempts all inmate disciplinary policies from rulemaking, and West Virginia exempts “rules relating to or contested cases”.<sup>27</sup>

The other two states have very specific corrections exemptions. Florida allows their Department of Corrections to limit prisoners’ ability to take part in the public comment portion of administrative rulemaking, and New Hampshire has a specific exemption to formal rulemaking strictly for rules regarding the state’s good time law.<sup>28</sup>

In order to better understand why states would choose to exempt their corrections agencies from the administrative procedure acts, we reached out to staff at a handful of legislatures in these states. Although we received only two responses, they provide some anecdotal answers to our question. Staff from both states told us that lawmakers felt that corrections rules were unlikely to impact the general public. However, in one of those states, if corrections rules do impact the public, the agency must follow rulemaking procedures. In the other, most corrections rules are available to the public through an open records request.

**Finding #10:** More than half of states exempt all or part of corrections department policies from the Administrative Procedure Act process.

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<sup>26</sup> Oregon Revised Statutes § 183.310.

<sup>27</sup> South Dakota Codified Laws § 1-26-1, West Virginia Code § 29A-1-3.

<sup>28</sup> Florida Statutes Section 120.81, New Hampshire Revised Statutes § 541-A:1.

## **Methodology Notes**

We searched specifically for definitions of “agency” and “rule” or “regulation” and exceptions to those definitions relevant to this audit. We began our review by specifically looking for “internal” exceptions similar to what exists in Nebraska’s law. During the course of our review, we noted that several states had exceptions for corrections departments or prisoners and tracked that information as well, as it was relevant to the original request for this audit.

This review produced sufficient information to meet our goal of identifying key issues for policymakers to consider, but may not have identified all of the exemptions in each state. For example, we did not search for exemptions within agency-specific statutes in each state. We determined that such reviews were unlikely to produce additional information important enough to warrant the time needed to conduct them. Similarly, because this audit is focused on the creation of rules and not their enforcement, we did not review each state’s administrative adjudication procedure.



### ***III. Fiscal Analyst's Opinion***



# State of Nebraska

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Legislative Fiscal Office  
PO Box 94604, State Capitol  
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July 8, 2015

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Legislative Auditor

JOANNE PEPPERL  
Revisor of Statutes

MICHAEL CALVERT  
Legislative Fiscal Analyst

MARCHALL LUX  
Ombudsman

RECEIVED  
JUL 13 2015  
LEGISLATIVE AUDIT

Martha Carter  
Legislative Auditor  
11<sup>th</sup> Floor, State Capitol Bldg.  
Lincoln, NE 68509

Dear Martha:

Each analyst assigned to the respective agencies have supplied their comments to me regarding the audit of the Departments of Revenue, Corrections and Health and Human Services with respect to the Administrative Procedures Act. Their comments are compiled below:

After reviewing the findings and recommendations set out by the Performance Audit Committee regarding the Administrative Procedures Act and the Department of Revenue, the Department could implement the Audit Committee's recommendation within their current appropriation.

After reviewing the performance audit on the rule and regulation process in the Department of Health and Human Services, the Department could implement the Audit Committee's recommendation within their current appropriation. Although the development and adoption of a formal policy regarding which policies should be promulgated through the Administrative Procedures Act will require the time of one or more attorneys, this is a one-time activity that can be handled within the agencies current appropriation.

After reviewing the findings and recommendations set out by the Performance Audit Committee regarding the Administrative Procedures Act and the Department of Corrections

Finding #3 applies to the Department of Correctional Services (DCS). The Recommendation:

DCS should adopt a formal policy regarding which policies should be promulgated through the APA and which can be created through an internal process and make such policy available to the public.

**DCS should be able to implement this Recommendation through its current appropriation.**

Finding #10 applies to the Department of Correctional Services (DCS). The Recommendation:

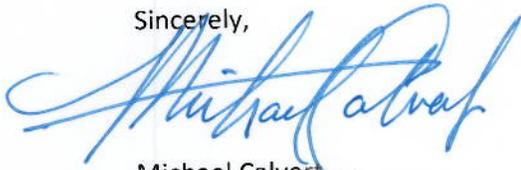
If policymakers believe that there is justification for the Department of Correctional Services regulations to be enacted outside of the Administrative Procedure Act they may want to add DCS to the list of agencies and entities exempted from the APA. If they feel DCS should promulgate rules within APA guidelines, they may want to clarify for the agency which rules are subject to the APA and which, if any, are not.

**DCS should be able to implement this Recommendation through its current appropriation.**

**To the extent that other Recommendations may impact DCS without specifically mentioning the agency, DCS should be able to implement those Recommendations through its current appropriation.**

If you have any questions, please let me know.

Sincerely,



Michael Calvert  
Legislative Fiscal Analyst

## ***IV. Background Materials***



## **BACKGROUND MATERIALS**

The “background materials” provided here are materials (in addition to the Office’s report) that were available to the Committee when it issued the findings and recommendations contained in Part I of this report. They include:

- the agencies’ responses to a draft of the Office’s report; and
- the Legislative Auditor’s summary of the agencies’ response.



# STATE OF NEBRASKA

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## DEPARTMENT OF CORRECTIONAL SERVICES

Scott R. Frakes

Director



Pete Ricketts  
Governor

July 30, 2015

Martha Carter  
Legislative Performance Audit Committee  
P.O. Box 94604, State Capitol  
Lincoln, NE 68509

Dear Ms. Carter,

This letter is in response to the draft performance audit report received by our office on July 1, 2015, titled "Nebraska Administrative Procedures Act: Review of Select Agencies and Best Practices" and the audit closeout meeting held on July 2, 2015. The response from the Department, as requested by the committee, for inclusion in the published version of the report, is attached.

I thank Ms. Carter and the members of her audit team for their professionalism and constructive approach in researching and examining the issues presented by the audit. I support program evaluation and the performance audit process and feel that it is a useful tool to ensure that agency policy and practice is in line with statute and to identify areas where improvements can be made.

With regard to the draft report and the audit team's findings, I have little to disagree with. I feel the report accurately describes the Department's current processes and provides a good comparison of the scope of Nebraska's Administrative Procedures Act with the Federal APA and laws in other states. I do disagree with the finding that only personnel policies should be exempt from the Administrative rulemaking process. As was demonstrated in the audit, there are numerous other matters that the agency needs flexibility in issuing that are not appropriate for promulgation under the APA. These include: institutional operational procedures, security procedures, research and policy development, internal investigation procedures, budget preparation and emergency response procedures.

The Department has been conducting an internal review of its rulemaking process and will incorporate some of the feedback from this report into this review. I look forward to

continuing to work with the committee and the legislature to balance the competing interests in this area.

In conclusion, I appreciate the opportunity to provide feedback on the performance audit process. I look forward to improving NDCS's processes based upon the recommendations found in the report.

Sincerely,

A handwritten signature in black ink, appearing to read 'Scott R. Frakes', with a large, stylized initial 'S' and a horizontal line extending to the right.

Scott R. Frakes  
Director

Nebraska Department of Correctional Services

See attachment enclosed

Below are the Department's responses to the specific findings in the report:

## INTRODUCTION

**Finding #1:** The plain language of the Administrative Procedure Act exemption for internal management policies suggests that it should be interpreted narrowly to include only purely personnel policies that do not affect the public in any way.

**NDCS Response:** NDCS disagrees with this narrow interpretation of the plain language in the Administrative Procedures Act. Personnel policies are not the only types of rules that an agency may have which do not affect private rights, private interests or procedures available to the public. Litigation planning, budget preparation, internal research and policy development are just a few examples of policy areas which fall within the plain meaning of the statutory exemption.

**Finding #2:** Agencies' internal policies on issues other than agency personnel matters are arguably in violation of the Administrative Procedures Act, although such a strict reading of the law may be unreasonable.

**Recommendation:** Policymakers should consider the intent of the APA and whether they want all non-personnel policies to be promulgated.

**NDCS Response:** NDCS agrees that it would be beneficial to clarify the intent behind and the scope of the internal management exemption in the Administrative Procedures Act. However the department disagrees, that the existing exemption is limited to only "purely personnel policies". As noted above, the arguments set forth in the report do not support this finding. The report itself states that a court would likely reject the statutory interpretation on which this conclusion is based.

**Finding #3:** Although the Department of Correctional Services does not have a written policy regarding when to go through the Administrative Procedures Act, the agency only uses that process for a narrow set of circumstances. The internal organization of the internal policies is clear.

**Recommendation:** DCS should adopt a formal policy regarding which policies should be promulgated through the APA and which can be created through an internal process and make such policy available to the public.

**NDCS Response:** The Department agrees with this finding and recommendation and is currently in the process of reviewing all of its internal policies to determine which of those policies should be promulgated under the APA. When this review is complete the Department will also

formalize the process in policy. The feedback from this performance audit and the legislature has been helpful and will continue to inform this process. The Department is willing to work with all parties to reach an outcome that is both feasible and reasonable when it comes to delineating what policies need to be promulgated through the APA.

With regard to the two areas of concern identified in the report, the Temporary Alternative Placement program (TAP) was eliminated by former Director Mike Kenney in October 2014 and the Residential Furlough Program was suspended by Director Frakes on February 9, 2015 and no new individuals have entered the program since that date. There are currently five individuals on RFP status as of 7/27/15 and all of them are set to transition to parole by the end of 2015.

**Finding #7:** Internal management exceptions are common and only a few contain a more detailed definition than does Nebraska's Administrative Procedures Act.

**Recommendation:** The Legislature may want to clarify what falls within the internal management exemption.

**NDCS Response:** NDCS does not disagree with this recommendation and would be interested in participating in future discussions regarding the scope of the internal management exemption. The discussion on page 18 of the report about the separation of powers and the executive branches authority to develop internal agencies policies is particularly relevant and on point to this discussion.

**Finding #8:** Exemptions for guidance documents are common in other states' Administrative Procedures Acts.

**Recommendation:** The Legislature may want to consider permitting agencies to develop policies outside of the APA that provide guidance to the public by amending the APA to allow for guidance documents. Best practice suggest that such a process should include 1) a clear explanation that guidance documents are advisory and do not have the force of law (unlike rules); 2) a guidance document must identify itself as such and explain that it is not binding on any person outside the agency; and 3) provide affected parties a way to challenge the guidance document interpretation.

**NDCS Response:** NDCS agrees with this recommendation and would be happy to work with the committee to develop recommended language for a guidance document provision in the APA.

**Finding #9:** Unlike all other states, the Nebraska Administrative Procedures Act does not provide for regulations in emergency situations.

**Recommendation:** The Legislature should consider amending the APA to authorize time-limited emergency regulations, which all other states allow.

**NDCS Response:** NDCS agrees with this recommendation.

**Finding #10:** More than half of states exempt all or part of corrections department policies from the Administrative Procedures Act process.

**Recommendation:** If policymakers believe that there is a justification for the Department of Correctional Services regulations be enacted outside of the Administrative Procedures Act they may want to add DCS to the list of agencies and entities exempted from the APA. If they feel DCS should promulgate rules within APA guidelines, they may want to clarify for the agency which rules are subject to the APA and which, if any, are not.

**NDCS Response:** NDCS agrees with the finding that over half the states exempt all or part of corrections policies from their versions of the APA. Unfortunately, there is insufficient information provided in the report regarding these exemptions to make an informed decision regarding why the exemptions exist and if there have been any benefits or problems created by the existence of these exemptions in other states.

The Department is very interested in participating in any discussions about whether or not an exemption to the APA for corrections policies should exist. The department would also be interested in reviewing any additional information on these policies that is provided to the committee or is used as the basis for any recommendations or legislation proposed as a result of this audit.



July 30, 2015

Martha Carter  
Legislative Audit Office  
State Capitol  
P.O. Box 94604  
Lincoln, NE 68509

Dear Ms. Carter:

This letter is in response to your performance audit report entitled "Nebraska Administrative Procedure Act: Review of Select Agencies and Best Practices." Below is our response that we would like included in the published version of your report.

**Finding #4 & #5**

The Department of Health and Human Services (DHHS) has begun developing a formalized process for determining which policies must be promulgated through the Administrative Procedure Act process. This process will incorporate a legal review of all proposed policies for compliance with the Administrative Procedure Act and will be documented as a Department-wide policy. Furthermore, DHHS will consider developing a uniform structure of our internal documents within our Department.

The Department would like to thank you and your staff for your work on this audit. If you have any questions or comments on our responses, please contact me or our Internal Audit Administrator, Garet Buller.

Sincerely,



Courtney N. Phillips, MPA  
Chief Executive Officer  
Department of Health and Human Services





**Pete Ricketts**  
Governor

# STATE OF NEBRASKA

DEPARTMENT OF REVENUE  
PO Box 94818 • Lincoln, Nebraska 68509-4818  
Phone: 402-471-5729 • [revenue.nebraska.gov](http://revenue.nebraska.gov)

July 24, 2015

Martha Carter  
Legislative Audit Office  
PO Box 94604  
Lincoln, NE 68509-4604

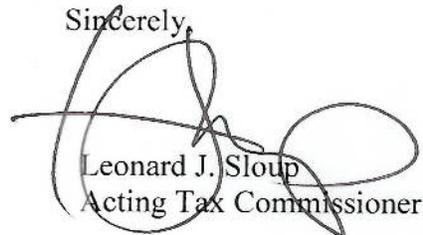
Dear Ms. Carter:

I am in receipt of the Performance Audit Section Draft Report of "Nebraska Administrative Procedure Act: Review of Select Agencies and Best Practices" which was provided to the Nebraska Department of Revenue (Department) on July 1, 2015.

The Department is in general agreement with the findings stated in the draft report. The Department does agree with the caution you included in your draft report regarding a requirement that an agency formally promulgate all non-personnel specific policies. You cautioned that such a requirement would be overly burdensome and may fail the "absurd result principle" of statutory interpretation. If such a requirement were imposed, the Department would be severely restricted in its ability to provide guidance to taxpayers in a timely manner. Additionally, such a requirement would force the Department to publish compliance, fraud detection, and audit selection criteria (information which we have always considered investigative/proprietary) which would likely result in less voluntary reporting and compliance by taxpayers.

Thank you for the time and effort expended by the Legislative Audit Office in conducting this audit. We enjoyed working once again with the members of the audit team. They were very professional and kept the Department well informed as the review process progressed.

Sincerely,



Leonard J. Sloup  
Acting Tax Commissioner



## **Legislative Auditor's Summary of Agency Response**

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This summary meets the requirement of Neb. Rev. Stat. § 50-1210 that the Legislative Auditor briefly summarize the agency's response to the draft audit report and describe any significant disagreements the agency has with the report or recommendations.

The responses from the Department of Health and Human Services and the Department of Revenue contained no disagreements with the draft audit report. The response from the Department of Correctional Services disagreed with one aspect of the report.

Specifically, the DCS Director disagreed with “the finding that only personnel policies should be exempt from the Administrative rulemaking process.” The Director stated that “as noted above, the arguments set forth in the report do not support this finding. The report itself states that a court would likely reject the statutory interpretation on which this conclusion is based.” The response suggests other types of policies that the Director believes should be covered by the existing exception for internal management policies.

The Audit Office believes that these points simply highlight the larger problem described in the report: there is no way of knowing what the Legislature intended the “internal management” exception to include because key terms are not defined in the statute or discussed in the legislative history. We took a conservative view in stating that *on a reading of the plain language alone* only personnel policies would be certain not to impact “public rights” or “public responsibilities.” However, we clearly indicated that such a narrow interpretation would likely be unworkable in practice and recommended that the Legislature consider clarifying its intent.