



**Pete Ricketts**  
Governor

# EXHIBIT

# 16

## STATE OF NEBRASKA

**NEBRASKA REAL ESTATE COMMISSION**  
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TO: Nebraska Real Estate Commission

FROM: Greg Lemon, *GL* Director

RE: LB867, Administrative Procedures Act, Commission Policies and Interpretations

Date: 11/10/2016

Attached please find a memorandum from the Attorney General's Office regarding changes in the Administrative Procedures Act under LB867 (2016). As explained in the memorandum, the bill amends the Administrative Procedures Act (which governs the creation of rules and regulations for the Commission and other agencies) and defines what may be accomplished through rule and regulation, and what may be accomplished under agency policies, referred to as "guidance documents" under the law.

Although it is not anticipated that the Commission will have to make significant changes to the Commission's regulatory structure, which includes our own rules and regulations, Commission policies and interpretations, and the trust account manual, I wanted to inform the Commission that the plan is a review of the current structure in light of the new law by the Director with assistance of legal counsel. Recommended changes if any will be reviewed at a future meeting.

### REAL ESTATE COMMISSION MEMBERS

**Drew D. Stange**  
*Broker Member, Lincoln*

**John A. Gale**  
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*Broker Member, Omaha*

**Andy Alloway**  
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*Broker Member, North Platte*

## MEMORANDUM

TO: State Officials, Agencies, Boards and Commissions

FROM: Office of the Attorney General

RE: LB 867 Changes to the Administrative Procedure Act Operative on January 1, 2017

DATE: November 2, 2016

LB 867, enacted by the Legislature this past session, makes a number of changes to the rulemaking provisions of the Administrative Procedure Act ["APA"], Neb. Rev. Stat. §§ 84-901 to 84-918 (2014, and Cum. Supp. 2016). While many State officials, agencies, boards, and commissions which exercise rulemaking authority under the APA are no doubt familiar with the changes made by LB 867, a summary of these changes is provided to ensure that all officials, agencies, boards, and commissions are prepared to implement LB 867 when it becomes operative on January 1, 2017.

### SUMMARY OF CHANGES TO THE APA UNDER LB 867

#### 1. Statement of Legislative Findings

LB 867 includes the following statement of legislative findings:

"(1) The regulatory authority given to agencies has a significant impact on the people of the state;

(2) When agencies create substantive standards by which Nebraskans are expected to abide, it is essential that those standards be adopted through the rules and regulations process to enable the public to be aware of the standards and have an opportunity to participate in the approval or repeal process; and

(3) Agencies should be encouraged to advise the public of current opinions, interpretations, approaches, and likely courses of action by means of guidance documents."

(2016 Neb. Laws LB 867, § 3 (*codified at* Neb. Rev. Stat. § 84-901.02 (Cum. Supp. 2016)).

#### 2. New Definition of "Rule or Regulation"

"Rule or regulation" is defined to "mean any standard of general application adopted by an agency in accordance with the authority conferred by statute and includes, but is not limited to, the amendment or repeal of a rule or regulation."

The following are excluded from the definition of "rule or regulation": "(a) internal procedural documents which provide guidance to staff on agency organization and operations, lacking the force of law, and not relied upon to bind the public; (b) guidance documents as issued by an agency in accordance with [section 84-901.03]; and (c) forms and instructions developed by an agency."

The definition of "rule or regulation" also provides that "[n]othing in this section shall be interpreted to require an agency to adopt and promulgate rules and regulations when statute authorizes but does not require it." (2016 Neb. Laws LB 867, § 4 (*codified at* Neb. Rev. Stat. § 84-901(2) (Cum. Supp. 2016)).

### **3. Issuance of "Guidance Documents"**

Agencies are authorized to issue "guidance documents," which are defined to "mean any statement developed by an agency which lacks the force of law but provides information or direction of general application to the public to interpret or implement statutes or such agency's rules or regulations."

Guidance documents are "binding on an agency until amended by the agency."

Guidance documents "shall not give rise to any legal right or duty or be treated as authority for any standard, requirement, or policy."

"Internal procedural documents which provide guidance to staff on agency organization and operations shall not be considered guidance documents." (2016 Neb. Laws LB 867, § 4 (*codified at* Neb. Rev. Stat. § 84-901(5) (Cum. Supp. 2016)).

### **4. Requirements Governing Guidance Documents**

Various requirements governing "guidance documents" are imposed, including provisions relating to issuance, availability, notice, requests to revise or repeal and responses, and publication of an index.

#### **(a) Issuance, Availability, and Publication of Index**

"Upon the issuance of a guidance document, an agency shall make such document available at one public location and on the agency's web site. The agency shall also publish on its web site an index summarizing the subject matter of all currently applicable rules and regulations and guidance documents. Such agency shall provide the index electronically to the Executive Board of the Legislative Council by December 31 of each year." (2016 Neb. Laws LB 867, § 5(1) (*codified at* Neb. Rev. Stat. § 84-901.03(1) (Cum. Supp. 2016)).

"All decisions made by an agency [under section 84-901.03] shall be made available at one public location and on the agency's web site." (2016 Neb. Laws LB 867, § 5(4) (*codified at* Neb. Rev. Stat. § 84-901.03(4) (Cum. Supp. 2016)).

**(b) Notice Required to Be Placed on Guidance Documents**

"An agency shall ensure that the first page of each guidance document includes the following notice: This guidance document is advisory in nature but is binding on an agency until amended by such agency. A guidance document does not include internal procedural documents that only affect the internal operations of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules and regulations made in accordance with the Administrative Procedure Act. If you believe that this guidance document imposes additional requirements or penalties on regulated parties, you may request a review of the document." (2016 Neb. Laws LB 867, § 5(2) (*codified at* Neb. Rev. Stat. § 84-901.03(2) (Cum. Supp. 2016)).

**(c) Requests to Revise or Repeal a Guidance Document and Agency Response**

"A person may request in writing that an agency revise or repeal a guidance document or convert a guidance document into a rule or regulation. No later than sixty calendar days after the agency receives such a request, the agency shall advise the requestor in writing of its decision to (a) revise or repeal the guidance document, (b) initiate a proceeding to consider a revision or repeal of a guidance document, (c) initiate the rulemaking or regulation making process to convert the guidance document into a rule or regulation, or (d) deny the request and state the reason for the denial." (2016 Neb. Laws LB 867, § 5(3) (*codified at* Neb. Rev. Stat. § 84-901.03(3) (Cum. Supp. 2016)).

**5. Emergency Rulemaking**

A new provision permits emergency rulemaking under certain circumstances, and establishes the procedure for emergency rulemaking, as well terms of duration, renewal, filing, and publication.

**(a) Factors Justifying Emergency Rulemaking and Procedure**

"If an agency determines that the adoption, amendment, or repeal of a rule or regulation is necessitated by an emergency situation, the agency may adopt, amend, or repeal a rule or regulation upon approval of the Governor. Such agency's request shall be submitted to the Governor in writing and include a justification as to why the emergency rule or regulation is necessary. Factors for the justification shall include:

- (a) Imminent peril to the public health, safety, or welfare; or

(b) The unforeseen loss of federal funding for an agency program.”

(2016 Neb. Laws LB 867, § 6(1) (*codified at* Neb. Rev. Stat. § 84-901.04(1) (Cum. Supp. 2016)).

#### **(b) Availability of Emergency Rulemaking**

“Any agency may use the emergency rule or regulation procedure as set for in [section 84-901.04]. However, no agency shall use such procedure to avoid the consequences for failing to timely adopt and promulgate rules and regulations.” (2016 Neb. Laws LB 867, § 6(2) (*codified at* Neb. Rev. Stat. § 84-901.04(2) (Cum. Supp. 2016)).

#### **(c) Duration of Emergency Rule or Regulation and Renewal**

“Rules and regulations adopted, amended, or repealed under [section 84-901.04] shall be exempted from the notice and hearings requirements of section 84-907 and the review process required under section 84-905.01 and shall be valid upon approval of the Governor. An emergency rule or regulation shall remain in effect for a period of ninety calendar days and is renewable once for a period not to exceed ninety calendar days.” (2016 Neb. Laws LB 867, § 6(3) (*codified at* Neb. Rev. Stat. § 84-901.04(3) (Cum. Supp. 2016)).

#### **(d) Filing and Publication of Emergency Rules**

“Any agency which adopts, amends, or repeals [an emergency] rule or regulation under [section 84-901.04] shall file such rule or regulation with the Secretary of State. The agency shall also publish such rule or regulation on the agency's web site.” (2016 Neb. Laws LB 867, § 6(4) (*codified at* Neb. Rev. Stat. § 84-901.04(4) (Cum. Supp. 2016)).

### **6. Limited Exemptions from the Rulemaking Process**

LB 867 also includes the following limited exemptions from the rulemaking process.

#### **(a) Style or Format Changes, Correction of Technical Errors, and Alteration of Cites or References to State or Federal Law.**

“A change to an existing rule or regulation to (a) alter the style or form of such rule or regulation, (b) correct a technical error, or (c) alter a citation or reference to make such citation or reference consistent with state or federal law but which does not affect the substance of the rule or regulation is exempt from the requirements of this section. Such change shall not alter the rights or obligations of the public.” (2016 Neb. Laws LB 867, § 11(3) (*codified at* Neb. Rev. Stat. § 84-907(3) (Cum. Supp. 2016)).

**(b) Security Policies and Procedures**

“Agencies shall be exempt from promulgating security policies and procedures which, if made public, would create a substantial likelihood of endangering public safety or property.” (2016 Neb. Laws LB 867, § 11(4) (*codified at* Neb. Rev. Stat. § 84-907(4) (Cum. Supp. 2016)).

**CONCLUSION**

LB 867, which becomes operative on January 1, 2017, may raise questions as to the interpretation and application of the various changes made to the APA under that legislation. Should you or your legal counsel wish to discuss such changes or desire legal advice on specific issues that arise, we encourage you to contact the Assistant Attorney General assigned to represent you as a State official, or your agency, board, or commission.