

February 20, 2015

Senator Les Seiler, Chair
Judiciary Committee
P.O. Box 94604
Lincoln, NE 68509-4604

RE: LB 606

Dear Senator Seiler and members of the Judiciary Committee:

I write regarding LB 606. The Department of Health and Human Services (DHHS) has reviewed LB 606 which, among other things, proposes changes to the Administrative Procedure Act, Neb. Rev. Stat. § 84-901. LB 606 expands the definition of rule and regulation to include statements, policies, instructions, guidelines, criterion, or standards of general applicability, and then excludes from this definition “forms, manuals, opinions, bulletins, or rulings designed to provide guidance and assistance to the public.”

The proposed new definition of rules and regulations creates ambiguity regarding the scope of the "statements, policies, instructions, guidelines, criterion, or standards of general applicability" that would be subject to APA rulemaking requirements. Expanding the definition in this manner could require APA rulemaking for all internal policy memoranda or other documentation that provides regulatory interpretive guidance to DHHS staff. Essentially, this expanded definition could be interpreted to require not only the promulgation of rules and regulations, but also the promulgation of rules and regulations that incorporate the agency's interpretation of rules and regulations. Such a requirement would exponentially expand the volume of rules and regulations promulgated by DHHS.

As you may know, Senator Heath Mello introduced LB 1013 in 2012. LB 1013 similarly (but unsuccessfully) attempted to expand the definition of rule or regulation to include statements, policies, instructions, or standards of general applicability. In 2013, Senator Mello introduced LB 98, which included some provisions from LB 1013 but omitted the “rules and regulations” definitional change because, as Senator Mello acknowledged in testimony, state agencies had been overwhelmingly concerned that the proposed new definition in LB 1013 “cast too wide of a net and would essentially force agencies to follow APA promulgation procedures to take virtually any action affecting the public.”

The acknowledged concerns about LB 1013 remain and apply to LB 606, which re-introduces (and expands upon) the definitional change previously proposed. The exclusion of “forms, manuals, opinions, bulletins, or rulings designed to provide guidance and assistance to the public” does not sufficiently address concerns about the degree to which the department’s interpretation of its rules and regulations must be incorporated into rules and regulations.

I greatly appreciate the opportunity to share the above concerns and recommendations.

Thank you for your time and for considering this information.

Sincerely,

A handwritten signature in blue ink, appearing to read "Joe M. Acierno", with a long horizontal flourish extending to the right.

Joseph M. Acierno, MD, JD
Acting Chief Executive Officer
Department of Health and Human Services

Cc: Senator Mello