BILL DRAFTING MANUAL

prepared primarily for use
by staff members
of the
Legislative Counsel's office

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Legislative Counsel Committee
State Capitol
900 Court Street NE S101
Salem OR 97301

FOREWORD

The preparation of bills and other measures for legislators, legislative committees and state agencies is one of the major functions of the Office of the Legislative Counsel. This manual is intended primarily for attorneys in the Legislative Counsel's office.

This manual also is intended to encourage uniformity in the form, style and language of legislative measures, because experience has demonstrated that uniformity contributes greatly to the framing of sound and effective legislation. However, it is impossible in a manual of this kind to anticipate or resolve all of the issues that arise in drafting legislation.

In preparing this manual, we have drawn upon manuals of other states and textbooks. Reed Dickerson's outstanding textbooks *Legislative Drafting* (1954) and *The Fundamentals of Legal Drafting* (1965) were especially helpful. Extensive parts of this manual have also been derived from the *Form and Style Manual for Legislative Measures*, published by the Publication Services staff of the Legislative Counsel's office. We gratefully acknowledge our debt to all of these sources.

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*Office of the Legislative Counsel use only

INTRODUCTION

Poorly drafted statutes are a burden upon the entire state. Judges struggle to interpret and apply them, attorneys find it difficult to base any sure advice upon them, the citizen with an earnest desire to conform is confused. Often, lack of artful drafting results in failure of the statute to achieve its desired result. At times, totally unforeseen results follow. On other occasions, defects lead directly to litigation. Failure to comply with certain constitutional requisites may produce total invalidity. Menard, "Legislative Bill Drafting," 26 Rocky Mt. L. Rev. 368 (1954).

* * *

It is hard to put a price tag on badly constructed legislation. How can we measure the cost of litigating the uncertainties of meaning that are brought about by language that is ambiguous or needlessly vague? And how can we evaluate the cost of finding legislative provisions that have been obscured by inept legislative placement? And, I might add, how frustrating is the effort when ambiguities exist and the search for legislative intent becomes fruitless, as is so often the case. L. Jaworski, "The American Bar Association's Concern with Legislative Drafting" in *Professionalizing Legislative Drafting*, p.5 (R. Dickerson, Editor, 1973).

* * *

The legal drafting attorney must write for unidentified foe as well as known friend. The drafting attorney must write so that not only a person reading in good faith understands but a person reading in bad faith cannot misunderstand.

* * *

In formulating any legislation, three phases are involved. The first phase is to secure accurate factual information about a problem. The second phase is to find an approach to meet the problem, to resolve the policy issues. The third phase is to produce a bill that reflects the policy accurately in a form consistent with constitutional provisions and other laws.

The first two factors are inherently and exclusively legislative, but in practice are only as effective as the language in which they are clothed. An accurate expression of the legislative will require skill in the mechanics of bill drafting.

* * *

Until courts chart their statutory construction course, legislative attorneys would be wise to take certain defensive measures. One is to recognize that they cannot draft so as to determine absolutely the results of litigation. In fact, it is not desirable to determine results absolutely; a drafting attorney cannot foresee all the situations to which the law may apply, so courts must have some flexibility. Rather than conceiving of their task as ensuring that cases will come out a certain way, drafting attorneys should conceive of it as determining the boundaries of, and the terms of, the future judicial discourse that will be construction of the statute being drafted. In order to prevent further usurpation by the courts of legislatures' authority, drafting attorneys should pull in those boundaries and more fiercely defend them. They can do those things by constantly remembering a draft's main purpose while creating its details, by imagining possible facts to which

the statute may apply, by seeing the new statute in relation to current statutes, and especially by frequently and carefully using definitions.

Some of the carelessness and imperfection seen in adopted legislation reflects lack of skill on the part of the drafting attorney. Unfortunately, some of the problems of poorly drafted legislation result from the failure to recognize that good drafting requires time and a specialized skill.

Drafting is a craft in which one becomes proficient only by experience, which includes much trial and many errors. However, this manual can assist a drafting attorney in avoiding many of the errors that others have experienced. Although it is designed primarily for use in drafting legislative measures in Oregon, most of the principles set out in this manual apply equally to measures drawn for local governments and other states, and even to the preparation of legal instruments generally.

CHAPTER ONE

THE BILL DRAFTER

The office of the Legislative Counsel ("LC") provides Oregon legislators and state agencies with bill drafting services and prepares amendments for measures it drafts.

LC attorneys put into statutory form what the requesting client asks for in substance. Drafting attorneys craft statutory language that is understandable by laypersons as well as by administrators, judges and lawyers. The complexity of social problems addressed by the statute, the ambiguities of meaning and the political process of enacting law combine—if not conspire—to make drafting difficult.

Requesters often view the drafting attorney's responsibility as simply choosing the right words. Indeed, that view may be supported by the amount of space this manual and the *Form and Style Manual for Legislative Measures* direct toward style and usage. The deeper aim of good bill drafting involves untangling what is apparently requested from what is meant. Drafting is the reduction of thought to writing, but if the drafting attorney has not thought through the problem, the most artful drafting tends to only conceal that lack of clarity. Manuals cannot teach drafting attorneys how to sense issues, how to frame relevant hypothetical situations or how to get at the meaning. Only experience can do that. It is a challenging and rewarding task.

The drafting attorney first must isolate the concepts that express the requester's goal and then must find the language that expresses that concept. This manual addresses techniques for handling the language of drafting. But, regardless of the drafting attorney's skills in grammar and style, there is no substitute for cultivating the ability to foresee drafting problems and the wisdom to devise answers that come from experience with the legislative process.

A drafting request is often expressed in less than adequate detail. Relying solely on the requester for complete understanding of the substance of a request and its context is to ask for trouble. Requesters do not always understand the current law or the legal ramifications of their requests. One advantage of Oregon's practice of assigning subject areas to individual drafting attorneys is that they become experts in the law and ongoing developments in their subject areas. This comes from repeated experience drafting, writing opinions and reviewing rules in a specific field; from relationships with legislative and agency staff and lobbyists; and from reviews of relevant news reports, legal journals, developing case law and other reference sources. The drafting attorney who is knowledgeable about the subject area has two advantages: the knowledge of the inciteful questions to ask the requester and the experience efficiently thinking through the problems to compose the draft.

Drafting requests sometimes come in the form of prewritten draft language, rather than a narrative explanation of the problem to be solved and the requester's preferred solution.

Legislative drafting is a specialized endeavor, with its own rules. Few people outside of LC know enough to be adept at it. Submitted drafts frequently have sloppy language and violate our form and style. Worst of all, the unvetted proposal may fail to achieve the requester's aims by overlooking fundamental details, implementation or hidden pitfalls. Drafting attorneys who adhere slavishly to submitted draft language are not doing their clients any favors.

While drafting attorneys will develop subject-matter expertise, they are not involved in deciding the political wisdom of a course of action. The legislative members are officially charged with policymaking. The drafting attorneys are not. Drafting attorneys have a professional responsibility to serve the requester objectively in accomplishing the requester's ends and have a legal duty not to oppose, urge or attempt to influence legislation.[1] Moreover, a drafting attorney focused on policy may mistakenly believe a bill draft includes the attorney's assumptions that are not in the text. Dispassionate analysis reveals these gaps accurately and quickly. It is easier to concentrate on ensuring a bill answers the important questions of "who," "what," "when," "where" and "how" when the drafting attorney is divorced from concerns of "why" and "whether."

A drafting attorney's experiences, factual knowledge and legal training all must be called into play in advising a requester on the potential problems that a strategy, policy or method may encounter. This advice may affect the policy decisions of the requester but must not usurp the right of the requester to make the final decision.

The key to distinguishing which comments concerning policy are appropriate lies largely in the drafting attorney's attitude. With an attitude that supports accomplishing the requester's goals and reinforcing the professional services provided by the office, the attorney can better distinguish the situations. A drafting attorney overly concerned with the wisdom of the request often will not be properly discerning.

LC attorneys are subject to the Oregon Rules of Professional Conduct and the jurisdiction of the Oregon State Bar in matters of legal ethics. Ethical rules guide attorneys toward an understanding of their duties to their clients, but also to the public and the rule of law. Formal ethics opinions of the Oregon State Bar contain little guidance for government lawyers as a group and even less for LC attorneys. For example, would it be ethical if an LC attorney, at the request of a member, obscured from the public a material provision of a bill by burying it in an unrelated portion, omitting it from the measure summary or otherwise hiding it?[2] The answer is not obvious, but drafting attorneys should be aware of the potential ethical limits upon their practice.

A perfect law never has been written and never will be. The passage of time ultimately renders every law obsolete. However, a drafting attorney can do much to anticipate

[1] ORS 173.240 ("Neither the Legislative Counsel nor any employee of the committee shall oppose, urge or attempt to influence legislation.").

[2] See O.R.P.C. § 8.4(a)(3) (It is misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law.")

problems and reduce inconsistency and ambiguity. Success as a drafting attorney depends on the extent to which the drafting attorney achieves these ends.

COUNSEL'S LAMENT[3]

I'm the Legislative Counsel,
I compose the sundry laws,
And of half the litigation
I'm supposedly the cause.
If I employ the kind of English
Which is hard to understand,
The members do not like it,
But the lawyers think it's grand.

I am the Legislative Counsel,
And my sentences are long.
They are full of inconsistencies
Grammatically wrong.
I put legislative wishes
Into language of my own,
And though no one understands them
They're expected to be known.

I compose in a tradition
Which was founded in the past,
And I'm frankly rather puzzled
As to how it came to last.
But the civil service use it,
And they like it at the Bar,
For helps to show the laity
What clever chaps they are.

I'm the Legislative Counsel
And my meanings are not clear,
And though words are merely language
I have made them my career.
I admit my kind of English
Is inclined to be involved.
But I think it's even more so
When judicially solved.

I'm the Legislative Counsel,
And they tell me it's a fact
That I often make a muddle
Of a simple little Act.
I'm a target for the critics,
And they wish to see me fried—
Oh, how nice to be a critic
Of a job you've never tried.

[3] Adapted from J.P.C., *Poetic Justice 31 & 32 (1947).*

CHAPTER TWO

STEPS IN DRAFTING A BILL

This chapter gives a broad overview of the entire drafting process. Some of the subjects are explained in greater detail in other chapters of this manual.

1. TAKING A REQUEST.

The Legislative Counsel's office furnishes bill-drafting and opinion-writing services to legislators, legislative committees and state agencies (referred to categorically as "the requester"). Requests are submitted in various forms and with widely varying degrees of specificity.

Most requests are submitted to the LC Request email address and are processed by the attorney who is on yellow-sheet duty. Attorneys typically are assigned to yellow-sheet duty on a weekly basis. A request also may be processed as the result of a conversation with or email from a requester.

While a request may be submitted in various forms, when possible, encourage the requester to submit a form made available by the office to assist in obtaining suitable information, including the name of any person or agency that the requester desires to have consulted.

When an LC attorney processes a request, the attorney creates a "yellow sheet" by entering information about the request into the Oracle docket and assigning the request to an attorney based on the subject matter of the request. The yellow sheet should be completed in as much detail as possible. The yellow sheet should identify any authorized consultations so that the front desk knows who is authorized to talk to an attorney about the request. Additionally, the subject matter descriptions on the yellow sheet should be descriptive enough that the requester can identify the request on the docket printouts received by the requester and an attorney can search for the document in the docket. The yellow sheet subject lines should include a verb that describes the intent of the proposed draft. If a redraft is requested, the docketing attorney should indicate the bill number in the subject lines, and place a copy of the earlier session bill in the LC file. The front desk staff generate sequentially numbered electronic file folders prior to each session.

After a yellow sheet is created, the attorney forwards the request email to the front desk and the assigned drafting attorney, and indicates the LC number. The front desk will finalize the docket entry. If a requester indicates great urgency, the attorney processing the request should alert the Legislative Counsel and the front desk of the urgency..

2. CONFIDENTIALITY.

a. Member Requests.

A drafting request from a member of the Legislative Assembly will be treated as confidential and the name of the requester and nature of the request will not be revealed to any person except as follows:

(a) Without revealing the identity of the requester, an attorney may consult with others to gain necessary background information for drafting.

(b) An attorney may inform subsequent requesters who request an identical or almost identical draft that the earlier request has been made, but may not inform the second requester of the name of the first requester without the authorization of the first requester.

(c) An attorney may discuss the draft with any person the requester authorizes the drafting attorney to consult in preparing the draft, as authorized on the request form or after drafting has begun.

(d) An attorney may presume that legislative aides and other persons on the member's staff have authority to discuss a draft requested by the member.

b. Committee Requests.

A committee request is a publicly made request based on the authorization of a majority of the members of the committee. As a publicly made request, a committee request is not confidential. Committee requests are treated as follows:

(a) An attorney may acknowledge receipt of a committee request and may reveal the nature of the request and the name of the committee. All inquiries as to the specifics of committee requests, other than inquiries from members of the committee, should be referred to committee staff.

(b) The office will not supply a list of committee requests except to members of the committee. Persons seeking general information of this nature will be directed to committee staff. Persons other than members of the committee seeking copies of drafts prepared for committees will be directed to committee staff.

(c) An attorney may inform subsequent requesters who request an identical or almost identical draft that the earlier request has been made and may inform the second requester of the name of the committee that made the request without further authorization from the committee.

(d) An attorney may discuss the specifics of a committee request with others to gain information needed to prepare the draft.

c. Agency Requests.

An agency drafting request will be treated as confidential and the name of the requester and nature of the request will not be revealed to any other person except as follows:

(a) Without revealing the identity of the requester, an attorney may consult with others to gain necessary background information for drafting.

(b) An attorney may inform subsequent requesters who request an identical or almost identical draft that the earlier request has been made, but may not inform the second requester of the name of the first requester without the authorization of the first requester.

(c) An attorney may discuss the draft with any officer or employee of the Oregon Department of Administrative Services or the office of the Governor if the draft requires the approval of the Governor under ORS 171.133.

(d) An attorney may discuss the draft with any person the requester authorizes the drafting attorney to consult in preparing the draft.

(e) An attorney may presume that all officers and employees of an agency have authority to discuss an agency draft.

3. THE PURPOSE OF THE REQUEST.

Before beginning to prepare a bill, the drafting attorney must determine what the requester wants to accomplish. An attorney's function is to devise appropriate statutory language for the requested objectives, and not to supply substance or policy. An attorney is unlikely to achieve the objective of the requester if the drafting attorney has an imprecise idea of what the requester wants.

For agency requests, determining what the requester wants is a little trickier because all requests are submitted through the Oregon Department of Administrative Services (DAS) in a process that may take many months before the requests are brought to Legislative Counsel. Therefore, prior to beginning work on an agency draft, the drafting attorney should check with the person named as the agency contact to be sure that the drafting attorney and the agency agree on what the agency is requesting. As part of the DAS process, agencies are required to submit suggested statutory language with each request. Remember that suggested language is usually written and reviewed by people who do not have drafting training and who may be in a hurry. Agency employees sometimes have a stake in seeing their exact words in the final bill draft. Nonetheless, the drafting attorney's obligation is to produce a draft that accomplishes what the agency wants to accomplish. The "how"—the actual drafting—is ultimately the drafting attorney's responsibility.

Because of the complexity of some requests, sometimes a requester cannot give explicit instructions when making the request, nor can the person taking the request anticipate every question that will arise in the course of drafting. When the instructions are not precise, the requester's objective and the various means by which that objective can be accomplished must be analyzed. After conducting an analysis, the drafting attorney can check with the requester so that the requester can consider and answer any questions. As drafting proceeds, the drafting attorney may encounter additional questions that require subsequent contacts with the requester. These contacts *should* be kept to a minimum. Requesters, particularly legislators, generally are busy and are relying on the expertise of the drafting attorney to isolate policy issues. It is sometimes better for the drafting attorney to fill in the interstices and advise the requester in writing of the options used in the draft than to seek additional details from the requester during initial drafting.

4. IS IT CONSTITUTIONAL?

Legislation must conform to state and federal Constitutions. If the drafting attorney fails to observe constitutional requirements or restrictions, the bill will be invalid in whole or part. The Oregon Constitution also imposes requirements on legislative form and substance. For example, a proposed bill may not embrace more than one subject[1] and may not violate the requirement for uniformity of taxation.[2] Many other constitutional requirements apply as well.

[1] Article IV, section 20, Oregon Constitution.
[2] Article IX, section 1, Oregon Constitution.

Specific constitutional provisions are discussed at appropriate places in this manual and a brief discussion of constitutional limitations on legislation is provided in Appendix B.

An attorney ordinarily need not render a formal opinion on each constitutional issue. However, the requester may reasonably expect that the drafting attorney will point out any constitutional issue and, if possible, indicate an alternative, constitutional means of accomplishing the objective. The drafting attorney should record in the file, however briefly, the nature of the problem and the fact that the requester has been notified of its existence.

5. WHAT IS EXISTING LAW?

An attorney must become an expert on constitutional provisions, court decisions and statutes relating to the subject matter of each bill the drafting attorney is requested to prepare. If a bill passes, the substance of the bill will take its place in the body of existing law. The drafting attorney must ensure that the bill will not create conflicts or produce unintended results. Not searching for conflicting provisions of existing law may seem to save time, but sooner or later individuals, agencies and the courts may have to spend much more time and money trying to resolve the conflicts.

To determine the application and meaning of existing statutes, the drafting attorney may begin by using the ORS classification outline, index and annotations. Annotations that have been written but not yet published are electronically stored in a file on the I: drive.

Some statutory provisions are of general application. For example, ORS chapter 174 provides certain definitions and standards for all statutes in ORS. The drafting attorney ought to be familiar with statutes of general application so that the bill will not duplicate material already covered.

Federal laws establishing standards for state programs in certain areas such as welfare, health, education and highways may limit state activities in these areas. Noncompliance with federal standards could result in the state losing federal funding for certain programs. Other areas may be preempted by federal action. Check federal laws and regulations if there is suspicion that a bill may conflict with federal programs. If unable to find the information online, an attorney may contact the appropriate federal or state agency, but any contact is subject to the rule on confidentiality.

6. USING OTHER LEGISLATION AS A BASIS.

When possible, an attorney should avoid reinventing the wheel when preparing a bill. An attorney can do this by searching for a law or a previously prepared bill that is similar or analogous to the one requested. Revising a previous bill or adapting a law may save time compared to writing a new bill. Also, the benefit of someone else's thinking, perhaps even the drafting attorney's own on some occasion when more time was available, may be desirable. Problems and solutions that otherwise would be overlooked may be found. Materials that may be helpful for finding similar or analogous bills are described below.

a. Other Oregon Statutes.

A bill can be patterned on an existing Oregon statute, even when that statute is not precisely on the same subject. For example, if requested to draft a bill creating a board to license a certain profession, the drafting attorney could examine other occupational and professional licensing laws to find many provisions that suggest appropriate substance and language.

The procedure prescribed by an existing law *usually* can be assumed to be workable. The language used in an existing law often has been construed administratively or judicially. Consequently, it may be preferable to use the "tried and tested" procedure and language rather than take chances on something new. However, existing laws are not always perfect in form, style or substance, and must be adjusted to fit the needs of the present bill. The drafting attorney should check the workability of an existing statute with the appropriate state agency before using the statute as the basis for a new bill. The drafting attorney also should review the annotations for court cases and Attorney General opinions that may suggest problems with the proposed model.

b. Bills of Past Sessions.

Refer to Appendix E, Redrafts of Bills from Previous Sessions, to prepare redrafts. A bill introduced but not passed, or a draft prepared by the Legislative Counsel's office but not introduced, may help in preparing a new bill. Bills introduced at a previous session can be found by using the indexes or tables in the final Legislative Calendar, searching the Measures database in STAIRS for a previous session or searching in OLIS. Usually the style and substance of a previous draft or bill can be improved. The drafting attorney cannot assume that a bill introduced at a prior session is satisfactory for present purposes.

For a bill or draft from a previous session, the bill request file may contain helpful information. Bill request files are organized by the LC number for the bill. The LC numbers can be located by searching for the bill on the electronic docket, by looking in the bottom left-hand corner of the printed bill or by looking in the conversion tables located in the LC library. Beginning with the second special session, convened in August 2020, all LC files are stored in electronic form in the I:\ drive. For prior sessions, he bill request files for at least two long sessions and two short sessions are stored in the office of the Legislative Counsel. The bill request files for older sessions are stored at Archives and may be retrieved by submitting a request to the front desk of the office of the Legislative Counsel.

c. Bills of Current Session.

As a legislative session progresses and the number of bills introduced increases, an attorney may be able to use a similar bill that already has been introduced as the basis for a new draft. Similar bills may be found by searching for key terms on OLIS, in the docket for the current session, in the Measures database for the current session in STAIRS or in the weekly cumulative bill index. Another method for finding similar bills is to search the

table of sections amended, repealed and "added to," to find changes made to the same statutes.

If a similar bill has been introduced during the same session, sometimes the requester's objective can be more easily accomplished by amendment of the bill. However, an attorney should not draft amendments instead of a bill without first consulting the requester.

If a similar bill already has passed both houses, the bill being drafted may need to be adjusted to make it consistent with the earlier bill. Progress of all bills is available on OLIS and in the weekly cumulative legislative calendars and their daily supplements. If a conflict exists between the passed and proposed bills, consult with the conflicts team.

d. Laws and Bills of Other States.

If legislation similar to the bill being drafted has been presented in another state, that bill (or law, if it was enacted) may be helpful. Sometimes a similar law can be found by checking the codes of other states on the Internet or in the Supreme Court Library. For electronic searching, the National Conference of State Legislatures has a searchable bill tracking database called NCSL 50. For other searches, the drafting attorney may need to exercise some ingenuity in selecting the states most likely to have confronted the same problem. For example, an attorney is unlikely to find anything useful about commercial fishing among the Utah statutes.

In adapting a measure from another state, the drafting attorney must be sure that necessary changes are made to conform to terminology and procedures used in Oregon statutes. An attorney must remember, too, that a bill may be constitutional in another state but unconstitutional in Oregon. Therefore, bills from other states usually should be used only as general guidelines to regulatory approaches and direction, and not as copy to be followed in detail.

e. Uniform and Model Acts.

An attorney may find that a bill similar to the one being drafted has been prepared by the National Conference of Commissioners on Uniform State Laws. The conference prepares uniform Acts that are intended, for the most part, to be followed exactly. The text of uniform Acts can be found in Uniform Laws Annotated at the Supreme Court Library or at www.uniformlaws.org (National Conference of Commissioners on Uniform State Laws.)

Model Acts, intended as guides for legislation in areas where uniformity is not necessary, come from a variety of sources, including trade groups, occupational associations, etc.

f. Interim Committee Bills.

Legislative interim committees and task forces usually recommend legislation, drafts of which sometimes are printed in their reports. Copies of interim committee reports are available on the legislative website.

g. Oregon State Bar Bills.

Committees of the Oregon State Bar frequently propose legislation. The reports of these committees (often including the full text of proposals), are published each year for consideration by the annual meeting of the Bar. Copies of these publications are available on the Bar's website.

h. Other Sources.

Federal legislation may suggest approaches to be taken in drafting, but an attorney should take careful note that the mere existence of federal legislation on a subject suggests either preemption or supremacy. Further, federal legislation rarely provides a desirable drafting model.

Local ordinances may be used as samples. There are two caveats, however. First, if the matter can properly be subject to local ordinance, the drafting attorney must determine whether the matter is within the authority of the Legislative Assembly or is a subject of home rule. Second, ordinances are usually not good drafting models.

Quasi-public associations such as the League of Oregon Cities, the Association of Oregon Counties and the Oregon School Boards Association may be good sources of suggested legislation.

Trade associations are also sources for draft legislation on the subjects affecting their interests. The State Library can usually provide addresses if there are no local affiliates.

7. USE OF LIBRARY FACILITIES AND ELECTRONIC RESOURCES.

The drafting attorney should become thoroughly familiar with the research and reference tools available electronically and in the LC office library, Supreme Court Library and State Library. A visit to each of the libraries is the best way to find out what is available. Research librarians at both the Supreme Court Library and the Oregon State Library can be invaluable resources for conducting research for a bill.

The State Archivist has the records and files of standing committees and interim committees of recent legislative sessions. A check of the State Archives may provide background on an existing Oregon statute. The Chief Clerk of the House and the Secretary of the Senate retain all recordings of the floor debates.

The State Library, Supreme Court Library and Willamette Law School Library have facilities to photocopy pages of books and other library materials. For the drafting attorney's convenience, the Legislative Counsel's office has "charge cards" available for

copying purposes at these libraries (fees charged to this office). A charge card can be checked out at the Legislative Counsel front desk and must be returned by the end of that day.

A variety of electronic resources are available, including STAIRS, Westlaw, HeinOnline, Oregon LegisLaw and the Internet. STAIRS may be used to research ORS, session laws, measures and other databases. Westlaw is the preferred online research service for the office of the Legislative Counsel and may be used to research ORS, as well as Oregon case law, United States Supreme Court case law and other databases. Westlaw may also be used to Shepardize a particular case. LegisLaw provides access to Oregon laws, drafts, amendments and LC opinions from previous sessions. The Internet is useful for researching the laws of other states, federal laws and policies, Oregon Administrative Rules and other topic areas. The electronic resources available in the office for research frequently change. The drafting attorney should periodically review them.

8. CONSULTATION WITH EXPERTS.

Sometimes an attorney will not be sufficiently familiar with a given area to determine the practical effect of a new procedure or change in the law. In these cases, *if the requester consents* and if time permits, the drafting attorney may consult experts in the area to be affected. For example, if the bill being drafted would impose new duties and powers on a state agency, it would be proper to confer with appropriate personnel of that agency. Problems of a practical nature may occur to them that would not occur to others. However, the drafting attorney must protect the requester from possible agency lobbying attempts by protecting the requester's identity unless *specific* permission has been given to reveal that identity.

Usually it is easy to find the appropriate official for consultation if a state agency is involved. More difficulty will be experienced with respect to city or county officials. However, the League of Oregon Cities or the Association of Oregon Counties can provide useful information concerning procedures and operations of the local governments represented by each.

The Legislative Fiscal Officer and the Legislative Revenue Officer may be able to assist in problems concerning state revenues, expenditures and fiscal matters generally. LFO analysts staff the Ways and Means committee and subcommittees; LRO economists staff the revenue committees.

9. REVIEWED FOR FORM AND STYLE ONLY.

Do not caption a draft "Reviewed for Form and Style Only." An attorney may receive a bill draft request with instructions that no changes are to be made or for which there is not sufficient time before the draft is due for the drafting attorney to examine the draft, much less rewrite it. In either case, consult with the Legislative Counsel or Chief Deputy Legislative Counsel instead of adding a caption that reads "Reviewed for Form and Style Only."

10. ANALYZING PROVISIONS TO BE IN BILL.

After completing the necessary background research, the drafting attorney must begin to visualize the elements of the bill to be drafted. While the bill may embrace only one general subject, it will do so by doing one or more of the following:

1. **Creating new law.**
2. **Amending existing law.**
3. **Repealing existing law.**

If an existing statute is not found that can be amended to accomplish what is desired, the bill must **create new law** (new sections) imposing duties, conferring powers, granting privileges, decreeing prohibitions, prescribing penalties, making appropriations, etc., as necessary to accomplish its purpose.

Research may indicate that existing statutes deal with the subject covered by the request and that a change in or an addition of language to one or more of these existing statutes will accomplish the requester's purpose. If so, the bill will need to **amend existing statutes**. Language may be taken from other statutes to express the changes in or additions to the section amended. It is important to harmonize the language added with that already used in the section amended, and to avoid creating inconsistencies and conflicts with unamended portions of the law. Because it is important to maintain consistency of language between the new material and the unamended existing law, the drafting attorney may need to exercise self-restraint.

Often a bill must **repeal existing law** (removing sections). It is important to check a statute carefully prior to its repeal, to be certain that nothing in the statute should be in force after the bill being drafted becomes law. In addition, internal references to the repealed law may exist in sections not otherwise being amended. These references must be reconciled. STAIRS is available on the computer for checking repealed sections and renumbered subsections. See the STAIRS training and reference manuals for information on how to use STAIRS.

11. OUTLINING A BILL.

For many bills, a mental or written outline of a bill, prepared before writing the bill itself, is a necessity. The outline should express the results of the analysis of provisions to be included in the bill, following the suggestions in Chapter 6 of this manual with respect to arrangement. For a simple bill, an outline may be unnecessary. Probably there will be less need for a detailed written outline for an experienced drafting attorney, but some advance planning for drafting a bill will always be required.

A carefully structured outline, based on a sound analysis of the required provisions, is a good basis for dividing a lengthy or complex bill dealing with many aspects of the subject into smaller, manageable units.

12. WRITING A BILL.

After completing an outline, an attorney must begin to write. Writing should never be delayed until all research is completed. Research is *never* completed. Judgment is necessary to distinguish between the research effort necessary to produce a draft and research for its own sake or as a tactic to delay drafting.

An outline is useful in preparing the first draft. Form and style can be imposed later, but on a first draft the drafting attorney should concentrate on getting the *substance* of the bill in writing.

If the bill amends current ORS, read the entire ORS section before inserting the amendments and again after inserting the amendments. Many drafting mistakes can be avoided, or will be caught, if you read the entire section.

If possible, let a day or two elapse after completing a first draft and take the time to reread and rewrite the bill to:

- Attain clarity, giving careful attention to style and grammar and the use of specific words.
- Arrange the provisions in the most useful order.
- Ensure constitutionality or, if not ensured, review and comment upon it.
- Take into account statutory and common law rules for interpreting statutes.
- Comply with mechanical, formal and substantive requirements.
- Ensure that there is no conflict with or duplication of constitutional or statutory provisions of general application.
- Resolve "birds in flight" (i.e., actions and proceedings already under way or to be initiated that may be affected by the bill).

Finally, when the body of the bill is complete, the drafting attorney drafts an appropriate title. If the draft is "**final**," the drafting attorney should prepare a measure summary.

13. TIPS THAT SAVE TIME FOR LENGTHY BILLS.

In drafting a lengthy bill, the drafting attorney may not want to number sections or insert section numbers in internal references until the final arrangement of sections is

determined. If the bill is exceptionally long, it may be helpful to keep track of internal references.

For redrafts of bills with many statutes or new material, time often can be saved by asking a Word Processing Specialist in Publication Services to retrieve the statutes or the new material. Be sure to provide the bill number and session year to the Word Processing Specialist.

14. COMPILATION IN ORS.

The bill should be drafted in such a way that it will fit into ORS. To anticipate codification, the drafting attorney must understand the system of classification and arrangement of ORS.

During the drafting of a bill, the drafting attorney should examine ORS to discover if the new provisions of the draft should be placed in a particular place in ORS. If there is an adequate reason to do so, state that the new section is "added to and made a part of . . . " an existing series, chapter or code in ORS. There are two basic requirements for adding something to and making it a part of: There must be an affirmative reason to do so; and the series, chapter or code added to must exist as something more than an editorial convenience. For a more detailed discussion of adding a new section to an existing ORS series, chapter or code, see "DRAFTING NEW SECTIONS" in Chapter 13.

15. NUMBERS-REFERRED-TO SEARCH.

When amending or repealing an existing ORS section, the drafting attorney must *always* do a STAIRS search of ORS for all references to the amended or repealed section. See "Editorial Substitutions" under "ALTERNATIVES TO AMENDMENTS," Chapter 13, for discussion of editorial substitutions that may be effected in lieu of extensive "housekeeping" amendments and of situations that may require the drafting attorney to scrutinize more carefully those sections in which reference is made to the amended or repealed section in the bill.

16. SECTIONS AMENDED, REPEALED OR ADDED TO.

The Legislative Counsel's office maintains information on sections amended, repealed or added to for each current legislative session. This information is available online and in the tables printed weekly. These tables contain an entry for each ORS section, ORCP section, uncodified section or Oregon Constitution section for which an amendment or repeal has been proposed, and for each series of sections or chapter of ORS or Article of the Constitution to which one or more sections has been proposed to be added by a measure introduced at the session. See "CONFLICTING AMENDMENTS," Chapter 13, for further discussion of "A and R" tables.

17. SPECIAL ATTENTION NOTES.

Since 1949, Legislative Counsel's staff has accumulated a large number of notes concerning ambiguities, conflicts and defects in the statutes. These notes, commonly referred to as "special attention notes," are kept in loose-leaf binders in the office and are noted when a section is retrieved in the drafting program as follows: "**NOTE:** This section has an SA note."

Unfortunately, not all defects in the statutes have been noted in the special attention file. Part of the job of an attorney is to discover and record additional ambiguities, conflicts and defects. Special forms, known as "pink sheets," have been provided to record these. The notes should be prepared even though the draft cures the problem, in case the draft does not become law.

When encountering a special attention note in ORS retrieval, an attorney should check the pink sheets to determine whether the special attention note may be addressed in the bill.

18. RETRIEVAL NOTES.

A retrieval note may appear after the amending clause and before the text when an ORS section is retrieved in the drafting program. Retrieval notes bring to the attention of the drafting attorney any aspects of the ORS section that may require special handling, including delayed effective and operative dates, repeals and similar anomalies. Typically, retrieval notes alert an attorney if multiple versions of an ORS may need to be drafted and provide the effective or operative dates for the other versions.

19. REVISER'S BILL.

The Reviser's Bill amends ORS sections to make nonsubstantive changes, including correcting errors in syntax, internal references, gender references, etc. ORS retrieval for affected sections contain notes after the amending clause and before the text as follows: "**NOTE:** This section is amended in the Reviser's Bill."

When encountering such a note in retrieval, check the Reviser's Bill change and, if there is no conflict, do not make the Reviser's Bill change to the ORS section in the current draft. In cases of conflict between the Reviser's Bill and the current draft, see the Reviser's Bill team.

20. CHECKING FINAL DRAFT.

When a draft is finished, the drafting attorney should check it *carefully*. The final version of the draft and copies showing editor markup are in the Work in Progress folder for the session in the I:\ drive. The attorney should spot check the corrections to make sure that they are accurate. No matter how experienced in drafting bills, an attorney still may find mistakes that can be fixed or language that can be improved when the draft is reviewed.

Several *separate* readings are advisable to check arrangement, style, grammar, use of specific words, definitions, incorporations by reference, internal references to other

sections, etc. As a final check, there is a Checklist for Drafters inside the request folder. The drafting attorney should consider each point in this checklist and not mechanically check items.

21. THE BILL REQUEST FOLDER.

As discussed above, the bill request folders are now maintained as electronic folders. These folders should be maintained in good order at all times. Every version of a delivered draft is stored in the folder. The attorney should also store copies of all correspondence about the request. Emails can be stored as Outlook items or in Acrobat. If an attorney receives an opinion request that they answer informally, a copy of the email or a note of a phone conversation should be stored in the electronic file before the record is closed in the docket.

22. TRANSMITTAL.

Often an attorney will want to point out important features of a bill, or problems not addressed in the bill, in a memo accompanying the draft. An attorney should preserve for the record any constitutional or other legal objections that might be raised against the bill, even though the requester has been advised of them orally.

Having been advised of serious difficulties, the requester may still choose to adhere to original instructions. An attorney must accept that decision with good grace. Because of staff limitations during sessions, an attorney need not and should not send a formal, nonsubstantive letter with each draft.

23. PREPARATION OF WORK COPIES.

The LC attorney should use discretion when asked to share unedited versions of drafts and proposed amendments with requesters and others. The policy of the office is to prepare and deliver unedited "work drafts" only if it will assist the attorney in achieving the goals of the requester and managing the attorney's workload, not because of pressure from lobbyists. Frequently, the time that is saved by distributing an unedited version is lost because of the need to make additional corrections to the version that was shared. However, an attorney may find it useful to share short, precisely-worded text with stakeholders after careful discussion of the desired approach to wording and before editing.

24. SUMMARY.

In performing the duties of a bill drafter, an attorney must:

1. Ascertain the exact purpose the requester has in mind, and the means by which that purpose can be accomplished.

2. Explore in detail alternative approaches and, by pointing out the policy questions involved, help the requester think the problem through and decide the issues.

3. Find out which constitutional provisions and existing statutes relate to the subject of the proposed bill, and what adjustments, if any, must be made in existing law.

4. Develop a plan for the organization and arrangement of the bill.

5. Prepare a draft in a form meeting legal and technical requirements.

6. Check doubtful substantive matters with experts (unless the requester directs otherwise) or by independent research.

7. Check with the requester on further questions of policy.

8. Reread and revise the draft as many times as necessary to produce a satisfactory result.

9. *Re-recheck* the draft, using the bright green **Checklist for Drafters**.

CHAPTER THREE

STYLE AND GRAMMAR

A drafting attorney must deal constantly with difficult problems of expression. The material in this and the next two chapters is intended to help a drafting attorney write not only bills but other materials that reflect the A,B,C's of drafting: ***accuracy, brevity*** and ***clarity***.

1. GENERALLY.

In general, the following are good drafting practices:

- Short statements.
- Positive rather than negative statements.
- Active rather than passive voice.
- Present tense as much as possible.
- The indicative mood as much as possible.
- Simple, finite verbs rather than their infinitives, participles or gerunds.
- Singular rather than plural nouns.
- The same words consistently for the same meaning – avoidance of synonyms.
- Avoidance of unnecessary modifiers, unnecessary definitions, unnecessary references, long and unfamiliar words, legalistic expressions and circumlocutions.
- Words and forms of popular speech as much as possible.

A drafting attorney should *avoid* these types of word surplusage:

- **Deadwood.** Deadwood, by definition, should be eliminated. Vague, empty or pretentious words and phrases should be replaced by specific and direct language.

- **Unnecessary repetition.** Repetition is one means of achieving coherence in a written work, but if repetition does not contribute to the design, establish a pattern, emphasize important material or link parts, it is not functional and should be eliminated.

- **Overuse of passives.** The active voice is shorter and more direct than the passive voice.

- **Weak intensifiers and qualifiers.** Since legal propositions may have to include a number of modifying phrases or clauses, fitting them into the sentence simply and clearly is sometimes difficult. Words like "very," "quite," "rather," "completely," "definitely" and "so" can usually be struck from a sentence without loss.

  Usually the best places to put modifying phrases and clauses are before the subject or after the predicate or, in cases where the modifier is short, next to the word being modified. The least desirable place to put a long modifying phrase or clause is between the verb and the predicate noun.

- **Negative constructions.** When an idea can be accurately expressed either positively or negatively, it should be expressed positively.

- **Extra sentences and clauses.** Sentences are sometimes wordy because ideas are given more elaborate grammatical constructions than they need. These constructions can be grammatically subordinated or reduced. Several rules help the attorney tighten the draft:

  If two consecutive sentences have the same subject, they often can be combined.

  If the idea at the end of one sentence is picked up as the subject of the next sentence, the two sentences can usually be combined.

  Clauses beginning with "who" and "that" can be transformed to embedded phrases.

  Sentences and clauses beginning with "it is," "this is" and "there are" can be made more concise by eliminating those useless constructions.

- **Long-winded introductions.** Vague, empty words and phrases clog the beginnings of sentences. When the deadwood is cleared, the subjects appear early, and the main verbs appear close to them.

2. CONSISTENCY.

A drafting attorney must be consistent in the *use of words*. If a word or phrase is used more than once in a bill, there is a presumption that the word or phrase has the same meaning throughout. This presumption governs unless a contrary intent is clear. In view of this rule, two mandates can be framed:

(1) The same word should *not* be used to convey different meanings.

(2) Different words should *not* be used to convey the same meaning.

Consistency in *approach* also is important. For example, in drafting a statute to create an occupational licensing board, the attorney should check existing ORS chapters that provide for the licensing of particular professions, so that the draft will be consistent with the overall approach of existing law. In drafting a new section that will contain material similar to that in an existing ORS section, the new material should be arranged in the same way unless there is good reason to do otherwise. This does not mean that the arrangement and wording of an existing ORS statute must be imitated slavishly if the attorney finds a more precise and concise way to draft the material.

3. BREVITY.

Many statutes are ambiguous or obscure because of long and poorly constructed sentences. The drafting attorney must make a conscious effort to keep sentences short. If each sentence expresses a single thought, it generally is easier for the reader to grasp that thought. It does not matter if the result sounds "choppy," so long as it is clear.

As a general rule, when both a short word and a long word have the same meaning, the short word should be used because it may be more easily understood.

By limiting a sentence to one or two thoughts and a paragraph to a single relationship of thoughts, the attorney often can avoid ambiguity.

These suggestions help: Sentences of no more than 25 words; paragraphs of no more than 75 words.

A word of caution: Everyone wants a short bill. However, greater mischief may result from a bill that treats a complex subject briefly with vague provisions than from a bill that is lengthy but precise.

4. THE LEGISLATIVE SENTENCE.

The simplest legislative sentence consists of a **legal subject** and a **legal action**. These two parts together constitute the **rule**. In more complicated forms, the legislative sentence also may contain **exceptions, conditions** and **cases**.

a. The Legal Subject.

The legal subject identifies the person who is required or permitted to do something or prohibited from doing something. The legal subject determines the person to whom the law will apply. The legal subject must be used precisely to be sure that the rule confers rights or imposes duties on all of the persons whom the requester intends to obligate or benefit, and no others.

Legal duties, liabilities, rights, privileges and powers can reside only in *persons***.** A *thing* cannot possess a right or be subject to a liability. However, there are times when stating the persons who constitute the legal subject would require extensive repetition or would result in awkward arrangement. In these instances, if the persons are definite, even though by implication, a thing as the subject of the sentence may be used.

When using descriptive language to limit the legal subject, the drafting attorney should use the present or past tense of the verb and avoid the future and future perfect tenses; for example, "an employee who leaves" or "an employee who has left," *not* "an employee who shall leave" or "an employee who shall have left."

b. The Legal Action.

The legal action describes the particular act that a person is required or permitted to do or prohibited from doing. The legal action should stay close to its subject.

If the rule (legal subject plus action) is **permissive**, that is, confers a right, privilege or power that is to be exercised at the will of the legal subject, the word "may" is used in the legal action. If the rule is **imperative**, that is, imposes a duty or liability on the legal subject, the words "shall" or "may not" are used. "Shall" should never be used to express future action in stating the legal action. "May" or "shall" must never be used in any part of the rule except in the legal action.

The use of "will" results in the following kind of ambiguity: "Any employee of the department will be allowed to undergo courses of training." Since a privilege is conferred and no duty is imposed, the action should read "may take," i.e., "Any employee of the department may take courses of training."

Even when no ambiguity results, use of "will" may cause a thing to be used as the subject. For example, "The duration of the courses will be determined by the administrator." This example should read: "The administrator shall determine the duration of the courses."

The drafting attorney ought to be wary of such constructions as "The department shall be compensated for expenses incurred in the performance of its duties under this section." Does the sentence impose a legal action or is the action simply cast in the future passive? One assumes the former is intended, since the latter would be mere narrative. Upon whom, then, is the duty of compensating the department imposed? Who or what is the legal subject? Cast the sentence in the active voice, and not only is the legal subject immediately apparent, but

the imperative is established: "A corporation shall compensate the department for expenses incurred by the department in the performance of its duties under this section."

The drafting attorney also should avoid constructions that use "shall" purportedly to impose a requirement on an entity that is not of a type that can logically fulfill a requirement. An example is "The member appointed under subsection (1) of this section shall be licensed by the Oregon State Boxing and Wrestling Commission." Does this mean the commission shall license the appointee? Probably not. Some attorneys attempt to avoid this error by replacing "shall" with "must." While the substitution is arguably preferable to the original, it still does not address the issue, which is one of statutory function. The statutory function in this instance is not to authorize, require or forbid a legal action, but to impose a condition upon the appointment, and "shall" can readily perform its accepted role if the sentence is recast with that function in mind: "The (appointing authority) shall appoint a person licensed by the Oregon State Boxing and Wrestling Commission."

c. The Case.

The extent or application of a legal rule can be limited by stating the case in which it operates. In other words, the case sets out the state of facts upon which the rule is to operate. Ordinarily "when" introduces the case. Cases may be stated in the alternative.

Generally, the case should be stated at the *beginning* of the legislative sentence. The reader has immediate notice that the law is limited in application, and is informed promptly whether the rule deals with a state of facts in which the reader is interested. Sometimes, however, a single rule applies to numerous cases. It may be more convenient to list numerous cases *after* the statement of the rule, rather than before.

The present or past tense of the verb should be used in stating the case, never the future. For example, the following should *not* be used: "when the director shall have found." Instead, use "when the director finds" or "when the director has found," depending on whether the facts stated in the case must occur before or at the same time as the legal action.

A drafting attorney should not use "whenever" or "where" to mean "when." Also, the case should not be introduced by conditional phrases such as "in case" or "in the event."

d. The Condition.

Sometimes the legal rule applies only upon the fulfillment of stipulated conditions. Ordinarily, "if," "until" or "unless" introduces the condition.

The logical position for a condition is directly after the statement of the case. Since the rule is suspended until the condition is fulfilled, the condition should be placed before the rule. If there are several conditions, they can be listed in the chronological order in which they are to be performed or occur.

As in the case of other parts of the legislative sentence, the future tense of a verb must not be used to state a condition.

It is sometimes difficult to determine whether something is a case or a condition; indeed, perhaps there is no significant difference. In determining whether to use "when" or "if," the following examples, drawn from the Wisconsin drafting manual, might be helpful:

- When you are expressing a condition that may never occur, use "if" to introduce the condition, not "when" or "where."

  Correct: If the suspect resists arrest, the officer may use force to subdue the suspect.

- If the condition is certain to occur, use "when," not "if," where" or "whenever."

  Correct: When this section takes effect, the court shall dismiss all pending proceedings.

e. The Exception.

An exception is used to exempt from the application of the law some matter that otherwise would be within the scope of the rule. An exception is introduced by "except," but care must be exercised that all of those items following the word "except" are intended to be governed by it.

An exception may be used to incorporate by reference exemptions that have been stated in other provisions to avoid an overly complex sentence. For example, "Except as provided in sections 2 and 3 of this (year) Act, a person who. . . ." Ordinarily this type of exception should *precede* the case and condition, if any, and the rule.

Probably no single element contributes more to confused legislation than the inept use of exceptions, especially in the form of provisos (see section 11 of chapter 4 of this manual), when the matter should be covered by a direct statement. Provisos are archaic, confusing and consistently misused. An exception, limitation or condition should be introduced by "except that," "but" or "however," or by a new sentence or paragraph. To avoid pitfalls, a drafting attorney may consider the following techniques:

1. If certain persons are to be excluded from the operation of the rule, the language of the legal subject must be adjusted.

2. If limitations on time, place, manner or circumstance in the operation of the rule are to be made, the language of the legal action must be adjusted.

3. If dispensing with particular conditions is desired, the statement of the condition must be qualified.

4. All other limitations on the application of the rule are placed in the case.

f. Putting the Parts of the Legislative Sentence Together.

A legislative sentence in its most complicated form is made up of the following parts:

EXCEPTION

CASE

CONDITION

Rule — Legal subject

Rule — Legal action

Normally these parts should be stated in the order given, because it is best to state the circumstances in which the rule is to apply before stating the rule itself.

For example:

Exception — Except as provided in section 2 of this (year) Act,

Case — when an application for a license is filed,

Condition — if the applicant has satisfied all the requirements of this (year) Act,

Rule — Legal subject: the director

Rule — Legal action: shall issue a license to the applicant.

If the rule is to apply under several cases or conditions, the rule may be stated first, followed by the cases or conditions.

Rule
- Legal subject: A county
- Legal action: may issue refunding bonds when the outstanding bonds:

Cases
- (1) Have matured but have not been paid;
- (2) Are about to mature and become payable; or
- (3) Are redeemable at the option of the county.

Another example:

Rule
- Legal subject: The state
- Legal action: may give preference to a bidder under section 5 of this (year) Act only if:

Conditions
- (1) The bid does not exceed by more than five percent the lowest bid; and
- (2) The bond or deposit required by section 6 of this (year) Act has been filed by the bidder.

5. TENSE.

The law is considered as speaking continuously. In other words, a statute is a continuing command. Language used in the present tense is construed as referring to the time when the statute is applied, not to the time it is drafted or enacted. There is a natural temptation to regard the time when a statute is being drafted as the present and to cast legislative sentences in the future tense.

Use of the future tense results in statements like the following:

DON'T

Any person who *will drink* intoxicating liquors on a common carrier or who *will use* profane or obscene language thereon *will be* guilty of a misdemeanor.

Since the law is considered to be speaking continuously, it is much more natural and more concise to state the prohibition as follows:

DO

Any person who *drinks* intoxicating liquors on a common carrier or who *uses* profane or obscene language thereon *is* guilty of a misdemeanor.

The past tense may be used when the present tense also is used and an expression of the time relationship between two or more activities is desired. Facts concurrent with the operation of the law should be recited as if they were present facts, and facts precedent to the law's operation as if they were past facts.

A drafting attorney should be aware, however, that a court may construe the use of the past tense in a statute as an indication that the Legislative Assembly intended the statute to apply retroactively.[1] A good way to avoid ambiguity about a statute's application—regardless of the verb tense used—is to include an applicability clause. See section 1 of chapter 10 of this manual for further discussion of clauses relating to a bill's application and the rules of construction that apply in the absence of such a clause.

Use of the word "shall" must be limited to statutory commands. This is the prevailing usage in *Oregon Revised Statutes*, in uniform and model Acts and in other well-drawn statutes. A drafting attorney should not, therefore, use "shall be" where "is" or "are" fits. For example, there is a definite difference in meaning between "every partner is an agent" and "every partner shall be an agent." Also, although the expression "no person shall" is hallowed by long and extensive usage, literally the expression is equivalent to saying, "no person is required to," and therefore is not truly a prohibition. Use instead "a person may not." A more extensive discussion on the use of "shall," "may," "must," "shall not" and "may not" appears in section 3 of chapter 4 of this manual.

[1] See, e.g., State ex rel. Juvenile Dep't v. Nicholls, 192 Or. App. 604, 609 (2004) (when determining whether a statute applies retroactively, "in the absence of an express retroactivity clause, we consider such textual cues as verb tense and other grammatical choices that might suggest what the legislature had in mind"); Newell v. Weston, 150 Or. App. 562, 570-571 (1997) (reasoning that a statute was intended to apply retroactively because the relevant provision used the past tense and, "if the legislature had intended the statute to apply prospectively only, it presumably would have used the present . . . or the future conditional . . . tense"), rev den., 327 Or. 317 (1998).

Ultimately, a drafting attorney should remember that verb tense is critical to the meaning of a statute. Courts assume that the Legislative Assembly's choice of verb tense is purposeful and are reluctant to disregard that choice when interpreting a statute.[2]

6. VOICE.

Use the active voice rather than the passive voice, if the active voice can be used. If a drafting attorney writes in the passive voice, ambiguities may be created by neglecting to identify the person who is given the right, power or privilege or is subjected to the duty or liability.[3]

"Notice of the meeting shall be given at least 10 days in advance," fails to specify who is responsible for giving the notice. The same mandate written in the active voice requires that the responsible person be designated. The attempt to change something written in the passive voice into something written in the active voice may illuminate gaps that need to be filled by policy decisions before a complete bill can be drafted.

Do not use the passive voice with a double negative; for example, "The powers set out in section 4 of this (year) Act *may not be exercised* by the director *without* the prior approval of a majority of the members of the board." Rather, the sentence should be written: "The director *may* exercise the powers set out in section 4 of this (year) Act *only with* the prior approval of a majority of the members of the board."

7. TABULAR ARRANGEMENT.

The readability of a legislative sentence often can be improved by breaking it down into its parts and presenting them in tabular form. If a number of rights, powers, privileges, duties or liabilities are granted to or imposed upon a single subject, a drafting attorney often can save space and make meaning clearer by using the tabular form. A provision should be arranged in this way whenever the subject matter makes short sentences or independent phrases impossible. Ordinarily, the tabular form is achieved by arranging the material in the form of subsections and paragraphs, as in ORS 205.160 or 475.940. It may be necessary to use a table arranged in columns, as in ORS 825.476. See a Publication Specialist if you need help.

8. SECTIONS.

A separate, numbered section is needed in the bill for each new section that is created and for each existing ORS section that is amended. The word "**SECTION.**" must be inserted before each section number. The repeals may be grouped together in a separate, numbered section. The sections of a bill are numbered consecutively. However, during the session, when amendments make consecutive renumbering of sections in a lengthy bill impractical, sections

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[2] Martin v. City of Albany, 320 Or. 175, 181 (1994); see State v. Gonzalez-Valenzuela, 358 Or. 451, 464-467 (2015) (analyzing the meanings conveyed by different verb tenses).

[3] See Alfieri v. Solomon, 358 Or. 383, 399-400 (2015) (explaining that, depending on the context, the passive voice might convey a legislative intent for a statute to apply more broadly or might simply generate ambiguity as to how the law should be applied); see also State ex rel. Click v. Brownhill, 331 Or. 500, 509-510 (2000) (Durham, J., concurring) (noting that a statute's use of the passive voice had "spawned the parties' legal dispute" by failing to identify clearly the person or entity to whom the legislature had addressed a statutory prohibition).

may be inserted in proper order by numbering "**SECTION 1a.**" or "**SECTION 11a.**" as necessary. Similarly, sections may be del0eted and a note inserted in the bill that reads:

"**NOTE:** Section 2 was deleted by amendment. Subsequent sections were not renumbered."

How much material should go into a section? There is no definite answer to this question. Generally, the contents of a section should correspond to the contents of a paragraph in ordinary English composition. This means that each distinct concept should be a separate section, except that the drafting attorney may divide a concept into a series of sections to avoid a section of excessive length.

If sections are short, the bill is easier to organize. This practice also reduces the length of any future bill amending the section, because the amendment must conform to the constitutional requirement that the section amended be set forth at length. Short sections also are easier to compile in ORS and to index and annotate.

One test that many drafting attorneys use to determine whether a section is too long or too short is mentally to compose a leadline (section caption) for the section. If it is impossible to write a concise leadline that covers all the contents of the section, the section probably is too long. Conversely, the drafting attorney should consider consolidating a series of short sections if it is found that a single, concise leadline covers the entire series.

9. DESIGNATION AND NUMBERING OF PARAGRAPHED UNITS.

a. Designation of paragraphed units by rank.

(1) - subsection
(a) - paragraph
(A) - subparagraph
(i), (ii) - sub-subparagraph

b. Numbering.

When numbering paragraphed units, the drafting attorney must observe the following rules:

If a section consists of two or more independent subsections, each is numbered with an Arabic numeral in parentheses: "(1)", "(2)", etc.

If a section is unitary in its grammatical construction but includes dependent subsections in parallel construction, a numeral is not placed before the introductory clause, but the dependent subsections are numbered with Arabic numerals in parentheses. For example:

> **SECTION 1. The commissioner shall:**
> **(1) Issue licenses;**
> **(2) Hold hearings; and**

(3) Enforce the law.

If a section contains more than one subsection, and any one of the subsections includes subordinate paragraphs, the subordinate paragraphs are identified by means of lowercase letters in parentheses. However, "(L)" is used to identify the paragraph between "(k)" and "(m)" to avoid confusion with the designation of subsection "(1)." Example:

SECTION 5. The board shall:
(1) Hear appeals; and
(2) Issue orders relating to:
(a) Revocation of licenses; and
(b) Suspension of registration.

As a general rule, tabulation should not go beyond subsections and paragraphs. If a section being written seems to require further subdivision, it should be reconstructed or split. In those rare cases where it is not possible to avoid further subdivision, as in certain tax laws, capital letters are used in parentheses for subparagraphs and small Roman numerals in parentheses for sub-subparagraphs.

It is generally preferable to avoid the use of numbers or letters in parentheses in the body of a section without indentation to designate clauses. If such separation appears necessary, the clauses probably are of sufficient importance to be designated as separate subsections or paragraphs.

The use of numbered paragraphs or subsections in the middle of running text, the device commonly known as "flush left" or "blank slug flush," must be avoided. An example of this *improper* device is as follows:

SECTION 3. Any person under 21 years of age who:
(1) Consumes alcoholic beverages in a public place; or
(2) Operates a school bus without a valid driver's
license,

is guilty of a misdemeanor.

For a number of reasons, sections arranged in this manner are confusing when set out in type. The proper procedure is:

SECTION 3. A person commits a misdemeanor if the person is under 21 years of age and:
(1) Consumes alcoholic beverages in a public place; or
(2) Operates a school bus without a valid driver's license.

c. Conjunctive-Disjunctive Tabulation.

When two or more subsections or paragraphs are set out, the drafting attorney must indicate whether they are conjunctive or disjunctive. Note the effect of using an "and" or an "or" in the following:

SECTION 4. The board may revoke the license of any person who shoots a duck:
(1) Out of season.

(2) On public land.

In this example, there are four possible combinations of circumstances:

1. A person might shoot a duck out of season and on public land;
2. A person might shoot a duck out of season and on private land;
3. A person might shoot a duck in season and on public land; and
4. A person might shoot a duck in season and on private land.

If the tabulation is conjunctive ("and"), the board may revoke the person's license in only one of the four circumstances: The duck is shot out of season and on public land.

If the tabulation is disjunctive ("or"), there are three circumstances in which the board may revoke the person's license: The duck is shot:

1. Out of season and on public land;
2. Out of season and on private land; or
3. In season but on public land.

By longstanding usage in ORS, the "or" in tabulation is always "inclusive." That is, "(1); or (2)" means "Either (1) or (2) or both"; it does not mean "either (1) or (2) but not both." If a drafting attorney wants to say "either (1) or (2) but not both", the attorney needs to find a way other than tabulation to do so.

The ambiguity caused by failure to use an "and" or an "or" is obvious in this example, but may not be so obvious in more complex sections. It is well to form the habit of inserting "and" or "or," even when one can infer from the context whether the disjunctive or conjunctive sense is intended, to avoid the possibility of creating ambiguity by tabulation. An alternative is to preface the tabulation with "any of the following" (for "or") or "all of the following" (for "and"). ORS form is to use the "and" or "or" only after the penultimate phrase in the series.

d. Internal References.

The following rules apply in referring from one part of a bill to another part of the same bill:

Referring to an ORS section: ORS 171.122 (2)(c).

Referring to a new section: "section 4 (2)(c) of this (year) Act" or "paragraph (c) of this subsection" if the reference appears in subsection (2).

The correct reference to a series of new subsections or paragraphs is "section 3 (1) to (6) of this (year) Act." When referring to a series of subsections in an ORS section, the reference is "ORS 164.362 (2) to (6)."

For discussion of references to "this (year) Act" and ORS series, see chapter 13 of this manual.

10. SPELLING.

Merriam-Webster's Collegiate Dictionary (10th Edition), and *Webster's Third New International Dictionary, Unabridged,* should be followed in the spelling, compounding and dividing of words, except when otherwise provided in the *Form and Style Manual for Legislative Measures* or in Rules of the Legislative Assembly or by legislative usage.

Required Spellings. Extensive usage in existing Oregon statutory law requires the following words to be spelled as indicated:

attorney fees	hotline	rulemaking
boldfaced (adj)	insanitary	up to date (adv)
cross-claim	rescission	up-to-date (adj)
driver license	right of way	X-ray (n, v, adj)
ground water (n, adj)	rights of way	

The following spellings for computing and electronic telecommunications terms have been established for Oregon statutory law:

bandwidth	file name
cellular telephone (not cell phone)	home page
database	Internet
disc (for compact discs, etc.)	online (adj, adv)
disk (for hard drives and floppies)	voice mail
electronic commerce (not e-commerce)	webpage
electronic mail (not e-mail)	website
facsimile (not fax or FAX)	World Wide Web

Plurals. For nouns that have a choice of endings, one English and the other foreign, the English ending is generally preferred. However, some nouns that are used in statutory language require the Latin ending. These nouns include, but are not limited to:

Singular	**Plural**
biennium	biennia
curriculum	curricula
memorandum	memoranda
referendum	referenda

Words with Similar Spellings. The meanings of certain words with similar spellings are frequently confused. For example:

- "Affect" when used as a verb imports action against or upon a person or thing, while "effect" when used as a verb indicates accomplishment or achievement of a result.

- "Appellant" is a noun that means the party who is appealing a decision; "appellate" is an adjective that means having jurisdiction to review decisions of a lower tribunal.

- "Biennially" means once every two years; "biannually" means twice a year.

- "Capitol" means the statehouse; "capital" means the capital city.

- "Compose" means to form; "comprise" means to consist of. The parts compose the whole; the whole comprises the parts.

- "Continually" connotes frequent recurrence during a period; "continuously" means without interruption.

- "Disburse" means to pay out, while "disperse" means to cause to break up or spread out.

- "Endorse," in Oregon's statutory law, means to approve, to add a notation to a document or to publicly express support; "indorse" means to sign or to place a signature on a negotiable instrument or to amend an insurance policy by adding or subtracting a type of coverage.

- "Ensure" means to make certain or guarantee; "insure" means to procure insurance for something; "assure" means to make certain or to try to increase another's confidence. Of these terms, use "ensure" in drafting unless the topic is insurance.

- "Farther" indicates distance; "further" indicates time, quantity or degree.

- "Forego" means to precede; "forgo" means to do without.

- "Moneys" means sums of money; "money" means currency.

- "Payer" and "payor" both mean the individual or entity that pays a bill or note. The secondary spelling, payor, is used throughout the Uniform Commercial Code (ORS chapters 71, 72, 72A, 73, 74, 74A, 75, 77, 78 and 79). The primary spelling, payer, is used in the remaining ORS chapters.

- "Practicable" means feasible or possible to practice or perform; "practical" means can be actively put to use.

- "Prescribe" means to establish authoritative rules; "proscribe" means to prohibit or forbid.

- "Stationery" means paper and envelopes used for letter writing; "stationary" means immobile.

- "Therefore" indicates a conclusion; "therefor" indicates in place of, in return for or because of.

Words with Special Connotations. The word "to" means "to and including" when used in reference to a series of statute sections, subsections or paragraphs or references to *Oregon Revised Statutes*. The word "person" means individuals, corporations, associations, firms, partnerships, limited liability companies and joint stock companies. See ORS 174.100 for these and other definitions generally applicable to the statute laws of this state.

11. HYPHENATION.

Hyphens should not be used after the prefixes **co, de, inter, intra, multi, non, pre, pro, re, semi, sub or un** (copayment, decentralize, interagency, intrastate, multistate, nonzoned, preempt, proactive, readmit, semiannual, subparagraph, undocumented), unless the prefix precedes a capitalized word or a number (inter-American, pre-1989). Also use a hyphen to prevent misinterpretation (re-mark, meaning to mark again; remark, meaning a comment).

Always use a hyphen after the prefixes ex, post, quasi and self (ex-offender, post-conviction, quasi-judicial, self-propelled). Hyphenate the words "post office" only when they are used as an adjective (post-office address).

Do not hyphenate foreign phrases that are used as adjectives (prima facie evidence).

Compound Modifiers. Hyphenate a compound modifier when the hyphen is needed to avoid misinterpretation or when the modifier is a compound word (such as "cost-effective") that requires a hyphen as indicated in *Merriam-Webster's Collegiate Dictionary* (10th Edition). Always check definitions and existing usage in ORS for exceptions, such as "first class mail" and "long term care facility."

Also hyphenate a compound modifier when a number is part of the modifier, such as "three-year plan" and "10-year projections." "10 percent reduction" and "$10 million shortfall" are exceptions.

Do not hyphenate adjective forms of compound modifiers that include the adverb "very" or an adverb that ends in "-ly," such as "privately owned."

12. ABBREVIATIONS AND ACRONYMS.

Use abbreviations and acronyms sparingly and only if they have been defined. Examples of acronyms that have been defined and used in ORS include "HIV," which means human immunodeficiency virus, and "DNA," which means deoxyribonucleic acid. Exceptions include acronyms such as "radar" and "laser" that have passed into common usage.

"ORS" is the official citation for *Oregon Revised Statutes*[4] and "ORCP" is the official citation for Oregon Rules of Civil Procedure[5] and do not require further definition.

[4] See ORS 174.510.
[5] See ORCP 1 G.

To avoid confusion between a section of law being amended and the section of the bill that is doing the amending, abbreviate the word "**SECTION**" to "**Sec.**" when a section of session law is set forth for amending in a bill. For example:

> **SECTION 49.** Section 4, chapter 1190, Oregon Laws (year), is amended to read:
> **Sec. 4.** Sections 2 and 3**, chapter 1190, Oregon Laws (year),** [*of this (year) Act*] are repealed on January 2, [*2008*] **2010**.

When a section of the Oregon Constitution is set forth for amending in a joint resolution, abbreviate the word "**Section**" to "**Sec.**" For example:

> **PARAGRAPH 1.** Section 14, Article IV of the Constitution of the State of Oregon, is amended to read:
> **Sec. 14.** The [*deliberations*] **meetings** of each house, of committees of each house or joint committees**,** and of committees of the whole**,** [*and of political party caucuses*] shall be open. Each house shall adopt rules to implement the requirement of this section and the houses jointly shall adopt rules to implement the requirements of this section in any joint activity that the two houses may undertake.

13. CAPITALIZATION.

CAPITALIZE:

- The first word in a sentence, the first word following a colon and the first word in an enumeration or schedule paragraphed after a colon.
- Proper names.
- Months and days of the week.
- Common nouns or adjectives forming an essential part of a proper name, such as "Marion County," "Linn and Benton Counties," "Circuit Court for Baker County," "Board of County Commissioners of Lane County," "City of Salem," "Columbia River," "State of Oregon," "State Capitol" or "United States Government."
- "Governor" in all references to the state's chief executive.
- "President of the Senate" and "Speaker of the House of Representatives" in first references, and "President" and "Speaker" in subsequent references.
- The full official title of a state officer or state agency, such as "Seventy-sixth Legislative Assembly," "Legislative Assembly," "Senate," "Senator," "House of Representatives," "Representative," "Senate Committee on Agriculture and Natural Resources," "Supreme Court," "Secretary of State," "Department of Revenue" or "State Fish and Wildlife Commission." See appendix D of this manual for ORS citations designating official titles.
- The word "Act," meaning a legislative Act.

- Popular names of Acts, such as "Uniform Commercial Code" or "State Personnel Relations Law." However, do not capitalize a general reference to a law on a particular subject, such as "motor carrier law" or "insurance statutes."

- The full official title of an interstate compact or other formal agreement, such as the "Columbia River Gorge Compact" or the "Master Settlement Agreement."

- References to "Oregon Constitution," "Constitution of the State of Oregon," "United States Constitution" or "Constitution of the United States." Also capitalize references that do not include "Oregon" or "United States," such as "the Constitution," "the Constitution of this state," "Constitution and laws of Oregon" or "the state and federal Constitutions."

- References to clauses and amendments to the United States Constitution, such as "Sixth Amendment to the United States Constitution" and "Establishment Clause of the First Amendment to the United States Constitution."

- "Law Enforcement Data System," "Oregon Benchmarks" and "Social Security number" in all references.

- The proper name of a state fund or account in first references, such as "Geology and Mineral Industries Account," "State Highway Fund" or "General Fund."

- The words "Miscellaneous Receipts" in budget bills.

- Names of historic events, such as "World War II" or "Vietnam War."

- The word "Class" when used to describe a type of felony, misdemeanor or violation, such as "Class B felony," "Class C misdemeanor" or "Class D violation," or when describing a license, certificate or registration, such as "Class A dispenser license."

DO NOT CAPITALIZE:

- Generic words that are used for second and subsequent references within a section, such as "the secretary," "the director," "the court," "the legislature," "the committee," "the department" or "the commission."

- The word "state," except when it is part of a proper name, such as "State of Oregon," "State Department of Energy" or "State Banking Board." Do not capitalize "state" in such uses as "state Senator," "state Representative," "this state," "state highway" or "the state is not liable."

- The word "federal," except when it is part of a proper name, such as "Federal Deposit Insurance Corporation" or "Federal Emergency Management Agency."

- Words indicating geographic position, such as "southern Oregon."

- The words "chapter" or "section" in a sentence, for example, "as provided in ORS chapter 12" or "under section 36 of this (year) Act."

- The words "administrative law judge" when referring to an administrative law judge assigned from the Office of Administrative Hearings established under ORS 183.605. However, in ORS chapters 654 and 656, capitalize references to an "Administrative Law Judge" employed by the Workers' Compensation Board.

- General references to a constitution of a governing body or nongovernmental organization, as in "any instrument, constitution, statute, charter, ordinance, rule or regulation" or "under the constitution, bylaws, rules or regulations of the club or organization."

14. PUNCTUATION.

Good drafting requires the barest minimum of punctuation. A short sentence limited to the clear expression of a single idea will go a long way toward meeting this requirement. Punctuation considered essential in other forms of writing is usually excessive in a bill.

Punctuation, although a proper guide to interpretation, will be disregarded by a court if it defeats clear legislative intent.[6] No more punctuation should be used than is necessary for clarity. Sentences must be constructed so that their meaning does not depend on punctuation. This requires skillful phrasing to avoid ambiguity and to ensure exact interpretation. A statute that applies to "salaried elected and appointed officials" (no comma) is quite different from one that applies to "salaried, elected and appointed officials." The following rules are designed to promote uniformity in punctuation:

The **period** should be used as frequently as possible. The comma or semicolon can and should be avoided. The long, rambling, "run-on" sentence, somewhat like this one, held together by "ifs," "ands" and "buts," requiring innumerable commas and other little marks to give it meaning should never be employed by a bill drafting attorney.

The **comma** is omitted before the conjunction within a series of words, phrases or clauses. For example, "men, women and children"; *not* "men, women, and children."

The subject of a sentence is never separated from its verb by a single comma. The "all or nothing" rule: A single comma is not used in a parenthetical phrase or clause. For example, "The amendment, which had been approved by the committee was accepted." A comma must be placed after the word "committee" so that the parenthetical phrase "which had been approved by the committee" is isolated from the rest of the sentence, if the intent is to isolate the phrase. If it is not the intent to isolate the phrase, "that" should be substituted for "which"

[6] Fleischhauer v. Bilstad, 233 Or. 578, 586 (1963).

and the comma should be omitted: "The amendment that had been approved by the committee was accepted."

A **colon** is used in the text of a section only to express time in hours and minutes or to introduce a series of subelements. Usually, within the series, a **semicolon** is used except after the last item. For example:

> **SECTION 8. The department shall:**
> **(1) Adopt rules;**
> **(2) Prosecute violators; and**
> **(3) Disseminate information.**

If a sentence consists of two clauses, either of which requires a comma, a semicolon is used to separate the two clauses. However, in such circumstances it is preferable to use two sentences. If a sentence consists of two independent clauses connected by a conjunction, a comma is used before the conjunction, as in the following circumstance: "The department has jurisdiction, and it may issue appropriate orders to compel obedience." A compound predicate is not separated by a comma: "The department has jurisdiction and may issue appropriate orders to compel obedience."

The **apostrophe** shows possessiveness of nouns and indefinite pronouns. The apostrophe is omitted if the proper name of an entity omits it, e.g., Veterans Administration. Possessive personal pronouns (its, their) never take an apostrophe.

An apostrophe is properly used in measure of time and space in the genitive form, e.g., two weeks' pay. If "of" cannot be used in place of the apostrophe, then the apostrophe is misplaced. When there is no genitive relation between the time or quantity and the noun, the apostrophe is not used, e.g., three-day seminar.

Since drafting is formal expression, apostrophes for contractions, as reflecting speech patterns, are not used.

For purposes of consistency, periods and commas are placed inside **quotation marks**. Other punctuation marks should be placed inside quotation marks *only* if the punctuation marks are part of the matter quoted. *Exception:* In writing amendments to bills, no punctuation marks are placed inside the quotation marks unless they are a part of the text of the amendment. See chapter 18 of this manual for a discussion of punctuation rules for amendments to bills and other measures.

Material in **parentheses** should be avoided in the *text* of a bill because the use may be confused with brackets indicating material to be deleted. Usually it is possible to substitute commas for parentheses; if not, perhaps the sentence needs to be rephrased or split. Em dashes or double dashes should not be used in a bill in place of parentheses for any reason. Parentheses are used, however, to indicate matter to be completed in a statutory form.

Brackets [ ] indicate the deletion of material by amendment and are used for *no other purpose* in bill drafting.

To indicate blank lines in a form prescribed by statute, **underscoring** is used rather than dots or dashes. ORS 108.510 is an example.

If a section prescribes a form or sets out a table, the form or table is separated from the body of the text by a line drawn above and below the form (**hairline rules**). ORS 100.305 is an example.

Commas and the last antecedent:

When adjectives or other qualifying words are intended to apply either to one or to all of a group of nouns, care must be exercised in the construction and punctuation to express the intent clearly. In the following example, does the 3,000 pound limit apply to trailers and semitrailers or only to pole trailers?

> Trailers, semitrailers and pole trailers of 3,000 pounds gross weight or less are not required to be licensed.

If the 3,000 pound limit *is not* intended to apply to trailers and semitrailers, the provision should read:

> Pole trailers of 3,000 pounds gross weight or less and trailers and semitrailers are not required to be licensed.

If the 3,000 pound limit *is* intended to apply also to trailers and semitrailers, the provision should read:

> A trailer, semitrailer or pole trailer is not required to be licensed if it has a gross weight of 3,000 pounds or less.

The drafting attorney should *avoid* reliance on the punctuation rule of the last antecedent because, although cited in grammar books, its use has generated much litigation. The last antecedent is the last word, phrase or clause that can be made an antecedent without impairing the meaning of the sentence. Under the doctrine of the last antecedent, qualifying words and phrases refer solely to the last antecedent absent evidence of a contrary intent. A court may interpret a qualifying phrase that is separated from the antecedents by a comma as evidence that the qualifying phrase was intended to apply to all antecedents instead of only to the immediately preceding one.[7] Courts have also recognized the following exception to the doctrine, however: "'When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.'"[8]

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[7] See State v. Webb, 324 Or. 380, 386-388 (1996) (discussing and applying the doctrine of the last antecedent).
[8] Price v. Lotlikar, 285 Or. App. 692, 703 (2017) (quoting Porto Rico Railway, Light & Power Co. v. Mor, 253 U.S. 345, 348 (1920)).

Ultimately, a drafting attorney should watch for modifying, referential or qualifying words and phrases and try to write the sentence in such a way that its interpretation does not turn on the presence or absence of a comma. If the interpretation is to turn on that, however, the drafting attorney must be aware of how the presence or absence of the comma affects the meaning of the sentence.

15. OFFICIAL TITLES OF PUBLIC OFFICERS AND AGENCIES.

The official and correct title for a public officer or agency is used when referring to that officer or agency within the text of a bill. The official title should be set out once at the beginning of each section. The advantages to such practice outweigh the alternative of relying on definitions. Use of the official title not only expedites computer searches but enables the reader to identify more readily the agency or officer referred to when the section is set forth alone and outside its context.

Official titles ordinarily are set out in the constitutional or statutory section that created the agencies or positions. Appendix D of this manual includes a list of state officers, agencies, boards, commissions, committees, councils, funds and accounts and their corresponding ORS citations.

Note that, in statute, members of the Supreme Court are "judges," not "justices," except for the "Chief Justice," who is the presiding judge of the Supreme Court and the administrative head of the state Judicial Department. In correspondence, however, all members of the Supreme Court may be referred to as "justices." Members of the Court of Appeals, Oregon Tax Court and circuit courts are judges.

16. TERMINOLOGY.

Gender. ORS 174.129 requires that statutes "be written in sex-neutral terms unless it is necessary for the purpose of the statute . . . that it be expressed in terms of a particular gender."

In addition, section 1 (1), chapter 578, Oregon Laws 1985, authorizes Legislative Counsel to "substitute sex neutral nouns or articles for nouns or pronouns that are not sex neutral or delete pronouns that are not sex neutral except in cases where the substitutions or deletions would alter the meaning or substance of the section."

Be advised that Legislative Counsel will change submitted copy that is not sex neutral unless it is necessary for the purpose of the bill "that it be expressed in terms of a particular gender." Use of "he or she," "husband/wife" or other similar devices should be avoided because they are not sex neutral.

Person with a disability. It is the policy of the Legislative Assembly to use "person with a disability" and similar terminology that places the person before the disability, to the extent consistent with state and federal law and as described in ORS 182.109.

Singular/Plural. When possible, use the singular number instead of the plural. The singular usually makes the meaning clearer. Under ORS 174.127, the singular number may include the plural and the plural number may include the singular.

Disfavored Colloquialisms. Except in some existing health care statutes following the language of federal law, avoid the term "grandfathered." Avoid the phrase "rule of thumb."

17. NUMBERS AND FIGURES.

Express numbers in figures, not in words. Exceptions:

- **Cardinal and ordinal numbers less than 10** are expressed as words (six, sixth). However, all numbers in connected groups should be in figures if any number in the group, standing alone, would be in figures (1, 2, 3, 15 or 1st, 2nd, 15th).

- **Numbers beginning a sentence** are expressed in words. At the beginning of tabulated items, figures may be used.

- **Fractions.** Spell out fractions for amounts less than one, using a hyphen between the words (one-half, three-fifths, two-thirds). Use figures to express precise amounts greater than one, using a hyphen between the whole number and the fraction (2-2/5, 33-1/3).

- **Percent** is expressed by the word "percent." The symbol "%" may be used in tables. Use a zero before the decimal point for percentages less than one (such as "0.08"), to avoid computer coding problems.

Numbers should not be expressed both in words and figures. *Right:* $100. *Wrong:* $100 (one hundred dollars).

a. Monetary Sums.

Monetary sums should be expressed as follows:

one cent	$2,000 (comma)
10 cents	$160,000
$3 (no decimal point)	$3 million
$3.65	$3,504,282
$115	

In text, use "$3 million." In tables, use "$3,000,000." In text and tables of an appropriation section, use "$3,000,000."

b. Dates, Time, Age and Time Periods.

Dates: Dates should be expressed as follows:

the June 2017 report (no comma)
the months of June and July 2017 when combined (no comma)
June 6, 2017, and (*not* June 6th, 2017) (commas)

June 29 to July 18, 2017, and (comma)
January 15 (*not* the 15th day of January)
sixth day of June, 2017, (commas) (use this expression only in the text of statutory forms and in memorials and resolutions)
2017-2018 biennium (*not* 2017-18 biennium)
21st century

Time: Time should be expressed as follows:

4:30 p.m.
10 p.m.
1:00 p.m. (colon and double 00 only with the hour "1")
12 noon
12 midnight

Age: Age should be expressed as either "18 years of age" or "age of 18 years." Do not use hyphenated constructions such as "18-year-old offenders." Express an age range as "at least 15 years of age and not older than 22 years of age."

Time periods: Normally, a period is to be measured in whole days only, and not in elapsed time less than whole days. For example: "The appeal must be filed not later than *the 90th day after* the judgment was entered."

If an action must be completed by the end of a designated period that begins in the future, the drafting attorney should indicate whether the action:

1. *May* be done *before* the designated period *begins*, as in "not later than the 90th day after the end of the tax year"; or

2. *Must* be done *within* the designated period, as in "within the 90-day period immediately following the end of the tax year."

The words "**heretofore**" and "**hereafter**" must not be used, particularly to refer to events taking place before or after the effective date of an Act. In a new enactment, "before the effective date of section 10 of this (year) Act" is used instead of "heretofore," and "after the effective date of this (year) Act" is used instead of "hereafter."

Similarly, the combination of "heretofore and hereafter" should not be used to indicate that a bill applies to situations occurring before as well as after its effective date. Instead, a drafting attorney should include a separate section clarifying the bill's application and should use the phrase "before, on or after the effective date of this (year) Act." See chapter 10 of this manual for a discussion of applicability clauses.

18. CITATIONS.

a. Citing Oregon Constitution.

In the text of a bill, provisions of the Oregon Constitution are referred to as follows:

"Article III, sections 2 and 3, Oregon Constitution, provide . . ." or "Article III, sections 2 and 3, of the Oregon Constitution, provide . . . ."

In the text of a section of the Constitution itself, another section is referred to as follows:

"sections 2 and 3, Article III of this Constitution" or "section 2 of this Article."

A new Article VII has been adopted, but the original Article VII has not been repealed. The original is referred to as "Article VII (Original), section 15, Oregon Constitution," and the new as "Article VII (Amended), section 4, Oregon Constitution."

b. Citing Oregon Laws.

Session laws are referred to in the text of a bill as follows:

Generally, "Oregon Laws 2011" or "Oregon Laws 2012," denoting the year of the regular session in which the laws were enacted. If a special session is held, the reference is to "Oregon Laws 2013 (special session)" or if there is more than one special session in a year, "Oregon Laws 2013 (second special session)."

Chapter: "chapter 27, Oregon Laws 1991."

Section: "section 1, chapter 27, Oregon Laws 1991."

Subsection: "section 1 (2), chapter 27, Oregon Laws 1991."

Paragraph: "section 1 (2)(a), chapter 27, Oregon Laws 1991."

c. Citing Current Session Bills.

Use the citation form for Oregon Laws to refer to another current session bill. If the bill has *not* been assigned its Oregon Laws chapter number by the Secretary of State, the proper reference is:

"section 1, chapter ____, Oregon Laws 1999 (Enrolled Senate Bill 3), . . ."

If a chapter number has been assigned, the proper reference is:

"section 1, chapter 47, Oregon Laws 1999 (Enrolled House Bill 2005), . . ."

If referring to a resolution, the proper reference is:

"Senate Joint Resolution 32 (1999)."

d. Citing *Oregon Revised Statutes*.

The general statute laws of Oregon, as enacted in 1953 and subsequently amended, are known and cited as *Oregon Revised Statutes*, for which the abbreviation "ORS" may be substituted (ORS 174.510). ORS parts in the text of a bill are cited as follows:

Complete chapter: "ORS chapter 97."

Particular section: "ORS 97.190." The word "section" or the symbol "§" is unnecessary. A statement that the ORS section is amended "as amended by" some previous law is unnecessary when reference to the latest version of the section printed in ORS is intended. A simple reference to "ORS 97.190," for example, means the section as it reads after the 1959, 1965 and 1977 amendments to that section.

Two ORS sections: "ORS 97.180 and 97.190." "ORS" is not placed before the second section number.

Three ORS sections: "ORS 97.170, 97.180 and 97.220."

Series of ORS sections: "ORS 97.010 to 97.130."

It is not necessary to say "inclusive" or "to and including," because the series reference, as provided in ORS 174.100, includes both sections mentioned and, usually, all intervening sections. An intervening section is not included in the series if it was not legislatively enacted as part of the series or added to and made a part of the series. If a section has been editorially placed in a series, the fact that it is not legislatively part of the series is so indicated by a note following the section. A different form of citing series may be used in correspondence, since the reader probably does not have access to ORS 174.100.

The drafting attorney should avoid referring to a string of ORS sections as "ORS ____ to ____" unless the numbers referred to are an existing series that can be confirmed either by STAIRS or the Series Database located in the W: drive. String citations—lists of consecutively numbered ORS sections or bill sections—may be used to avoid creating an unnecessary series.

If the drafting attorney determines that a new series *must* be created by referring to "ORS ____ to ____," the new series will not include any intervening sections that were not previously legislatively part of a smaller series within the newly created series. If the drafting attorney wishes to include those intervening sections in the new series, they must be

legislatively added to and made a part of the new series. For further discussion on series, see section 2 of chapter 13 of this manual.

List of ORS sections, series and chapters: "ORS 97.010 to 97.130, 97.134 (2), 97.141 and 97.145 and ORS chapters 110 and 125."

Subsections, paragraphs, etc.: See section 9 of this chapter.

Title numbers in ORS are not used in citing parts; only chapters, series of sections, sections or parts of sections are used.

If a particular ORS section, as it read before a current session has amended it, is to be referred to, the date of the ORS edition in which the section was compiled just prior to the amendment should be used. For example, "ORS 97.190 (1991 Edition)" or "as set forth in the (year) Edition of Oregon Revised Statutes." The drafting attorney also may refer to "the provisions of ORS 97.190 in effect immediately before the 1989 amendment to that section," if only one Act amended ORS 97.190 in 1989. If more than one Act amended the section in 1989, the reference should be to "the provisions of ORS 97.190 in effect immediately before its amendment by section 13, chapter 221, Oregon Laws 1989." Note that a parenthetical reference ["(1999 Edition)"] freezes the reference in time.

e. Citing Oregon Rules of Civil Procedure.

The designation "ORCP (number of rule)" is used to cite a specific rule of the Oregon Rules of Civil Procedure. For example, Rule 7, section D, subsection (3), paragraph (a), subparagraph (i) is cited as ORCP 7 D(3)(a)(i). Any changes to leadlines or rule names in ORCP must be done by amendment, boldfacing new material and bracketing existing material to be deleted.

f. Citing Oregon Administrative Rules.

Oregon Administrative Rules are cited as OAR followed by the number of the rule, but it is definitely preferable to avoid citing an administrative rule in a statute.

g. Citing United States Constitution.

Provisions of the United States Constitution are cited as follows:

"Article I, section 3, United States Constitution."

"Amendment XX, section 2, United States Constitution."

h. Citing Federal Statutes.

There is no uniform method of citing federal statutes. The cite must be accurate and contain as much material as is available. For example, "National Historic Preservation Act (P.L. 89-665, 80 Stat. 915, 16 U.S.C. 470) (1966)."

i. Citing Ballot Measures

Cite ballot measures by number and election year: "Ballot Measure 11 (1994)."

j. Citing Within Bill

Always include the session year when an Act (bill) refers to itself. For example:

"this (year) Act"
"section 1 of this (year) Act"
"sections 2 to 10 of this (year) Act"

CHAPTER FOUR

SPECIFIC WORDS AND PHRASES

Most writers use too many words. One or two well-chosen words can often replace a multiword phrase without loss of meaning. Likewise, short, simple words can replace long ones. English may often be substituted for Latin in legal terminology. The result is a shorter, less complex sentence.

1. OBJECTIONABLE WORDS AND PHRASES.

Some words have led to so much ambiguity or are so pedantic in style that they should be avoided altogether in drafting a bill.

"Said," when used as a demonstrative adjective, adds nothing in making a noun more definite than "the," "that" or "those." "Same" should not be used as a substitute for "it." If the antecedent is in any doubt, the use of "same" does not clarify the situation. A more specific reference should be used. "Whatsoever," "whensoever," "wheresoever" and "whosoever" may impart a scriptural ring to a statute, but are not favored in modern drafting. A colon (:) is more concise than phrases such as "to wit."

Words that refer to another section or statutory provision by its *position*—such as "above," "aforesaid, "aforementioned," "before-mentioned," "below," "following," "hereinafter," "hereinbefore" and "preceding"—should never be used. In referring to a provision set out in another section of a bill, the drafting attorney should refer to that provision by its precise and proper designation, e.g., "section 4 of this (year) Act."

The expression "and/or" has been attacked by numerous authorities. One authority notes it is "a device for the encouragement of mental laziness."[1] The Oregon Supreme Court has called "and/or" a "verbal monstrosity which courts have quite generally condemned."[2]

"Herein" should not be used, because it "may refer to the section, the chapter or the entire enactment in which it is used."[3]

2. PREFERRED WORDS AND PHRASES.

The following list includes some words and phrases to be avoided in drafting a bill. The preferred word is in the right-hand column. In general, the words in the left-hand column are not proscribed, as are "Objectionable Words," but most of them involve pomposity, redundancy or unnecessary length.

AVOID:	**USE:**
absolutely null and void	void
accorded	given
afforded	given
any and all	any, or all
at the time	when
attempt (verb)	try
attorney and counselor at law	attorney at law, or lawyer
be and the same is hereby	is
bonds, notes, checks, drafts and evidences of other indebtedness	indebtedness
cease	stop
commence	begin, or start
constitute and appoint	appoint
construed to mean	means
deem	consider
does not operate to	does not
during such time as, during the time that	while
during the course of	during
each and all	each, or all
each and every	each, or every
effectuate	carry out
employ (meaning "use")	use
endeavor (verb)	try
evidence, documentary or otherwise	evidence
examine witnesses and hear testimony	take testimony
expend	spend
fail, refuse or neglect	fail
final and conclusive	final

[1] 18 A.B.A. J. 456 (July 1932).
[2] Ollilo v. Clatskanie P.U.D., 170 Or. 173, 179 (1942).
[3] Gatliff Coal Co. v. Cox, 142 F.2d 876, 882 (6th Cir. 1944).

AVOID:	USE:
for the duration of	during
for the reason that	because
forthwith	immediately
full force and effect	force, or effect
in case	if
in cases in which	when
in lieu of	instead of
in order to	to
in the case of	when
in the course of	during
in the event that	if
inform	tell
inquire	ask
institute	begin, or start
is able to	can
is applicable	applies
is authorized to	may
is binding upon	binds
is defined and shall be	is
is directed to	shall
is empowered to	may
is entitled to	may
is hereby authorized and it shall be the duty of the person to	shall
is hereby vested with power and authority and it shall be the duty of the director in carrying out the provisions of this (year) Act to	shall
is required to	shall
is unable to	cannot
it is lawful to	may
it is the duty of the person to	shall
law passed	law enacted
matter transmitted through the mail	mail
means and includes	means, or includes, as required
modify	change
null and void and of no effect	void
obtain	get
occasion (verb)	cause
ordered, adjudged and decreed	ordered
per annum	each year
per day	a day
per foot	a foot
possess	have
preserve	keep

AVOID:	USE:
prior	earlier
prior to	before
prosecute its business	carry on its business
provision of law	law
pursuant to	under
render (meaning "cause to be")	make
render (meaning "give")	give
retain	keep
rules and regulations	rules (unless reference is to federal regulations or local provisions when "regulations" is correct)
shall have the power to	may
sole and exclusive	exclusive
subsequent to	after
terminate	end
the place of the abode of the person	the abode of the person
transmit	send
unless and until	unless, or until, as appropriate
until such time as	until
utilize (meaning "use")	use
whenever	if

3. "SHALL," "MAY," "MUST"; "SHALL NOT," "MAY NOT."

To impose an obligation to act, use "shall." To confer a right, power or privilege, use "may." Do not use "shall" to grant permission or "may" to impose a duty.

To prohibit an action, use "may not." Do not use "shall not" to prohibit an action. Although ORS 174.100 (5) makes "shall not" and "may not" equivalent expressions of prohibition, the office has a strong preference for "may not." If you are amending a section in which there is already extensive use of "shall not" (used as a prohibition), you may use "shall not" (to express a prohibition) in order to avoid extensive changes to the statute. Note that there are instances of "shall not" in ORS that are not actually prohibitions. For example, ORS 192.580 (3) (1999 Edition) said, "The provisions of subsection (2) of this section shall not apply in the case of records . . . ." The intended meaning is probably that the provisions "do not" apply. "Shall not" must not be mindlessly replaced with "may not." The drafting attorney must understand the function of the phrase "shall not" before determining whether and how it should be changed.

In a condition precedent, you may use "must." For example, "An applicant must be at least 18 years of age." To express an imperative in the passive voice, you may use "must." For example, "The report must be filed . . . ."

Avoid using "shall" in a manner that indicates a legal result rather than a command. For example, use "This (year) Act becomes operative on . . . ." instead of "This (year) Act shall

become operative on . . . ." Or, use "ORS xxx.yyy does not apply to . . . ." rather than "ORS xxx.yyy shall not apply to . . . ."

4. "MAY" SOMETIMES CONSTRUED AS MANDATORY.

Under certain circumstances, courts may construe the word "may" to be mandatory.[4] For example, ORS 654.335 (a section in the Employers' Liability Act, 1999 Ed.) provided: "The contributory negligence of the person injured shall not be a defense, but *may* be taken into account by the jury in fixing the amount of the damage." (Emphasis added.) In Donaghy v. Oregon-Washington Railroad & Navigation Company,[5] the Oregon Supreme Court concluded that the word "may" in that statute should be construed as "must."[6] The court noted that, in general, when "the rights of parties are concerned, the word 'may' is to be construed as 'must.'"[7]

Unfortunately, "may at the director's discretion" is not an acceptable cure. No general rule can be set out to determine the effect of the use of "may" in all cases. It will be construed to further the intent and purpose of the Act in which it is found, and this intent will be gathered from a consideration of the Act as a whole.

If a provision using "may" is likely to be construed to concern the public interest or the rights of individuals and to be mandatory, and if the drafting attorney wants to authorize and not to command, the intent should be made clear by using a separate sentence for this purpose; for example, "The exercise of this power is within the discretion of the director."

Even if "shall" is used, it is possible for a provision to be construed as less than mandatory. If so construed, strict compliance with the provision is not required. A court may permit some variation in the minor details of a procedure even though "shall" has been used, assuming that the legislature did not intend that minor matters and immaterial details in statutes be so firmly fixed that the courts cannot relax such requirements in proper cases.

Mandatory provisions usually contain both a command and a prohibition against varying the terms of the command, even though the prohibition may exist only by implication. If the prohibition is expressed affirmatively and imposes a sanction or penalty, the legislative intent that the provision be mandatory is as clear as it can be made.

5. "WHICH" HUNTING.

"That" is to be used when the intention is to limit or restrict the antecedent. Statute clauses normally are restrictive. "Which," on the other hand, is descriptive and in effect introduces a

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[4] See, e.g., State v. Guzek, 342 Or. 345, 356 (2007) (noting that "even use of the word 'may'—often viewed as a purely discretionary term—can be read to indicate a mandatory requirement when to do so reflects the legislature's intent"); Dilger v. School District 24 CJ, 222 Or. 108, 117 (1960) ("If necessary to carry out the intention of the legislature it is proper to construe the word 'may' as meaning 'shall.'").
[5] 133 Or. 663 (1930).
[6] Id. at 681-682.
[7] Id. at 682.

parenthetic effect, even if not so punctuated. The phrase using "which" may not be construed as restrictive in some cases where a restriction is intended.

According to *The Grammatical Lawyer*, a nonrestrictive clause (beginning with "which") provides only incidental or nonessential information about a previous word. Even if the clause is omitted, the basic meaning of the sentence will remain intact. For example, "The trial manual, which is regularly supplemented, is much in demand." Without the "which" clause, which is merely descriptive, the sentence will nevertheless survive. If "that" had been used ("The trial manual that is regularly supplemented is much in demand."), the implication would have been that the manual that is not regularly supplemented interests no one. For easy memorization of the above:

THAT -- essential (restrictive) -- no commas
WHICH -- nonessential (nonrestrictive) -- commas

6. "SUCH," "ANY," "EVERY," ETC.

In legalese, "such" often is used as a demonstrative adjective when "the" or "that" suffices. This departure from plain English not only is unnecessary but also may cause confusion when "such . . . as" is used in the same context.

Simple words such as "a," "an" or "the" nearly always can be used instead of "any," "each," "every," "all" or "some" with an attendant gain in clarity. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"[8] The greatest generality is accomplished with the least modification of the operative word, because the function is to make more specific the concept represented by that word. "A person" is at least as general as "any person" or "every person." When the use of "a," "an" or "the" produces an ambiguity, the concept probably needs to be refined and the use of "any," "each" or "every" is not the cure.

7. "PERSON" AND "INDIVIDUAL."

As defined in ORS 174.100, "person" includes individuals, corporations, associations, firms, partnerships, limited liability companies and joint stock companies. The drafting attorney may wish to consult the topic "Words and Phrases" in the ORS General Index for other definitions of "person." To refer only to humans and not to business entities, "individual" should be used.

8. "PUBLIC BODIES," "STATE GOVERNMENT," "LOCAL GOVERNMENT," ETC.

ORS 174.108 to 174.118 provide comprehensive definitions for public bodies of this state. The definitions provided by these laws apply *only* if the language of a bill draft makes specific reference to the statute providing the definition.[9] For instance, a draft that merely

[8] U.S. v. Gonzales, 520 U.S. 1, 5 (1997).
[9] ORS 174.108.

refers to a "public body" will not pick up the definition of "public body" provided by ORS 174.109. The draft must refer to a "public body as defined in ORS 174.109."

The definition provided by ORS 174.109 for "public body" was intended to be the broadest category of governmental entities. The term does not include, however, the federal government, foreign governments or the governments of other states. If the drafting attorney wishes to cover these types of governmental agencies, the draft must make specific reference to them. Nor does the term include the Oregon State Bar or Oregon Health and Science University.[10] Under the provisions of ORS 9.010 (OSB) and ORS 353.100 (OHSU), laws relating to public bodies or governmental entities do not apply to these entities unless the laws make a specific reference to OSB or OHSU.

ORS 174.111 defines "state government" as the executive department, judicial department and legislative department. If the drafting attorney wishes to refer only to the executive branch of state government (i.e., state agencies as the term is used in the Administrative Procedures Act), the drafting attorney should use "executive department as defined by ORS 174.112." Drafting attorneyAttorneys should avoid references to "the courts of this state" and use "the judicial department as defined in ORS 174.113." ORS 174.114 provides a definition of the "legislative department" that includes all committees and administrative divisions of the legislative branch.

"Local government" includes cities, counties and districts.[11] Note that the definition does not include school districts. When drafting bills relating to cities, use the term "city" and not "incorporated city" (all cities are incorporated).

ORS 174.116 (2) provides a comprehensive list of governmental entities that are frequently treated as districts for statutory purposes. As always, it is important to be sure that a specific draft intends to cover all of these entities if the defined term is used.

"Special government body" is a miscellaneous group of entities that do not fit under the normal definition of state government or local government, but are clearly public bodies.[12] It is unlikely that a drafting attorney would ever want to use this term.

9. PRONOUNS.

Nouns are used in preference to pronouns even if the noun must be repeated, especially when a lack of clarity otherwise might result. When a pronoun is used, the drafting attorney should check to see that there is no question as to the antecedent of the pronoun.

In Home Builders Association of Metropolitan Portland v. City of West Linn,[13] the Oregon Court of Appeals considered the meaning of "its" in ORS 34.100, which provides in part:

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[10] ORS 174.108 (3).
[11] ORS 174.116.
[12] ORS 174.117.
[13] 204 Or. App. 655 (2006).

> Upon the review, the court shall have power to affirm, modify, reverse or annul the decision or determination reviewed, and if necessary, to award restitution to the plaintiff, or to direct the inferior court, officer, or tribunal to proceed in the matter reviewed according to its decision.

The court noted that two competing grammatical rules—the rule of proximity and the rule of prominence—applied. On the one hand, "according to common grammatical rules, one way to resolve an ambiguous pronoun is to conclude that the pronoun refers to the nearest antecedent noun."[14] On the other hand, "an equally valid resolution is to conclude that it (again, the pronoun) refers to the most prominent noun in the sentence: the subject."[15]

A drafting attorney could have avoided this ambiguity by replacing "its" with the appropriate noun—which, as found by the court, was most likely intended to be the reviewing court.

ORS 174.129 states that all statutes must be written in sex-neutral terms. This means that gender specific pronouns ("he" and "she," for example) should normally not be used. See chapter 3 of this manual for further discussion of gender terminology.

10. ENUMERATION OF PARTICULARS.

There are two major canons of statutory construction that relate to the effect of using general words or phrases in association with particular words. These are commonly referred to as "*expressio unius*" and "*ejusdem generis*."

a. *Expressio Unius.*

The maxim "*expressio unius est exclusio alterius*" means that specifying one person or thing implies the exclusion of other persons or things.[16] For example, the Oregon Supreme Court has held that a law permitting the Secretary of State to exclude from the voters' pamphlet matter that is objectionable for several specified reasons did not permit the Secretary of State to exclude matter that the Secretary of State found objectionable for another reason.[17] The drafting attorney must analyze carefully the situation to which the statutory language may later be applied. The maxim as applied by the courts may also affect the completeness with which the drafting attorney must describe the situation.

b. *Ejusdem Generis.*

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[14] Id. at 661.
[15] Id.
[16] Norman J. Singer and J.D. Shambie Singer, 2A Sutherland Statutes and Statutory Construction §§ 47:23-47:25 (7th ed., 2007).
[17] Lafferty v. Newbry, 200 Or. 685, 689-690 (1954); see also Crimson Trace Corp. v. Davis Wright Tremaine LLP, 355 Or. 476, 497-498 (2014) (explaining the *expressio unius* principle and cautioning that "care must be taken in applying that principle," because it is "simply one of inference" and "the strength of the inference will depend on the circumstances").

The maxim "*ejusdem generis*" means that general words following an enumeration of particular persons or things apply only to persons or things of the same general character as the enumerated items.[18] This maxim is based on the reasonable assumption that a drafting attorney will not enumerate items if the drafting attorney intends general words to have their unrestricted meaning. For example, a statute that applied to any forged "record, writing, instrument or matter whatever" was held not to apply to forgery of a certificate of nomination for candidacy of a person seeking public office, because it was not a record, writing or instrument as those terms were defined by law.[19] The words "or matter whatever" were limited under *ejusdem generis* by the preceding enumeration of particulars.[20] "Other" is often the key word in an enumeration that will cause this maxim to be invoked. Distinctions may help, as with "applies to . . . but does not apply to," both methods of clarifying the general category.

c. Clear Intent.

The purpose of the two canons discussed is ostensibly to clarify statutory meaning. Like all canons of statutory interpretation, however, their application by the courts in particular cases is less than consistent. Nevertheless, a drafting attorney cannot afford to ignore them. The drafting attorney must consider carefully whether an enumeration of particulars is necessary. If a provision is to apply to a class as a whole, it is generally safer if the class is named in general terms rather than in particulars, even when the particulars would be preceded or followed by general language. It is virtually impossible to make an enumeration all-inclusive, and omission may be construed as implying deliberate exclusion.

Sometimes, however, there will be trouble finding a factor common to all the particulars, and it will not be possible to name them as a class to avoid listing each of the particulars. When it is necessary to list them, the drafting attorney must indicate whether the enumeration is exclusive or illustrative. If merely illustrative, a drafting attorney may want to preface a list of particulars with the word "including."[21]

Sometimes particulars can be enumerated that are being excluded from a class expressed in general terms. Other times the class may be named in general terms and any particulars that are in doubt as to whether they are included in the class may be listed, making it clear that the particulars listed are not exclusive of others that are included within the general class.

11. PROVISOS.

Clauses introduced by "provided, however," "provided, always," "provided, further" or "provided that" are called *provisos*. Provisos generally are undesirable because of uncertainty as to whether a condition or exception is intended. Also, one proviso may tempt drafting

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[18] See State v. Kurtz, 350 Or. 65, 74-75 (2011) (discussing the *ejusdem generis* principle).
[19] State v. Brantley, 201 Or. 637 (1954).
[20] Id. at 645-646.
[21] See, e.g., State v. Kurtz, 350 Or. 65, 75 (2011) (noting that "statutory terms such as 'including' and 'including but not limited to,' when they precede a list of statutory examples, convey an intent that an accompanying list of examples be read in a nonexclusive sense").

attorneys to add a second, and then the question arises as to whether the second proviso is a condition only to the first proviso or to the entire section.

If a legislative statement is limited in application or is subject to an exception or condition, the sentence should begin with the condition or exception to call attention to the limitations. More simply, a new sentence can begin with "However." Sometimes no special words are necessary to indicate the exception or condition when the controlling statement is placed in a sentence or subsection following the statement that is to be controlled.

If a statement is subject to numerous exceptions or conditions, the exceptions or conditions can be placed in a list tabulated at the end of the sentence or placed in a separate subsection or section. If a statement is subject to a long or complex exception or condition, the exception or condition should be placed in a separate subsection or section.

If the exceptions or conditions are placed in a separate subsection or in one or more sections, the drafting attorney usually will want to make an appropriate reference to the exceptions or conditions in the legislative statement to be controlled by them. The following are typical introductory phrases calling attention to conditions or exceptions that have been placed in a separate subsection or section: "Subject to subsection (2) of this section, the director shall . . . ."; "Except as provided in section 4 of this (year) Act, the director may . . . ."

12. MODIFIERS.

A common problem with the use of modifiers (adverbs, adjectives and participles) is that they suggest a standard without supplying it. *A drafting attorney does better to stick with unmodified verbs and nouns.* If the modifiers are supposed to supply standards, then probably the standards need to be more specific. One test of the need for a modifier is to try the same sentence with the reverse modifier. If the sentence uses "duly," the drafting attorney should try reading the sentence with "unduly" as a substitute. If the result is absurd, the modifier is probably not necessary. It is also worth noting that a misused modifier may produce a double standard. For example, "duly performed in a manner that . . ." may precipitate an argument whether "duly" is one standard and "a manner that . . ." is another.

In BedRoc Ltd. v. United States,[22] the United States Supreme Court interpreted a 1919 federal statute reserving to the United States the right to remove all coal and other "valuable minerals." The question before the court was whether sand and gravel are "valuable minerals" for purposes of the statute. An earlier case had interpreted another federal statute that reserved to the United States "all coal and other minerals." That court had concluded that gravel was a mineral. A plurality of the court in BedRoc agreed that gravel was a mineral, but decided that it was not a "valuable" mineral.[23] Accurate and careful drafting might have avoided all litigation.

13. "IMPLY" AND "INFER."

[22] 541 U.S. 176 (2004).
[23] Id. at 183-186.

Imply and *infer* are often confused with each other. To imply means "to suggest or say indirectly." To infer means "to surmise or to draw a conclusion." A speaker who hints, *implies*; a listener who recognizes the hint, *infers*.

The distinction between *imply* and *infer* is easily made if one remembers that just as *im* precedes *in*, one must imply before another can infer. The author implied, the reader inferred.

14. JUDGMENTS.

All judgments are either limited, general or supplemental judgments.[24] If the drafting attorney intends to refer to the judgment that is entered at the end of the trial court phase of the action, the drafting attorney should refer to a "general judgment, as defined in ORS 18.005." If the drafting attorney wishes to refer to a judgment that is no longer subject to appeal, the drafting attorney should refer to "a judgment that is no longer subject to appeal."

Note that references to "final" judgments are inherently ambiguous and should be avoided, because a final judgment may refer either to a judgment that has been entered at the end of the trial court phase of an action or to a judgment that is no longer subject to appeal. Drafting attorneyAttorneys should be careful about the manner in which they refer to the dates relating to judgments. ORS chapter 18 lays out the following sequence of events surrounding judgments: A judge renders a judgment. That is, the court decides one or more issues. The judge signs a judgment document and files the document with the court administrator. The court administrator notes in the register that the document has been filed, at which point the judgment is deemed entered.

When the drafting attorney wants to tie the effect of a provision to a specific date connected with a judgment, the best solution will almost always be to refer to the date on which a judgment is "entered as described by ORS 18.075." This date is reflected in the court's register, and is the option least susceptible to creating confusion. The drafting attorney should almost never have occasion to refer to the date on which a judgment is "rendered" or "signed."

Drafting attorneyAttorneys should also be careful in distinguishing between the "judgment" (i.e., the court's decision) and the "judgment document" (defined by ORS 18.005 to be "a writing . . . that incorporates a court's judgment"). Usually, a drafting attorney intends to refer to the "judgment," but there may be occasions when reference to the "judgment document" is more appropriate.

15. "WHERE" OR "WHEN."

"Where" represents place; "when" time. In the sentence "Where a hearing is held by the commission, the hearing shall be public," "when" should replace "where." However, depending on the context, the drafting attorney may wish to consider using "if" when the intent of the clause is to establish a condition.

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[24] See ORS 18.005 (defining limited, general and supplemental judgments).

Definitions should not use "is when" or "is where" in place of "means." For example: "Incarceration means confinement in a correctional institution," *not* "Incarceration is when a person is confined in a correctional institution."

16. ENACTED V. EFFECTIVE DATES.

Be careful when referencing the date that a law, rule or ordinance was "enacted." While the date a law becomes effective or operative may be clear-cut, the date of "enactment" can be murky. A recent Oregon Court of Appeals case found that a local law was enacted on the date passed by the local governing body, rather than the date the law became effective following a referendum by the people.[25]

17. PRETENTIOUS WRITING AND LEGALISMS.

A drafting attorney may be tempted to make an extravagant use of elegant words when simpler expression is adequate. For example, use of "respectively" usually is superfluous. The drafting attorney needs also to avoid words that give rise to legal arguments. "Valuable consideration" raises a whole series of law school questions that "compensation" does not. "Bona fide" is not only usually mispronounced but is subject to argument on its specific meaning.

[25] American Energy, Inc. v. City of Sisters, 250 Or. App. 243, 251 (2012).

CHAPTER FIVE

TITLE; PREAMBLE; ENACTING CLAUSE

1. TITLE
2. PREAMBLE
3. ENACTING CLAUSE

This chapter deals with the drafting of a legally sufficient title, preamble and enacting clause of a bill draft. Chapter 6 of this manual deals with the drafting of the body of a bill draft. Despite the ordering of these two chapters, a drafting attorney generally should draft the title *after* the body of the draft is finished.

1. TITLE.

Article IV, section 20, of the Oregon Constitution, provides:

> **Sec. 20.** Every Act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be expressed in the title.
>
> This section shall not be construed to prevent the inclusion in an amendatory Act, under a proper title, of matters otherwise germane to the same general subject, although the title or titles of the original Act or Acts may not have been sufficiently broad to have permitted such matter to have been so included in such original Act or Acts, or any of them.

For a general discussion of the first paragraph of the constitutional provision, see Probert, "The Constitutional Restriction on Titles of Acts in Oregon," 31 Or. L. Rev. 111 (1952). (The article does not discuss the second paragraph because the article was written before section 20 was amended to include that paragraph.)

a. Purpose of Title.

The title must identify generally the subject of the bill. By reading the title, a person should be able to determine whether the bill deals with a subject in which the person is interested. The purpose of the constitutional title requirement is to prevent the concealment of the true nature of the provisions of the bill from the legislature and the public.[1] The title serves as a means of identifying the subject of a bill and *not* as an index or table of contents.[2] The title

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[1] Northern Wasco County PUD v. Wasco County, 210 Or. 1, 7 (1957); see also Warren v. Marion County, 222 Or. 307, 321 (1960) ("The constitutional restriction on titles of legislative acts was designed to prevent the use of the title as a means of deceiving members of the legislature and other interested persons as the bill moved through the legislative process. The restriction was intended to assure those who could not examine the body of the act itself that the act did not deal with more than its title disclosed"); State v. Williamson, 4 Or. App. 41, 44 (1970) (function of title requirement is to "generally inform[ ] of the nature of the act" and "to inhibit legislative log-rolling").

[2] Calder v. Orr, 105 Or. 223, 232 (1922).

should describe what a bill is *about*, but not what the bill *does* or how the bill accomplishes its purpose.

The Oregon Supreme Court has held many times that the single subject is all that is required to be stated in the title, and that it is not necessary to recite all the "matters properly connected therewith" that are contained in the bill.[3] The Constitution further contemplates that a title be so phrased as to identify the subject of the bill, and should not leave it to the courts to determine, from an enumeration of particulars, what single subject of the legislation the Act concerns.

The requirement of Article IV, section 20, is mandatory, and legislation that fails to comply with it is invalid.[4] The requirement, however, is to be "liberally construed."[5]

For a violation of Article IV, section 20, to be found, the title must give "no notice" of the questioned provision;[6] the conflict between the title and contents of the bill must be "palpably plain."[7]

b. Form of Title Generally.

Bill titles begin with a "relating to" clause, such as "Relating to personal income taxation." This form expresses the subject of the bill, as required by Article IV, section 20, of the Oregon Constitution. References to amendments, repeals and other special provisions follow the "relating to" clause, not in obedience to constitutional requirements, but as a matter of adherence to legislative rules or practices for the convenience of legislators.

See subsections e. and f. of this section for discussion of the elements of a bill title and their proper ordering.

c. Designation of Subject in Title.

The title of a bill should designate the subject of the bill in general terms, not in minute detail. This designation must be honest and within reasonably defined limits. The title may be broader than the subject dealt with in the body of the bill, as long as it is not misleading, but it may not be narrower. For example, the title "Relating to personal income taxation" may be used for a bill that only involves tax exemptions for persons 65 years of age or older. A title

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[3] E.g., Foeller v. Housing Authority of Portland, 198 Or. 205, 255-258 (1953); Feero v. Housley, 205 Or. 404, 416-418 (1955).

[4] Brugger v. Wagner, 135 Or. 615, 617 (1931); State v. Hawks, 110 Or. 497, 508 (1924).

[5] Anthony v. Veatch, 189 Or. 462, 502 (1950) (holding that title of initiative Act did not violate Article IV, section 20, where Act prohibited taking of salmon, salmon trout or steelhead by certain means, but title made reference only to salmon; noting that "salmon" may be read as a "generic term" and noting that Attorney General's ballot title clarified scope of Act).

[6] Clayton v. Enterprise Electric Co., 82 Or. 149, 156-157 (1916).

[7] Calder at 230; see also Warren v. Marion County, 222 Or. 307, 321-322 (1960) (to invalidate law, insufficiency of title must be "plain and manifest" or "palpable and clear"); Croft v. Lambert, 228 Or. 76, 81 (1960) (rejecting challenge under Article IV, section 20; holding that Act's "title was not as general as it might have been, but it was not deceptive").

such as "Relating to personal exemptions under the income tax laws for persons 65 years of age or older" substantially restricts the scope of the bill by its specificity.

If a title includes a detailed description of the subject of the bill, then the title must express *every* detail in the bill; a detail not included may be held invalid.[8] For example, in a 1942 case, a lengthy title specifically setting out numerous protections for fish, but not mentioning obstructions, did not justify a section prohibiting the placement of obstructions to the passage of salmon in the Rogue River.[9] The provision was broadly related to all other provisions of the Act, but those other provisions were mentioned or at least were generally within the scope of the title; obstructions were not.[10]

Traditional practices of the House of Representatives and the Senate have prohibited amending the title. The prohibition is aimed at preventing the bill from being used as a vehicle for ideas unrelated to those initially expressed in the bill. This prohibition has the effect of restricting the scope of amendments that may be added to the bill; a title that is narrowly drawn will permit a narrow range of amendments, and a title that is broadly drawn will permit a broad range of amendments.

d. Single Subject.

Article IV, section 20, of the Oregon Constitution, requires that each Act be limited to one subject, which shall be expressed in the title. The use of a generic expression may make it easier to identify the single subject. However, the Oregon Supreme Court has held that the title "Relating to the activities regulated by state government" failed to identify a single subject, because it was so broad that it did "little more than define the universe with respect to which the legislature is empowered to act."[11]

The drafting attorney should avoid using the word "and" in the title. An "and" in the relating clause, when used between nouns, implies multiple subjects. For example, "Relating to dogs and cats" suggests two subjects, but "Relating to certain domestic animals" suggests a single subject.

It is best to draft the title *after* every other part of the bill has been finished. In other words, the title is drafted to fit the bill, rather than the bill being drafted to fit the title. After writing the title, the drafting attorney should check each section in the text to be sure that all sections are within the scope of the title.

See also the discussion of the one-subject rule in chapter 6 of this manual.

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[8] Northern Wasco County PUD at 11-12.

[9] State v. Beaver Portland Cement Co., 169 Or. 1, 12-13 (1942).

[10] See also State ex rel. Pardee v. Latourette, 168 Or. 584 (1942) (holding that an Act "to grant to nonresident owners of motor vehicles the privilege of using the highways of the state," and to subject "such nonresident users of the highways" to substituted service, did not cover a provision subjecting nonresident users who were *not* owners to substituted service); Multnomah County v. First National Bank of Portland, 151 Or. 342, 346-350 (1935) (holding that the title of an Act "relating to duties and powers of the county auditor of Multnomah county in auditing of claims" did not give adequate notice of a provision authorizing the auditor to borrow money when the county treasury did not contain enough money to pay approved claims).

[11] McIntire v. Forbes, 322 Or. 426, 445 (1996).

e. Special Matters Mentioned in Title.

While the Oregon Constitution does not require an enumeration of particular features or sections of a bill, the rules and practices of the Legislative Assembly require that the following matters be referred to in the title:

Amendments and repeals. If a bill amends or repeals sections in ORS, session laws or both, all amended or repealed sections are listed with all amended sections preceding all repealed sections, and the ORS sections preceding the session law sections. Regardless of their order in the bill, ORS sections are listed in the title in numerical order, and session law sections are listed in chronological order, then in chapter numerical order.

Example: Relating to water pollution; creating new provisions; amending ORS 440.010 and 440.015 and section 1, chapter 999, Oregon Laws 2013, and sections 2 and 4, chapter 999, Oregon Laws 2017; and repealing ORS 449.125 and sections 5, 6 and 7, chapter 999, Oregon Laws 2017.

New provisions. If a bill enacts a new section not otherwise described in the title *and also* amends or repeals existing law, the drafting attorney must add the words "creating new provisions" to the title. These words are *not* added if the bill creates new provisions of law without amending or repealing existing law.

Example for new provisions only: Relating to water pollution.

Example for new provisions and amendment: Relating to water pollution; creating new provisions; and amending ORS 440.010.

Emergency clause. If a bill contains an emergency clause, the drafting attorney must add the words "declaring an emergency" to the title. See chapter 12 of this manual.

Special effective date clause. If a bill contains a section prescribing a nonemergency effective date that is earlier or later than the normal effective date, the drafting attorney must add the words "prescribing an effective date" to the title.

Supermajority clause. If the bill contains provisions for revenue raising or criminal sentence reduction and more than a simple majority is required for passage, the drafting attorney must add the words "providing for revenue raising that requires approval by a three-fifths majority" or "providing for criminal sentence reduction that requires approval by a two-thirds majority" to the title as appropriate. The appropriate clause appears at the end of the title after all other special clauses except a referendum clause. See chapter 15 of this manual for a discussion of revenue raising that may require a supermajority and chapter 11 of this manual for a discussion of criminal sentence reduction that may require a supermajority.

Other supermajority clauses may be required, but are rare. These include: "providing for transfer of moneys from the Education Stability Fund that requires approval by a three-fifths majority" (see Article XV, section 4, Oregon Constitution); "providing for

revenue estimate modification that requires approval by a two-thirds majority" (surplus revenue kicker, see Article IX, section 14); and "anticipating reduction in state revenues distributed to local governments that requires approval by a three-fifths majority" (see Article XI, section 15 (7)).

Referendum clause. If the bill contains a referendum clause, the drafting attorney must add the words "and providing that this Act shall be referred to the people for their approval or rejection" to the title.

f. Order of Title.

Elements of a bill title are ordered as described below. Note that it is unlikely that a single bill title will include all of these elements.

First: Relating to . . . .

Second: creating new provisions

Third: amending . . . (ORS or session law, or both)

Fourth: repealing . . . (ORS or session law, or both)

Fifth: prescribing an effective date or declaring an emergency

Sixth: supermajority clause

Seventh: referendum clause

Some examples of properly ordered bill titles follow:

> Relating to taxation, including but not limited to a general retail sales and use tax; creating new provisions; amending ORS 316.005; repealing ORS 316.101; prescribing an effective date; and providing that this Act be referred to the people for their approval or rejection.

> Relating to taxation, including but not limited to a general retail sales and use tax; creating new provisions; amending ORS 316.005; repealing ORS 316.101; prescribing an effective date; and providing for revenue raising that requires approval by a three-fifths majority.

g. Title of Amendatory Act.

Prior to 1952, the Oregon Supreme Court had held that nothing could be added to a section by amendment that could not have been included under the title of the *original* Act that enacted the section being amended. In 1952, the second paragraph of Article IV, section 20, was added to permit inclusion in an existing ORS section of new material that is appropriate under the title of the *amendatory* Act, a change that simplifies the work of the drafting attorney enormously.

h. Title of Bill Amending Several Statutes.

A drafting attorney may amend any number of different statutes in a single bill, as long as *the substance of the amendments* relates to the single subject expressed in the title of the bill. It is perfectly proper to state a subject that describes only the substance of the *changes* made by the bill.

For example, if a bill to enact a general law covering bonds of public officers amends those provisions in existing statutes that relate to those bonds, the title "Relating to bonds of public officers" may be used even though the unchanged parts of the amended statutes contain provisions dealing with subjects other than bonds of public officers.

A drafting attorney must beware of too much "housekeeping" in a bill because the housekeeping changes may be beyond the scope of the title.

i. Germaneness.

Under section 402 of Mason's Manual of Legislative Procedure (adopted by rule of both the House and Senate), an amendment to a measure must be germane to the subject of the measure.

Germaneness is not a legal question. It is a parliamentary matter to be decided by the body. Legislative Counsel should not opine on the germaneness of an amendment. That being said, note that if the substance of an amendment falls within the relating clause of the measure to be amended, it is very likely that the amendment is germane to the measure.

2. PREAMBLE.

If a requester wishes, a drafting attorney may include a preamble in a bill draft following the title and preceding the enacting clause. A preamble does not become part of the law, but is a statement of the reasons for the enactment of the law. A preamble cannot supply a provision not appearing in the text of the bill and will not be considered in ascertaining the meaning of the bill unless the text of the bill is ambiguous.[12] If statutory text is ambiguous, however, courts may use the preamble as an indicator of legislative intent.[13]

If a requester insists on inclusion of a preamble, the drafting attorney should explain its effectiveness or lack thereof. Examples of Acts containing preambles are chapters 114 and 152, Oregon Laws 1957; chapter 302, Oregon Laws 1979; chapter 41, Oregon Laws 1981; and chapters 236 and 329, Oregon Laws 1999.

A preamble may be in the form of "whereas" clauses or in the form of numbered paragraphs. A preamble should not be organized in "sections."

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[12] Sunshine Dairy v. Peterson, 183 Or. 305, 317-318 (1948).

[13] See Oregon Cable Telecommunications Association v. Department of Revenue, 237 Or. App. 628, 641 (2010) (noting that the "preamble to the bill further informs our understanding of the legislature's intention").

3. ENACTING CLAUSE.

The enacting clause immediately precedes the text of the bill. The drafting attorney must include and may not vary the following form:

Be It Enacted by the People of the State of Oregon:

Until 1968, the form of the enacting clause was fixed by Article IV, section 1, Oregon Constitution, and failure to include the enacting clause could invalidate a bill.[14] In 1968, that section of the Constitution was repealed and replaced by a section that did not include reference to an enacting clause. However, judicial recognition of the traditional practice indicated the advisability of continuing to use the enacting clause formerly prescribed.

[14] Colby v. Medford, 85 Or. 485, 507-508 (1917); State v. Wright, 14 Or. 365, 374-375 (1887).

CHAPTER SIX

ORGANIZING A BILL

This chapter describes how to arrange the provisions of a bill. An LC attorney can help the reader understand a bill by presenting its provisions in a logical and orderly manner. Structure and organization are especially important when a bill is lengthy or complex.

1. TYPICAL ORDER OF SECTIONS.

Although a bill does not always fit a uniform pattern, the order described below is recommended unless there are valid reasons for departing from the order in drafting a particular bill. Not all sections are required, or even recommended, and a drafting attorney should consult the explanations of the sections in other chapters of this manual.

Sections of a bill ordinarily should be arranged as follows:

(1) Act names (rare).

(2) Definitions.

(3) Policy and purpose statements (rare).

(4) Legislative findings (rare).

(5) The leading purpose of the bill.

(6) Subordinate provisions (i.e., conditions, exceptions and special cases important enough to be stated as separate sections).

(7) Administrative provisions (i.e., authority and responsibility for administration and procedure).

(8) Subordinate (or "housekeeping") amendments (ordinarily arranged in ascending order of ORS number, but amended sections may be interspersed with new sections if this arrangement is more conducive to a logical development of the bill).

(9) Saving clause (rare).

(10) Temporary and transitional provisions.

(11) Penalties.

(12) Repeals.

(13) Operative or applicable date.

(14) Emergency clause or nonstandard effective date.

(15) Referendum clause.

A drafting attorney should never place temporary material in the same section as permanent material. When the ORS editors compile statute sections in the *Oregon Revised Statutes*, the editors must compile each section that is of a general, public and *permanent* nature. If a section contains both permanent and temporary material, it may be impossible to avoid compiling the temporary material. The ORS then contains material that becomes obsolete in a relatively short time. To avoid this problem, temporary material should be drafted by either: (1) creating a separate section that expires by its own terms or that is repealed by a specified date; or (2) double amending the permanent material to remove the temporary material. See chapter 12 of this manual for a discussion of double amending permanent law and for authorized sunset dates for temporary provisions.

2. LEADING PURPOSE.

Legislation generally has a single leading purpose. The section expressing this leading purpose should be short, concise and as near the beginning of the bill as possible. If the leading purpose is expressed by an amendment to ORS, that section should appear first. When the reader understands the leading purpose, the reader can proceed with greater ease to the details and special provisions of the bill.

Typically, the leading purpose of a bill is the rule of law, and the other provisions of the bill create the means and procedures for administering that rule of law. Sometimes, the leading purpose of a bill is to create or refine the administration of existing or future rules of law without explicitly establishing new rules of law (e.g., establishing a new agency to administer existing law). There are also many bills in which the provisions for the new rule of law and its administration are nearly equal in importance.

When practicable, the drafting attorney should place the provisions stating the rule of law before the administrative provisions. If the statement of the rule of law requires a reference to a newly created agency enforcing it, the attorney can use a referential phrase such as "the board created by section 10 of this (year) Act." If the provisions creating an agency are shorter and less complicated than the statement of the rule of law, the attorney may want to state the less complicated proposition first and then proceed to the lengthier, more complicated provisions.

The subordinate provisions of a bill vary so much in character and the combinations are so numerous that rules cannot be laid down for their sequence, but some general suggestions are:

- The drafting attorney should give precedence to the more important provisions. Provisions of normal and general application should be placed first.

- The drafting attorney should set out any successive steps of a procedure in the normal sequence of the procedure. For example, a provision authorizing issuance of a license should precede a provision describing the grounds for its denial, suspension or revocation.

It may be useful for the drafting attorney to examine the arrangement of analogous laws already compiled in *Oregon Revised Statutes*.

3. BILLS WITHOUT SINGLE LEADING PURPOSE.

Most bills have a single leading purpose, but sometimes a bill has several related main purposes and each of those main purposes has subordinate provisions. In that situation, the bill may be organized according to each of those main purposes and may even include a separate unit caption for each purpose.[1]

Sometimes, a bill is composed of multiple provisions of equal importance relating to a common subject. In that situation, there may be a natural sequence of steps that will suggest an order for the provisions. For example, a bill regulating procedural matters may be organized in the customary sequence of the procedure, beginning with service of notice and ending with appeals. In other cases, there is no natural sequence in the provisions and the drafting attorney may have to adopt a somewhat arbitrary order. In a bill with no natural sequence, keeping amended ORS sections in numerical order is a good approach to make it easier to locate the sections.

4. ONE SUBJECT.

A bill may contain any number of sections.[2] However, a drafting attorney must be aware at all times of Article IV, section 20, Oregon Constitution, which provides in part that "[e]very Act shall embrace but one subject, and matters properly connected therewith[.]" The Oregon Supreme Court has said that the object of this constitutional provision is to:

> prevent the combining of incongruous matters and objects totally distinct and having no connection nor relation with each other in one and the same bill, as well as to discourage improper combinations by the members of the legislature which would secure support for a

[1] See, e.g., chapter 72, Oregon Laws 2018.

[2] Compare, e.g., chapter 140, Oregon Laws 1991 (one section having four words), with chapter 595, Oregon Laws 2009 (1,206 sections filling 613 pages).

> bill of an omnibus nature with discordant riders attached, which, if acted upon singly, would neither merit nor receive sufficient support to secure their adoption.[3]

In other words, the single-subject requirement was enacted to avoid logrolling of legislation.[4] The court has defined "logrolling" as a "combining of incongruous matters and objects totally distinct and having no connection or relation with each other."[5] and as the "combining [of] subjects representing diverse interests, in order to unite the members of the legislature who favored either, in support of all."[6]

When determining if a bill satisfies the single subject requirement, the word "subject" is given a broad meaning. This broad meaning allows a drafting attorney to include in one bill all matters having a logical or natural connection. Provisions that reasonably may be said to be subservient to the general subject or purpose may be included in the bill.

There are limits, however, to the broad meaning. The court has determined that "a 'subject' must be narrower than the universe of those things with respect to which the legislature is empowered to act[.]"[7] Therefore, a bill that amends multiple statutes that have nothing in common, other than the fact that they involve activities regulated by state government, may not pass the single subject test.[8]

In analyzing the single subject of the body of an Act, the court will:

> (1) Examine the body of the act to determine whether (without regard to an examination of the title) the court can identify a unifying principle logically connecting all provisions in the act, such that it can be said that the act "embrace[s] but one subject."
>
> (2) If the court has *not* identified a unifying principle logically connecting all provisions of the act, examine the title of the act with reference to the body of the act. In a one-subject challenge to the body of an act, the purpose of that examination is to determine whether the legislature nonetheless has identified, and expressed in the title, such a unifying principle logically connecting all provisions in the act, thereby demonstrating that the act, in fact, "embrace[s] but one subject."[9]

The court has noted that the test above "does not prohibit legislation from promoting more than one desirable purpose in the process" and the fact that a bill promotes two or more desirable ends does not mean that the bill encompasses more than one subject.[10]

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[3] *Northern Counties Trust Co. v. Sears*, 30 Or. 388, 400-401 (1895).
[4] *Id*., *citing* Thomas M. Cooley, *Constitutional Limitations* section 173; *see also McIntire v. Forbes*, 322 Or. 426, 439 (1996).
[5] *McIntire* at 439, *quoting Nielson v. Bryson*, 257 Or. 179, 187 (1970).
[6] *McIntire* at 439, *quoting Nielson* at 186.
[7] *McIntire* at 442.
[8] *See McIntire* at 444-446 (striking down a bill that attempted to (1) provide state funding (and land use procedures) for light rail, (2) expand the availability of card-lock service stations, (3) promote "regional problem solving" in land use matters, (4) regulate confined animal feeding, (5) preempt local pesticide regulation, (6) adopt new timber harvesting rules, (7) grant immunity to shooting ranges for "noise pollution" and (8) protect salmon from cormorants).
[9] *McIntire* at 443-444 (emphasis in original.).
[10] *State v. Fugate,* 332 Or. 195, 205 (2001).

In addition to being limited to a single subject in the body of the bill, a bill cannot contain a provision that is not related to the single subject expressed in the title. Article IV, section 20, Oregon Constitution, provides in part that "if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be expressed in the title." If the title of a bill is so specific or limited as to include only one aspect of a general subject, then the drafting attorney must limit the body of the bill in the same manner. The bill cannot deal with aspects of a general subject that are broader than the specific aspects of the subject that are expressed in the title. See the discussion of titles in chapter 5 of this manual.

There is one exception to the general rule that any matter or thing properly related may be included in a bill. Article IX, section 7, Oregon Constitution, provides: "Laws making appropriations, for the salaries of public officers, and other current expenses of the State, shall contain provisions upon no other subject." Under this provision, the Attorney General concluded that appropriations for capital construction and certain other purposes could not be included in a general appropriation bill.[11] However, the provision does not prevent including an appropriation when it is simply a part of the administrative provisions. The distinction relates primarily to the biennial appropriation bills introduced to implement the Governor's budget. See chapter 9 of this manual for further discussion of appropriations.

[11] 33 Op. Att'y Gen. 402 (1967).

CHAPTER SEVEN

DEFINITIONS; ACT NAMES; POLICY AND PURPOSE STATEMENTS; LEGISLATIVE FINDINGS

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1. DEFINITIONS.

The use of definitions should be considered when drafting a bill. If the drafting attorney desires a particular word to have a particular meaning, a definition is essential. The length of bills can be reduced and the bill made clearer through the use of definitions. However, a word should *not* be defined if it is not used in the bill.

Definitions are useful to:

1. Limit or extend the meaning of a word, particularly if the word is used in a rarely employed sense or is ambiguous.

2. Translate technical terms or words of art into common language. See, for example, "acknowledgment" in ORS 197.015.

As a general rule, definitions should not be used for a word when that word has a clear and definite dictionary meaning and that meaning is the one intended. A statutory definition is unnecessary and could lead to confusion. On the other hand, if a word has a well-defined legal meaning (that is, one well-defined in case law) and there is no statutory definition, the court will assume that the well-defined legal meaning is what the Legislative Assembly intended.[1] If there is a well-defined legal meaning, and the Legislative Assembly intends that the definition of the term actually be something else, the drafting attorney should define the term whether or not the intended meaning is identical to the dictionary definition.

The appellate courts will use *Webster's Third New International Dictionary, Unabridged,* to determine the meaning of a word if there is no statutory definition or well-defined legal meaning. When resorting to dictionary definitions of a term it is important to consider the form of the word. For example, when a statute uses a word in its noun form, the definitions applicable to the verb form of the same word don't apply.[2]

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[1] Johannesen v. Salem Hospital, 336 Or. 211 (2003).

[2] State v. Glushko, 351 Or. 297 (2011); see also TriMet v. Amalgamated Transit Union Local 757, 362 Or. 484, 494-95 (2018) (holding that statutory definition of the term "meeting" did not control interpretation of the undefined term "meet").

A definition should not be used to twist a word into meaning something *wholly* foreign to its dictionary meaning. For example, "dog" should not be defined to mean "cat." After a word is defined, the defined word should be used rather than the definition.

The drafting attorney should take care not to place substantive matter in a definition. To do so makes the substantive matter hard to locate and usually detracts from the clarity of the definition. ORS 656.005 contains several examples of substance entwined with definitions.

Definitions should never be phrased in the alternative unless the use of the defined terms in the bill does not require judgment as to which alternative applies; for example, "commission means XYZ Commission **or** ABC Commission" may be acceptable, but not if the reader has to make a judgment as to which agency fits the definition each time the term "commission" is used.

Acronyms and abbreviations should be used sparingly in bill drafts, and only if previously defined.

ORS chapter 174 contains general rules of construction and certain general definitions that apply throughout the statutes. These definitions should not be duplicated in a bill. If any of the words defined in ORS 174.100, 174.102, 174.104 or 174.107 are used in the bill, the words will have the meaning given them in those statutes unless specifically provided otherwise. However, be aware that, under ORS 174.108, the definitions provided in ORS 174.108 to 174.118 for certain public bodies do not apply automatically, so a specific reference to the appropriate statute is necessary. If a bill relates to crime or criminal procedure, general definitions in ORS 161.015 and 161.085 must be considered. The drafting attorney should also consult the topic **WORDS AND PHRASES** in the ORS General Index or the computer search program as a source for definitions of similar words or phrases used elsewhere in the statutes.

The drafting attorney must also keep in mind the definitions and phraseology used in the ORS chapter in which a section being drafted will be compiled, or in which the section being amended is located. If a new section ought to be compiled only in one ORS chapter or within one ORS series, the definitions that apply to the existing ORS chapter or series can be made to apply also to the new section by adding the new section to, and making it a part of, the existing ORS chapter or series. This is one of the basic reasons for the "add" technique.

Definitions usually begin with a reference to the particular sections in the bill that rely on those definitions: "As used in sections x to y of this (year) Act …" or "As used in sections 2, 3 and 10 of this (year) Act …." Consider whether a penalty section is likely to be codified at the back of an ORS chapter. If no defined terms are used in the penalty section, consider whether omitting the penalty section from the definition reference will avoid the creation of a split series. Housekeeping or amended sections at the end of the bill may not depend on the definitions, so "As used in this (year) Act" should not be used. The ORS editors substitute all sections in an Act for references to "this (year) Act." If only a few sections depend on the definition, the substitution is confusing.

When writing a section of definitions, the drafting attorney should place each definition in a separate subsection or paragraph. The defined words must be placed in quotation marks and arranged in alphabetical order. Disregard spaces when alphabetizing defined terms.

"Means" is used in the definition if the definition restricts or limits the meaning of a word. "Includes" is used if the definition extends the meaning. The combination "means and includes" should *never* be used, even if the combination is split into more than one sentence. A doubt is raised as to whether the definition is intended to be restrictive or extensive. The singular form of "means" or "includes" is used even if the term being defined is plural because the subject of "means" or "includes" is "the word"; e.g., [the word] "Toys" includes teddy bears.

In some cases a drafting attorney may not want to define a word or phrase completely and exactly, yet may want to make certain that the word or phrase *includes* all the specific cases in mind.[3] If so, the drafting attorney may find the following example useful:

SECTION 1. As used in sections ____ to ____ of this (year) Act, "conveyance" includes an assignment, lease, mortgage or encumbrance.

Note that "including, but not limited to," "including, without limitation" and similar constructions are disfavored. At best, they are redundant. At worst, they call into question the meaning of the word "include" when it is not followed by a similar qualifier. Although requesters will often ask for this language, and although there are numerous examples of such language in existing law, drafting attorneys should strive to avoid its use.

A drafting attorney may want to *exclude* a meaning from an extensive definition. However, a drafting attorney should not use adjustments in a definition to create substantial law such as exceptions to the application of the law. If the exclusion is properly part of the definition, the definition should be phrased as follows:

SECTION 1. As used in sections ____ to ____ of this (year) Act, "fish" includes both game fish and nongame fish, but does not include thaleichthys pacificus, commonly known as smelt.

If it is necessary to exclude something that might otherwise be included within the scope of a definition, the use of "means, but does not include," is permissible. If the use of "means" is not sufficiently clear regarding the boundaries of a defined term, consider breaking the definition into two parts - one to say what the term means and one to say what the term does not mean. For example:

(1) "Widget":
(a) Means ... .
(b) Does not mean ... .

A drafting attorney may wish to incorporate by reference a definition found elsewhere in ORS. This practice allows more than one definition to be changed by a single amendment and is more efficient than repeating the definition when the desire is to keep the applicable definitions identical. The following form will accomplish the desired result:

[3] American Building Maintenance v. McLees, 296 Or. 772 (1984).

SECTION 1. As used in sections ____ to ____ of this (year) Act, "renewable energy resource" has the meaning given that term in ORS 469B.130.

When using in the text of a bill a word that is defined in the definition section, the drafting attorney should *always* use the word in the sense in which it is defined. This is true even if the definition section applies "unless the context requires otherwise."[4] Some drafting attorneys drop that phrase because it offers a wider possibility of meaning than they wish to allow. Notwithstanding the scope of a definition, judicial construction may limit the application of the word defined by reason of the context in which the word is found.[5]

Definitions generally should be placed at the beginning of the bill so that the reader can be aware of special meanings given to words and phrases before encountering them in the bill. However, in defining an expression that is used in one section only, it may be more convenient for the reader if the drafting attorney adds the definition to that section, usually in a separate subsection at the beginning of the section. A definition that applies to only two or three sections in a rather lengthy bill may be placed more conveniently just before those sections, rather than at the beginning of the bill.

2. ACT NAMES.

An Act name, or short title, is seldom used in legislation in Oregon except for uniform acts, e.g., the Uniform Commercial Code. Statutes are more conveniently cited by reference to ORS chapter or section numbers. However, if a lengthy bill establishes a continuing program of considerable importance, an Act name may be used, such as was done in ORS 801.010. Do not use quotation marks around the Act name.

An Act should not be titled using a date; for example, the title "Oregon Criminal Code of 1971" cannot be adjusted to reflect later amendments even if the new material is added to one of the series that constitutes the code unless the title section is also amended. The result misleads the reader who may conclude that the 1971 code has never been amended.

Act names are codified in ORS under the leadline "Short title."

3. POLICY AND PURPOSE STATEMENTS.

Unless requested to do so, the drafting attorney should not include policy or purpose statements. If policy or purpose language is of momentary interest only, such as a recitation of recent statistical information, consider placing the language in a preamble. If a statement of policy or purpose is made a section of the bill it will follow the enacting clause and, consequently, have the effect of law, as distinguished from a preamble, which appears before the enacting clause and does not have the effect of law. ORS 696.007 is an example of an enacted purpose statement.

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[4] It is a disfavored practice to provide that definitions apply "unless the context requires otherwise," a qualifier that creates more problems than it solves. There are, however, numerous instances of this language in existing law.

[5] Nilsen v. Davidson Industries, Inc., 226 Or. 164, 167 (1961); State v. Pacific Powder Co., 226 Or. 502, 507 (1961).

In some instances, a declaration of purpose may be intended as a guide for judicial construction or administrative application of a bill. The Oregon Supreme Court relied on ORS 337.110 (since repealed) in its effort to ascertain the meaning of another section.[6]

Policy or purpose statements cause some misunderstanding since they are often far more ambitious than the scope of the accompanying provisions.[7] If a policy or purpose statement is requested, it should be drafted to reflect the scope of the bill. If such a statement is submitted with a proposal, check it for redundancy, conflicts with substantive provisions of the draft or use of undefined terms. Be careful when using "for the purpose of" preceding a power, duty privilege or prohibition since it may be unclear whether the phrase is merely unnecessary explanation or is expressing a condition or limitation.

4. LEGISLATIVE FINDINGS.

Occasionally a drafting attorney is asked to include a legislative finding in a bill. It is wise to ask the requester to supply the text. Caution should be urged. The following statement by the Oregon Supreme Court indicates that the courts may take a dim view of the efficacy of enacting legislative findings into law:

> [Legislative] findings are only a recital of premises for legislation. As such, their vagueness or concreteness and their past or continued accuracy are immaterial. Their omission would not affect the validity of the [law]. If legislative findings mattered, drafting attorneys merely would busy themselves with inserting whatever prefatory recitals courts have quoted in sustaining similar laws. But lawmakers do not need to find or declare the factual predicates for legislation, unless some special statute requires it, and such a recital gains nothing for the validity of the legislation, though it can sometimes help toward its purposeful interpretation. It is the operative text of the legislation, not prefatory findings, that people must obey and that administrators and judges enforce.[8]

[6] Webb v. State, 217 Or. 1 (1959); cf. Conant v. Stroup, 183 Or. App. 270 (2002).
[7] See Peacock v. Veneer Services, 113 Or. App. 732 (1992).
[8] City of Portland v. Tidyman, 306 Or. 174, 185 (1988).

CHAPTER EIGHT

ADMINISTRATIVE PROVISIONS

This chapter contains sample provisions that cover various problems that arise in drafting administrative provisions. Each provision must be carefully tailored to fit the requirements of the bill in which it is used.

1. GENERALLY.

The administrative provisions of a bill ordinarily mirror the provisions creating new rights and liabilities. Laws creating a new agency should give a clear picture of the administrative organization and procedures. For example, section 1 sets out definitions, section 2 creates the agency, and the next sections provide for the duties of the agency, the selection of its chief administrator and employees and the adoption of its rules.

2. ESTABLISHING NEW STATE AGENCY.

See appendix A for the complete text of the <boiler newagncy> boilerplate.

The following section provides for the establishment of a new state agency:[1]

ESTABLISHING NEW STATE AGENCY

SECTION 1. (1) The Department of _____ is established.

[1] See also chapter 739, Oregon Laws 1991 (establishing Housing and Community Services Department); chapter 904, Oregon Laws 1989 (establishing State Parks and Recreation Department).

(2) The department shall _____.
(3) The department may _____.

Sometimes the provision creating a new agency attempts to summarize its functions. This is dangerous! The drafting attorney must be general and not create any inconsistency between these provisions and later sections that detail the agency's functions.

A drafting attorney generally does not need to specify that an enumeration of functions is not a limitation of other powers. However, the following may be used:

SECTION _____. The enumeration of duties, functions and powers in section _____ of this (year) Act is not intended to be exclusive nor to limit the duties, functions and powers imposed on or vested in the department by other statutes.

An agency may be composed of divisions, created as follows:

<spm agency-division>

SECTION _____. (1) The _____ Division is established within the Department of _____.
(2) The division shall _____.

3. DIRECTOR OF NEW AGENCY.

A state agency is usually headed by a chief executive officer known as a director (department) or assistant director (division). Although "commissioner" has been used occasionally, its use suggests a commission and may be misleading.

a. Basic Provision.

The following sample may be used as base for a section establishing a state office:

DIRECTOR

SECTION 2. (1) The Department of _____ is under the supervision and control of a director, who is responsible for the performance of the duties, functions and powers of the department.

(2) The Governor shall appoint the Director of the Department of _____, who holds office at the pleasure of the Governor.

(3) The director shall be paid a salary as provided by law or, if not so provided, as prescribed by the Governor.

(4) For purposes of administration, subject to the approval of the Governor, the director may organize and reorganize the department as the director considers necessary to properly conduct the work of the department.

(5) The director may divide the functions of the department into administrative divisions. Subject to the approval of the Governor, the director may appoint an individual to administer each division. The administrator of each division serves at the pleasure of the director and is not subject to the provisions of ORS chapter 240. Each individual appointed under this subsection must be well qualified by technical training and experience in the functions to be performed by the individual.

b. Confirmation by Senate.

The legislature may subject gubernatorial appointments to Senate confirmation.[2] Use the following text from the <boiler newagncy> boilerplate, if requested:

CONFIRMATION BY SENATE

SECTION 3. The appointment of the Director of the Department of _____ is subject to confirmation by the Senate in the manner prescribed in ORS 171.562 and 171.565.

c. Term of Office.

By statute, appointed officials serve for four years, subject to earlier removal by their appointer.[3] Therefore, it is unnecessary to specify a term of office for an executive officer.[4]

A drafting attorney may be asked to provide that an officer serve for a specified term. Terms of officers other than judges are constitutionally limited to four years.[5] The following alternative language is available as a standard phrase:

<spm agency-term>

(2) The Governor shall appoint the Director of the Department of _____. The director holds office for a term of _____ years, but may be removed at any time during the term at the pleasure of the Governor.

d. Salary.

In a bill creating an officer or employee, it is not customary to set a salary or salary limit. The Personnel Relations Law establishes salaries of employees in the classified service.[6] For an employee in exempt service, the basic provision for directors above can be borrowed to authorize an officer or body to prescribe the employee's compensation.

e. Travel and Subsistence Expenses.

Except in unusual cases, a drafting attorney does not need to provide for the reimbursement of the director for necessary travel and subsistence expenses. This is covered by ORS 292.220. However, if directed to draft such a provision, the attorney should use the following standard phrase:

<spm agency-expenses>

SECTION ___. In addition to being paid a salary, but subject to any applicable

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[2] Article III, section 4, Oregon Constitution; ORS 171.562.
[3] ORS 236.140.
[4] Although ORS 236.140 also applies to boards and commissions, board and commission members generally serve for fixed, staggered terms. See section 4a of this chapter.
[5] Article XV, section 2, Oregon Constitution. Judges are limited to six years. Article VII (Amended), section 1, Oregon Constitution.
[6] ORS 240.235.

law regulating travel and other expenses of state officers and employees, the Director of the Department of _____ shall be reimbursed for actual and necessary travel and other expenses incurred by the director in the performance of official duties.

f. Fidelity Bond.

The Oregon Department of Administrative Services (DAS) may require a fidelity bond of any officer, employee or agent of a state agency who handles state money or property.[7] The Director of DAS may fix the amount of the bond, except as otherwise provided by law, and must approve the sureties. The premium on the bond is paid by the state agency employing the bonded individual, usually through a blanket bond obtained for the state by DAS. Although ORS 291.011 makes specific bonding provisions unnecessary, the statute does not require a corporate surety and does not prescribe any definite amount. If the requester requires something other than this statute, adapt the following standard phrase:

<spm agency-bond>

SECTION ___. Before assuming the duties of the office, the Director of the Department of _____ shall give to the state a fidelity bond, with one or more corporate sureties authorized to do business in this state, in a penal sum prescribed by the Director of the Oregon Department of Administrative Services, but not less than $50,000.

Wherever a bond is required for a public officer or employee, the bond is paid out of the proper state or local funds.[8] Consequently, a drafting attorney does not need to specify this. But if there is any doubt as to the account or fund from which the premium should be paid, it can be made clear as follows: "The premium on the bond shall be paid from the __ ___ Department Account."

g. Special Requirements and Qualifications.

Most statutes do not prescribe special qualifications for an appointee to a state office. It is assumed that the appointing authority will choose an individual well suited to fill the position. However, the requester may wish to establish special qualifications. A drafting attorney can do this by adding them to subsection (2) of the basic provision above or may set them out in a separate section, particularly if the qualifications are lengthy. The standard phrase reads as follows:[9]

<spm agency-require>

SECTION ___. An individual is not eligible to hold the office of Director of the Department of _____, or to hold any office or employment in the Department of _____, if the individual has any connection with persons engaged in or conducting any _____ business of any kind, holds stock or bonds in any _____ business of any kind, or receives any commission or profit from or has any interest in the purchases or sales made by the department.

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[7] ORS 291.011 (1).
[8] ORS 742.354.
[9] See also, e.g., ORS 756.026 (1).

The drafting attorney should be aware of constitutional and statutory provisions that proscribe certain types of qualifications.

Sometimes the following sentence is added to subsection (2) of the basic provision: "The person appointed as director must be well qualified by training and experience to perform the duties of the office." This provision hardly seems necessary, but it does no harm if requested.

h. Oath of Office.

Few statutes require an oath of office. If requested, the following standard phrase may be added:

<spm agency-oath>

SECTION ___. Before assuming the duties of the office, the Director of the Department of _____ shall subscribe to an oath that the director faithfully and impartially will discharge the duties of the office and that the director will support the Constitution of the United States and the Constitution of the State of Oregon. The director shall file a copy of the signed oath with the Secretary of State.

4. ESTABLISHING NEW BOARD OR COMMISSION.

a. Basic Provision.

The following is the basic section used in creating a new board or commission:

<boiler board>

SECTION 1. (1) The _____ of _____ is established.

(2) The _____ of _____ consists of _____ members appointed by the Governor.

(3) The term of office of each member of the _____ is four years, but a member serves at the pleasure of the Governor. Before the expiration of the term of a member, the Governor shall appoint a successor whose term begins on _____ next following. A member is eligible for reappointment. If there is a vacancy for any cause, the Governor shall make an appointment to become immediately effective for the unexpired term.

(4) The appointment of each member of the _____ is subject to confirmation by the Senate in the manner prescribed in ORS 171.562 and 171.565.

(5) A member of the _____ is entitled to compensation and expenses as provided in ORS 292.495.

SECTION 2. Notwithstanding the term of office specified by section 1 of this (year) Act, of the members first appointed to the _____:

(1) One shall serve for a term ending _____, 2___ (year+1).

(2) One shall serve for a term ending _____, 2___ (year+2).

(3) One shall serve for a term ending _____, 2___ (year+3).

(4) Two shall serve for terms ending _____, 2___ (year+4).

The material in section 2 of the example should use the same day in each subsection. The provision is temporary and should not be placed in section 1 of the example to avoid needless compilation in the ORS. The section will instead be printed as a note in ORS for as long as it has current application.

If an initial term of office ends on a specified date in (year+4), the drafting attorney should ensure that an early operative date will not cause the initial term of office to exceed four years. Similarly, a drafting attorney should be careful to ensure that a delayed operative date will not result in a very short initial term. It can be difficult to locate appointees willing to accept a very short term, especially if it would limit their eligibility for future appointment.

If adding new members to an existing board, they may be added as follows:

> **SECTION 2. Notwithstanding the term of office specified in ORS 359.020, of the additional two members added to the Oregon Arts Commission by the amendment to ORS 359.020 by section 1 of this (year) Act:**
> **(1) One shall serve for a term ending _____, (year+2).**
> **(2) One shall serve for a term ending _____, (year+3).**

If staggered terms are desired but the number of members is not specified:

> **SECTION _____. Notwithstanding the provisions of section ____ of this (year) Act, the State Board of _____ shall adopt by rule a method for establishing the initial terms of office of board members so that the terms of office do not all expire on the same date.**

If members of one board automatically are made members of another board, the following may be used:

> **SECTION _____. The members incumbent on the State Board of _____ on December 31, (year), shall become the members of the New State Board of ____ on January 1, (year+1), subject to the terms of office to which the members were appointed.**

The length of term for each initial board member may also be determined by lot.[10] This method is not ordinarily used for state boards but sometimes is found at the local government level.

Changes to terms of office may require a special provision.[11]

If the board is changing from appointed to elected[12] members, the following may be used:

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[10] See, e.g., ORS 440.330 (4) ("The directors who are elected under subsection (2) of this section shall determine by lot the length of term each shall hold office. The terms of not more than one-half of the directors who are appointed or elected shall expire June 30 next following the first regular district election after the appointment or election. The terms of the remainder shall expire June 30 next following the second regular district election after the appointment or election.").

[11] See, e.g., section 35, chapter 198, Oregon Laws 1977.

[12] For examples of electing members, see ORS 204.017, 264.410.

SECTION 2. A person is eligible for election as a commissioner of the port who at the time of the person's election is an elector registered in the port, and who has for one year immediately preceding election resided within the port.

SECTION 3. (1) Commissioners of the port shall be nominated and elected as provided in ORS chapter 255.

(2) Except as provided in ORS 778.235, a commissioner, when elected, shall hold office for a term of four years and until a successor has been elected and qualified.

SECTION 4. (1) Each office of commissioner of the port shall be assigned a position number.

(2) The secretary of the port shall assign the position number to each office of commissioner. The number so assigned shall be certified by the secretary to the commissioner in office holding that position. The secretary shall file a copy of the certification with the election officer for the port.

SECTION 5. (1) At the first regular district election after the effective date of this (year) Act, five commissioners shall be elected, each to hold office for a term of four years commencing on July 1 following that election. At the second regular district election after the effective date of this (year) Act, four commissioners shall be elected, each to hold office for a term of four years commencing on July 1 following that election.

(2) Not later than 30 days after the effective date of this (year) Act, the secretary of the board of commissioners of the Port of Portland shall assign a position number to each office of commissioner as provided in section 4 of this (year) Act. The assignment of position numbers shall be determined by lot. The five appointed commissioners holding the offices assigned to lowest position numbers shall serve until June 30, (year+2), when they shall be succeeded by persons elected at the regular district election in that year. The remaining appointed commissioners shall serve until June 30, (year+4).

(3) Until the office of a commissioner of the port is held by a person elected to the office as provided in this (year) Act, the Governor may continue to appoint persons to that office and fill a vacancy in that office after the effective date of this (year) Act as if this (year) Act had not been enacted.

b. Confirmation by Senate.

With appropriate adjustments in terminology, the confirmation provisions for boards and commissions are the same as for confirmation of the appointment of a director.[13] However, the drafting attorney should not assume that the requester wants members confirmed by the Senate. Members of boards or commissions appointed by persons other than the Governor usually are not subject to Senate confirmation.

c. Fidelity Bond.

If the requester wants a fidelity bond for members of a board or commission, the form used for directors[14] can be used with necessary adjustments.

d. Oath of Office.

[13] See section 3b of this chapter.

[14] See section 3f of this chapter.

If the requester wants to require an oath of office for members of a board or commission, the form for directors[15] may be used as adjusted to fit the needs of the bill being drafted.[16]

e. Qualification of Members.

A drafting attorney may be asked to include special eligibility requirements for members of a board or commission. The qualifications should be placed in a separate subsection of the basic provision or, if they are lengthy, should be set out in a separate section. For example:

> **SECTION _____. The members of the Wildlife Commission must be residents of this state who are well informed on the principles of wildlife restoration and conservation and the correlation of this resource with industry, agriculture and other natural resources.**

A requester may wish to ensure that members are selected from congressional districts to distribute board membership geographically. There are now five congressional districts in Oregon. For example: "The board shall consist of one member from each congressional district and one member from the state at large," or "not more than two members may be appointed from any one congressional district." The boundaries and even the number of congressional districts may change each decade. The requester may prefer to select members from areas or zones with boundaries fixed by statute that do not change automatically (and perhaps unexpectedly) when congressional districts are redrawn.[17]

f. Constitutional Limits on Qualifications of Members.

If the requester requires special qualifications for membership, it is important to take care in describing those qualifications. *Appointment by a private organization is not acceptable.* According to the Attorney General, giving a private organization the right to appoint public officers constitutes an impermissible delegation of governmental power to private parties.[18] Giving a private organization that right violates the Oregon Constitution, specifically those provisions that: (1) vest the power to make and declare laws exclusively in the Legislative Assembly conditioned by the initiative and referendum process;[19] (2) separate government into three departments[20] (legislative, executive and judicial); and (3) require that no law be passed that depends upon any other authority to take effect.[21]

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[15] See section 3h of this chapter.

[16] See, e.g., ORS 677.240 (Oregon Medical Board).

[17] See, e.g., ORS 526.009 (State Board of Forestry); ORS 496.090 (State Fish and Wildlife Commission).

[18] 45 Op. Att'y Gen. 160 (1987); see also City of Damascus v. Brown, 266 Or. App. 416 (2014); Corvallis Lodge No. 1411 v. OLCC, 67 Or. App. 15 (1984) (delegation of governmental authority to private parties fails to provide procedural safeguards against unaccountable exercise of authority, particularly in light of conflicts of interest); Megdal v. Bd. of Dental Exam'rs, 288 Or. 293 (1980); Van Winkle v. Fred Meyer, Inc., 151 Or. 455 (1935) (unconstitutional to delegate price-setting authority to private parties); 28 Op. Att'y Gen. 69 (1957) ("all appointive power is vested in the three departments of government" and may not be delegated constitutionally to nongovernmental bodies); section 7 of this chapter.

[19] Article IV, section 1, Oregon Constitution.

[20] Article III, section 1, Oregon Constitution.

[21] Article I, section 21, Oregon Constitution.

However, it is permissible to require that an appointing authority *give consideration to* appointing persons nominated by private organizations.

The creation of a nonadvisory board or commission that exercises governmental functions and that includes members of more than one branch of government implicates concerns over constitutional separation of powers. The situation usually arises when requesting an executive branch board or commission that includes legislators. However, a drafting attorney should consider whether executive powers may be executed within any request to create a body that includes individuals from more than one branch of government. A board or commission exercises executive powers if, for example, it awards grants, establishes standards or sets policy for an agency.[22]

If a drafting attorney receives a request to have representatives from more than one branch of government on a nonadvisory board or commission, the attorney should consider and discuss with the requester:

1. Removing some of the members so that all members are from one branch of government;
2. Changing the duties of the board or commission so that the board or commission is *advisory* (e.g., place the nonadvisory functions of the board or commission in an independent executive branch agency); or
3. Allowing the legislators or judges to remain on the executive board or commission, but only as advisory members and without a vote on the matters under the purview of the executive branch.

Note: If you want a member of a board or commission to be a nonvoting member, state that the person is a nonvoting member. "Ex officio" does not mean "nonvoting"; it means "by virtue of office."

If a requester wishes to have legislative representation on an advisory board or commission, the appointing authorities should be the legislative leadership rather than the Governor. Appointment of a legislator to a position that requires Senate confirmation raises serious protocol questions.

g. Salary, Per Diem and Travel Expenses.

Many Oregon state boards and commissions consist of part-time members who serve without compensation or for the per diem specified by ORS 292.495. A provision allowing members of a board or commission travel expenses can be included in a bill by referring to ORS 292.495. If a per diem is intended, the drafting attorney should incorporate ORS

[22] For a discussion of separation of powers, see Monaghan v. School District No. 1, 211 Or. 360 (1957) (superseded by Article XV, section 8, Oregon Constitution, allowing public school teachers to serve in legislature notwithstanding separation-of-powers issues); see also 49 Op. Att'y Gen. 254 (2000); 46 Op. Att'y Gen. 133 (1989); 43 Op. Att'y Gen. 205 (1983).

292.495 by reference rather than writing a new per diem provision. The drafting attorney should be sure that the requester intends both the per diem and the expense allowance.

> **SECTION _____. A member of the State Board of _____ is entitled to compensation and expenses as provided in ORS 292.495.**

Note that ORS 292.495 applies only to boards and commissions. If a drafting attorney would like the provisions of ORS 292.495 to apply to a different type of public entity, such as an advisory committee or task force, one of the following may be used:

> **SECTION _____. A member of the _____ is entitled to compensation and expenses in the manner and amounts provided in ORS 292.495. Claims for compensation and expenses incurred in performing the functions of the _____ shall be paid out of funds appropriated to the _____ for that purpose.**

OR

> **SECTION _____. A member of the _____ is not entitled to compensation, but in the discretion of the _____ may be reimbursed from funds available to the _____ for actual and necessary travel and other expenses incurred by the member in the performance of the member's official duties in the manner and amount provided in ORS 292.495.**

Legislators are considered full-time public officials and do not receive a per diem under ORS 292.495. When serving ex officio on other than legislative committees, legislators can receive per diem and expenses if the reimbursement is specified.[23]

h. Officers of Board.

The following is a typical section providing for the designation of the officers of the board and specifying a quorum:

> **SECTION _____. (1) The State Board of _____ shall select one of its members as chairperson and another as vice chairperson, for such terms and with duties and powers necessary for the performance of the functions of such offices as the board determines.**
>
> **(2) A majority of the members of the board constitutes a quorum for the transaction of business.**

The provision does not provide for the election of a secretary for the board, but assumes the usual practice that the secretary will be an employee who is not a member of the board. If this is not the case, the drafting attorney must provide for the election of a secretary. An attorney also may want to provide for the election of a treasurer of the board. Sometimes the office of secretary-treasurer is combined. If there is provision for a treasurer or secretary-treasurer, a bond may be required.[24] The attorney should be sure of the requester's purpose as the issue of secretary-member versus secretary-employee has generated controversy.

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[23] ORS 171.072.

[24] E.g., ORS 198.220 ("The governing body of a district shall require bond or an irrevocable letter of credit of any member of the governing body or any officer or employee of the district who is charged with possession and control of district funds and properties.").

i. Quorum; Voting.

"Any authority conferred by law upon three or more persons may be exercised by a majority of them unless expressly otherwise provided by law."[25] It is unclear whether action may be taken by a majority vote, by a quorum being present or only upon the approval of a majority of the members. The bill should provide the number of members required to make a quorum and exercise authority, pending clarification of ORS 174.130.

Customarily, the vote of a majority of those in attendance with quorum is all that is required to act. Occasionally, a drafting attorney is asked to increase the number of affirmative votes, usually on more significant issues. If asked to require a greater number of votes to act, proceed carefully to ensure that the majority of quorum can adjourn meetings, call meetings, set agendas, etc.[26]

j. Meetings.

The following section is typical of those relating to meetings of a board or commission if the number of meetings is to be specified:

> **SECTION _____. The State Board of _____ shall meet at least once every three months at a place, day and hour determined by the board. The board may also meet at other times and places specified by the call of the chairperson or of a majority of the members of the board.**

Unless otherwise specified, every board is subject to the Open Meetings Law.[27] A drafting attorney should never presume that a board is to be exempted from that law since state policy is to the contrary. Any exemption should be confirmed by the requester.

5. EMPLOYEES.

The following sample provision for employees of a department, including a deputy director, is part of the <boiler newagncy> boilerplate:

> **EMPLOYEES**
>
> **SECTION 4. (1) The Director of the Department of _____ shall, by written order filed with the Secretary of State, appoint a deputy director. The deputy director serves at the pleasure of the director, has authority to act for the director in the absence of the director and is subject to the control of the director at all times.**
>
> **(2) Subject to any applicable provisions of ORS chapter 240, the director shall appoint all subordinate officers and employees of the Department of _____, prescribe their duties and fix their compensation.**

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[25] ORS 174.130.

[26] Larson v. State Bd. of Parole, 91 Or. App. 642 (1988) (interpreting "full membership of the board" in ORS 144.054 to not require all five members to act, but rather only those not disqualified from voting to give effect to provisions for filling vacancies, disqualifying members, and handling conflicts of interest).

[27] ORS 192.610 to 192.690.

Most state employees are in the classified civil service. The State Personnel Relations Law[28] provides the procedure for their appointment and discharge and for the fixing of their salaries. Another consideration when providing for employees is their status in PERS. Most state agencies are covered by the definition of "public employer."[29] Other agencies, such as semi-independent state agencies and public or public/private corporations, may require clarification of their PERS status, including which PERS pool they are in.

6. DUTIES AND POWERS.

Having provided for creation of a state agency and for the selection of officers and employees and their tenure, qualifications and salary, the drafting attorney next must specify the duties and powers of the agency and its general operation. The duties and powers ordinarily should be stated in a single section with numbered subsections. However, if the section becomes unduly lengthy or the powers differ in type, new sections can be used. The detailed procedures to be followed by the agency follow next. Procedures should be consistent with the Administrative Procedures Act.[30]

If the requester desires judicial review of agency orders that differs from the Administrative Procedures Act or that will be expedited—usually because of the controversial nature of the powers in which the order is based—the following example may be useful:

> **SECTION 11. (1) Any person dissatisfied with the final order issued by the Department of _____ after a contested case hearing may petition the Court of Appeals for review of the department's final order.**
>
> **(2) The petition must be filed not later than the 20th day after the final order is issued upon conclusion of the hearing.**
>
> **(3) The Court of Appeals shall conduct its review of the order according to the provisions of ORS chapter 183 applicable to review of a final order in a contested case.**
>
> **(4) The review by the Court of Appeals shall be conducted expeditiously to ensure the orderly and timely determination of whether or not the department has met the requirements of section ____ of this (year) Act to allow the department to _____.**

7. RULEMAKING.

a. Authority to Adopt Rules.

[28] ORS chapter 240.

[29] ORS 238.005 (21) ("'Public Employer' means the state, one of its agencies, any city, county, or municipal or public corporation, any political subdivision of the state or any instrumentality thereof, or an agency created by one or more such governmental organizations to provide governmental services. For purposes of this chapter, such agency created by one or more governmental organizations is a governmental instrumentality and a legal entity with power to enter into contracts, hold property and sue and be sued.").

[30] ORS chapter 183; see section 8 of this chapter.

The extension of governmental supervision over business and individuals has made it necessary to authorize state agencies to adopt rules to "fill in the details" in the statutes.[31] There are three classes of statutory term. The type of term the legislature uses governs agency discretion and judicial review. As explained by the Oregon Supreme Court:

> [Previous cases have] described three classes of statutory terms, each of which conveys a different responsibility for the agency in its initial application of the statute and for the court on review of that application. They may be summarized as follows:
> 1.) Terms of precise meaning, whether of common or technical parlance, requiring only factfinding by the agency and judicial review for substantial evidence;
> 2.) Inexact terms which require agency interpretation and judicial review for consistency with legislative policy; and
> 3.) Terms of delegation which require legislative policy determination by the agency and judicial review of whether that policy is within the delegation.[32]

Even without a specific grant of interpretive authority, an agency may state by rule its practices, procedures, and interpretations as long as those practices are within its authority to follow, unless the statute limits the agency to making case-by-case determinations.[33]

b. Granting Rulemaking Authority.

"Rule" means "any agency directive, standard, regulation or statement of general applicability."[34] This definition makes it unnecessary to use the older expression "rules and regulations." The word "regulations" in place of "rule" should not be used unless the regulations are of federal or local government origin. Since the Administrative Procedures Act uses "adopt" rather than "adopt and publish" or "promulgate," use only "adopt" in the context of administrative rules. The following excerpt from the <boiler newagncy> boilerplate is a sample provision in a bill creating a new agency:

GENERAL AUTHORITY TO ADOPT RULES

> **SECTION 5. In accordance with the provisions of ORS chapter 183, the Department of _____ may adopt rules for the administration of the laws that the Department of _____ is charged with administering.**

The following standard phrase language contains provisions that might be included in a bill giving an existing agency additional duties or more limited authority to adopt rules:

> <spm agency-rules>
> **SECTION ___. In accordance with applicable provisions of ORS chapter 183, the Department of _____ may adopt rules necessary for the administration of**

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[31] Rulemaking is discussed in ORS 183.325 to 183.410; Planned Parenthood Ass'n. v. Dep't of Human Res., 297 Or. 562 (1984); *CLE Administrative Law Handbook*.

[32] Springfield Edu. Ass'n. v. Springfield Sch. Dist. No. 19, 290 Or. 217 (1980); see also Or. Occupational Safety and Health Div. v. CBI Servs., 356 Or. 577 (2014) (explaining interplay between statutory construction and classes of statutory terms); J.R. Simplot Co. v. Dep't of Agric., 340 Or. 188 (2006); Coast Sec. Mortgage Corp. v. Real Estate Agency, 331 Or. 348 (2000).

[33] Morgan v. Stimson Lumber Co., 288 Or. 595 (1980), modified 289 Or. 93 (1980).

[34] ORS 183.310 (9).

sections _____ to _____ of this (year) Act.

The following allows agency rulemaking regarding licensing:

<spm agency-lic-rules>
SECTION ___. In accordance with applicable provisions of ORS chapter 183, the Department of _____ may adopt rules:
(1) Establishing standards for _____;
(2) Relating to the professional methods and procedures used by persons licensed by the Department of _____;
(3) Governing the examination of applicants for licenses issued by the department and the renewal, suspension and revocation of the licenses; and
(4) Establishing fees for _____.

Violations of rules can constitute grounds for revocation or suspension of a license. A criminal penalty also may be provided for violations and should be set out in a separate section with the following standard phrase:

<spm agency-penalty>
SECTION ___. Violation of section _____ of this (year) Act, or of any rule adopted under section _____ of this (year) Act, is a Class C misdemeanor.

The following is an example of a section under which an agency may go into court to enforce compliance with rules:

SECTION _____. The State Board of _____ may apply to any circuit court for an order compelling compliance with any rule adopted by the board under section ___ of this (year) Act. If the court finds that the defendant is not complying with any rule so adopted, the court shall grant an injunction requiring compliance. The court, on motion and affidavits, may grant a preliminary injunction ex parte upon such terms as are just. The board need not give security before the issuance of any injunction under this section.

When initial adoption of rulemaking is required by a specified date, it is unwise to insert that date in the section granting rulemaking authority to avoid raising the prospect that the authority lapses after that date. The better approach is to reference the rulemaking section as follows:

SECTION _____. The rules initially adopted under the authority of section _____ of this (year) Act must be adopted on or before _____.

c. Limits to Delegation of Powers.

The legislative power of this state is vested in the Legislative Assembly.[35] However, the Legislative Assembly may authorize others to do certain things that it might properly

[35] Article III, section 1, and Article IV, section 1, Oregon Constitution.

do but cannot advantageously undertake. An agency can "fill in interstices in the legislation and thereby aid the statute to accomplish its purposes."[36]

Historically, regulatory Acts lacking adequate standards were held unconstitutional.[37] Generally, once the legislature has established policies, standards or rules for their guidance, the matters of administrative detail, including the making of rules and the determination of facts, are left up to the agency.[38] More recently, "the important consideration is not whether the statute delegating the power expresses *standards*, but whether the procedure established for the exercise of the [agency's] power furnishes adequate *safeguards* to those who are affected by the administrative action."[39] The Legislative Assembly may authorize an administrative agency, within definite limits, to adopt rules for the complete operation and enforcement of the law within its stated purpose.[40] More definite standards may be needed in enabling legislation that affects the property rights of individuals[41] or their privilege to engage in a trade or profession[42] than would ordinarily be required in dealing with the public health, safety or welfare.

A bill probably can direct an agency to adopt the rules of a public or private entity as those rules exist on a given date not later than the effective date of the bill. However, the bill cannot adopt, or compel adoption of, rules of another entity that may be adopted in the

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[36] Van Riper v. Or. Liquor Control Comm'n, 228 Or. 581 (1961); see also Taylor's Coffee Shop, Inc. v. Or. Liquor Control Comm'n, 28 Or. App. 701 (1977).

[37] E.g., Demers v. Peterson, 197 Or. 466 (1953) (invalidating a crop-dusting statute's delegation and noting that "the authority to regulate may not be left wholly to the whim and caprice of such agency"); City of Portland v. Welch, 154 Or. 286 (1936) ("there must be some definite and reasonable rule for its guidance in the exercise of such discretion").

[38] Dilger v. School Dist., 222 Or. 108 (1960); Seale v. McKennon, 215 Or. 562 (1959); Foeller v. Housing Authority of Portland, 198 Or. 205 (1953) (The legislature can "empower an agency or official to ascertain the existence of the facts or conditions mentioned in the act upon which the law becomes operative"); M. & M. Wood Working Co. v. State Ind. Acc. Comm., 176 Or. 35 (1945); LaForge v. Ellis, 175 Or. 545 (1945); Van Winkle v. Fred Meyer, Inc., 151 Or. 455 (1935); Livesay v. DeArmond, 131 Or. 563 (1930); Winslow v. Fleischner, 112 Or. 23 (1924).

[39] Warren v. Marion Cty., 222 Or. 307 (1960) (emphasis in original); see also Qwest Corp. v. Pub. Util. Comm'n, 205 Or. App. 370 (2006) (look to overall statutory scheme to determine existence of procedural safeguards); May Trucking Co. v. Dep't of Transp., 203 Or. App. 564 (2006); Or. Ass'n of Rehab. Prof'l v. Dep't of Ins. & Fin., 99 Or. App. 613 (1989) (requiring rates to be "reasonable" is sufficient safeguard given ORS 183.400); Morse v. Div. of State Lands, 285 Or. 197 (1979) (Bryson concurring) (explaining and lamenting evolution from Van Winkle to Dilger and Warren).

[40] E.g., McCarthy v. Coos Head Timber Co., 208 Or. 371 (1956); S. Pac. Ry. Co. v. Consol. Freightways, 203 Or. 657 (1955); (upholding statute that authorized the Public Utility Commissioner to fix maximum speeds for railroad trains "commensurate with the hazards presented and the practical operation of the trains"); Cancilla v. Gehlhar, 145 Or. 184 (1933) (upholding a provision authorizing the State Department of Agriculture to make rules regarding transportation of produce by certain licensees).

[41] State ex rel. Public Welfare Comm'n v. Malheur Cty. Ct., 185 Or. 392 (1949).

[42] E.g., Eicks v. Teacher Standards & Practices Comm'n, 270 Or. App. 656 (2015) ("TSPC rules' requirement of ethical behavior 'at all times' was inconsistent with legislative intent"); Megdal v. Or. State Bd. of Dental Exam'rs, 288 Or. 293 (1980) ("when a licensing statute contains both a broad standard of 'unprofessional conduct' that is not fully defined in the statute itself and also authority to make rules for the conduct of the regulated occupation, the legislative purpose is to provide for the further specification of the standard by rules, unless a different understanding is shown").

future.[43] Therefore, avoid a phrase like, "the rules of ____, as they may be from time to time amended." A fixed date is preferred, though it is less flexible. However, it is likely permissible to direct an agency "to consider and to the extent practicable to adopt" as rules a third-party entity's policies as they exist at the time the agency adopts its rules (and even after the enactment of the enabling legislation).[44]

Given the judicially permissible breadth of delegation, the question for the requester remains how much detail should be left with the agency and to what extent should there be reliable standards or procedural safeguards. The use of standards may limit administrative discretion more than the procedural approach but, because of the detail involved, may incite more controversy.

8. ADMINISTRATIVE PROCEDURES ACT; OFFICE OF ADMINISTRATIVE HEARINGS.

The Administrative Procedures Act (APA)[45] applies to all state agencies that are not exempted by law. It pertains to the procedures for adopting rules, contested case hearings, judicial reviews of an agency action, and administrative law judges.

It is usually inadvisable to exempt agencies or officers from provisions of this generally applicable law without good cause (for instance, if federal requirements impose different procedures or a collective bargaining remedy replaces a statutory procedure). If the requester asks that specific provisions of the APA not apply to the new agency, the following standard phrase may fit:

<spm agency-apa>
SECTION _____. Except as otherwise provided in section _____ of this (year) Act, ORS chapter 183 applies to the Department of _____.

Exempting an agency from the rulemaking requirements of the APA[46] is perilous, as all agencies need predictable procedure in adopting rules.

If the new agency will be exempted from the contested case procedures of the APA,[47] the agency must be added to the list of exempt agencies in ORS 183.315. Most exempt agencies have alternative statutory procedures (e.g., workers' compensation cases) for adjudicatory hearings.

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[43] Hillman v. N. Wasco Cty. P.U.D., 213 Or. 264 (1958) (law linking wiring standards to the code approved by the American Standards Association "as they are compiled and published *from time to time*" is an impermissible delegation) overruled on other grounds by Maulding v. Clackamas Cty., 278 Or. 359 (1977); General Elec. Co. v. Wahle, 207 Or. 302 (1956) (unconstitutional delegation of legislative power to fix prices to private corporations).

[44] For example, "In adopting rules under section ___ of this (year) Act, the Agency shall consider, and to the greatest extent practicable shall adopt, the rules of the (federal agency)." The decision about the content of the rules is the agency's, but the legislative direction is clear.

[45] ORS chapter 183.

[46] ORS 183.325 to 183.410.

[47] ORS 183.411 to 183.502.

An agency must use administrative law judges from the Office of Administrative Hearings to conduct proceedings (primarily contested case hearings)[48] unless the agency is specifically exempted. When exempting an agency from the requirement to use administrative law judges from the office, add the agency to the list of exempted agencies at ORS 183.635.

9. OATHS; DEPOSITIONS; SUBPOENAS.

The following standard phrase provision provides authority to administer oaths, take depositions and subpoena witnesses:

<spm agency-subpoena>

SECTION ___. The Director of the Department of _____, the deputy director and authorized representatives of the director may administer oaths, take depositions and issue subpoenas to compel the attendance of witnesses and the production of documents or other written information necessary to carry out the provisions of sections _____ to _____ of this (year) Act. If any person fails to comply with a subpoena issued under this section or refuses to testify on matters on which the person lawfully may be interrogated, the director, deputy director or authorized representative may follow the procedure set out in ORS 183.440 to compel obedience.

The drafting attorney should verify that the requester wants to grant authority to subpoena witnesses because this provision has proved controversial.

10. ADVISORY AND TECHNICAL COMMITTEES.

The following standard phrase section may suggest a provision authorizing advisory and technical committees:[49]

<spm agency-comm>

SECTION ___. (1) To aid and advise the Director of the Department of _____ in the performance of the functions of the Department of _____, the director may establish any advisory and technical committees the director considers necessary. The committees may be continuing or temporary. The director shall determine the representation, membership, terms and organization of the committees and shall appoint their members of the committees. The director shall be an ex officio member of each committee.

(2) Members of the committees are not entitled to compensation but, in the discretion of the director, may be reimbursed from funds available to the department for actual and necessary travel and other expenses incurred by the members in the performance of official duties in the manner and amount provided in ORS 292.495.

11. TRANSFER OF FUNCTIONS FROM ONE STATE AGENCY TO ANOTHER.

[48] ORS 183.605 to 183.690.

[49] E.g., ORS 243.505 (Deferred Compensation Advisory Committee), ORS 366.112 (advisory committee on bicycle lanes and paths), ORS 418.005 (advisory committee on child welfare services), ORS 682.039 (State Emergency Medical Service Committee).

Bills that transfer functions from one agency to another also should be clearly organized. Usually the transfer section states the leading purpose of the bill and is near its beginning.[50] A sample of provisions necessary to transfer functions from one state agency to another is set out in appendix A.

In either case, the leading purpose is followed by provisions disposing of the agency's functions. Existing statute sections are then amended to reflect the transfers and to solve transitional problems.

12. CHANGING NAME OF AGENCY.

To change the name of an agency requires each statute containing the name to be examined and amended.[51] Whenever changing the name of an agency, the drafting attorney should use what is called a "name change provision" in the following form:

<spm name-change>
SECTION ___. (1) The amendments to ORS ___ by section ___ of this (year) Act are intended to change the name of the "Old Agency" to the "New Agency."

(2) For the purpose of harmonizing and clarifying statutory law, the Legislative Counsel may substitute for words designating the "Old Agency," wherever they occur in statutory law, other words designating the "New Agency."

This language enables Legislative Counsel, in the editing process, to substitute the new name for the old name.

A drafting attorney should not rely on the name change provision to make all the necessary changes in statute. The drafting attorney must amend the statute that establishes the state agency, account or program whose name is being changed and must amend any statutes in which a straight editorial substitution will not work. For example, if a statute says, "The Motor Vehicles Division shall notify the Motor Carrier Division of the status of a person's driver license . . .." and the bill changes the names of both the Motor Vehicles Division and the Motor Carrier Division to the Department of Transportation, a name change alone will not work. All that could be done at editing was to substitute "the Department of Transportation" for both divisions, resulting in a sentence saying, "The Department of Transportation shall notify the Department of Transportation . . .." Ideally, the drafting attorney should amend all statutes in which the name being changed is used, to avoid any possible uncertainty.

Because use of a name change provision might raise questions of delegation of authority to Legislative Counsel, such a provision should be used sparingly.[52] The following guidelines should be kept in mind:

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[50] However, if the bill abolishes an existing agency and transfers its functions, the abolishing provisions are normally first.

[51] See also Form and Style Manual, chapter 3, "Name Change Provision."

[52] See chapter 13 of this manual.

- Use a name change provision only for proper names.
- Be precise in identifying the new name and the old name.
- Never use a name change provision for the primary purpose of "picking up" references to the old name in new legislation.
- If you use a name change provision, you must still read each statute that contains the old name and determine whether it needs to be amended.
- Related names might need to be changed.[53]

13. ABOLISHING AGENCY.

Some of the provisions that could be used in a bill to abolish a state agency and transfer its functions to another agency are set out in appendix A. ORS 182.080 provides default rules for dealing with an abolished agency. This statute provides a procedure to be used in winding up the affairs, funds and liabilities of an abolished state agency. It also saves any rights or liabilities accruing prior to the repeal of the statute. A state agency may have property held in trust that will require appropriate disbursement.[54]

14. SEMI-INDEPENDENT STATE AGENCIES.

Semi-independent state agencies develop and finance their own budgets instead of receiving a biennial legislative appropriation from the General Fund. When creating a semi-independent state agency, the drafting attorney should exempt the agency from ORS chapters 291, 292 and 293, which deal with state financial administration, budgeting and salaries. Also consider the agency's status regarding PERS, including which PERS pool it is in. The agency should remain subject to audit by the Secretary of State.

Semi-independent state agencies establish the fees they charge, although maximum fees may be established by statute. The agency fee decisions are not subject to review by the Legislative Assembly or the Oregon Department of Administrative Services. The agencies also establish their own compensation for board members and are therefore not covered by the per diem language of ORS 292.495.

Semi-independent state agencies usually arise from the conversion or replacement of an existing state agency. The agency transfer boilerplate can provide a useful guide for identifying and addressing transition issues. ORS 182.456 to 182.472 provide default rules that may reduce how much must be drafted from scratch. It's easiest to add to the list of other semi-independent state agencies listed in ORS 182.454 rather than create a separate series of statutes for an agency.

In using (or borrowing from) ORS 182.456 to 182.472, note that ORS 182.462 allows an agency to adopt rules donating all or part of the agency's civil penalty receipts to the

[53] For example, a bill that changes the name of Oregon Health and Science University should also change the name of the Oregon Health and Science University Board of Directors.

[54] Chapter 196, Oregon Laws 1957, is an example of an Act that abolished the Battleship Oregon Commission and disposed of its property.

General Fund. This may require amending civil penalty and appropriation sections to reflect the optional nature of the disposition.

Because a semi-independent state agency handles its own finances, ORS 182.470 provides that moneys received by the agency to be deposited to an account established by the semi-independent state agency are in compliance with ORS chapter 295. If the drafting attorney is making an agency subject to ORS 182.456 to 182.472, it is a good practice to draft language that specifically identifies the agency to whose account moneys are continuously appropriated instead of relying on the appropriation language in ORS 182.470.[55] The drafting attorney must also address initial budgeting, funding and expenditure control issues to cover the start-up period for the agency.

15. STATUTORY FORMS.

When a state agency will administer a bill, the agency should be given the authority to prescribe any necessary forms.[56] However, if the bill imposes a duty on a number of local officials or other persons throughout the state and if uniformity is desired, it may be necessary to set out in detail the forms to be used.[57]

Use beginning and ending hairline rules to set off the text of a form from the rest of the section. Hairline rules are coded and may be inserted at your request by publication specialists. Text set forth between hairline rules does not require quotation marks. For example:

SECTION _____. (1) Each tax statement, in addition to the information required by ORS 311.250, shall be in substantially the following form:

By Act of the 1981 Legislature, $_____ has been distributed from the Local Property Tax Relief Account as relief for local property taxpayers. Because of this tax relief, your tax rate is $_____ per thousand dollars of true cash value less than it otherwise would be.

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(2) The appropriation under ORS 310.715 and the tax rate relief determined for the county under ORS 310.730 shall be indicated in the proper spaces.

The form text should generally follow legislative form and style. Capitalization and punctuation should be consistent within each form.

Blanks in a statutory form are indicated by coded underscored blank spaces rather than dashes. The information belonging in the blank should be indicated either by a statement following the form, as in the example above, or parenthetically after the blank; for example,

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[55] E.g., ORS 683.290.

[56] E.g., ORS 443.860 (4) ("The authority shall prescribe by rule the form and manner for application for or renewal of a license.")

[57] E.g., ORS 35.352 (public condemner), 97.725 (cemetery authority), 98.245 (law enforcement agency), 131.567 (seizing agency).

"_____(insert name of county)." Since brackets indicate the deletion of material by amendment, *brackets cannot be used in a statutory form*. If the section later is amended, confusion may result with respect to what material is being deleted.

In new (boldfaced) material, the code for short blanks is ":HR3B." and the code for long blanks is ":HR6B." For example, to insert an unknown dollar amount in the text of a form, type "$:HR3B." When printed, it will look like this: **$**_____. To insert an unknown year in the text of a form, type "2:HR3B." When printed, it will look like this: **2**_____.

Forms are usually introduced with phrases such as "substantially the following form," "the following notice" or "the following statement." Use of these phrases enhances database text searches.

In amending an existing statutory form, ask the requester whether there should be a grace period allowing the acceptance of either the older or amended form.[58]

16. REPORTS TO LEGISLATURE.

Many statutes require state agencies to report regularly to the Legislative Assembly. Task forces, special interim committees and advisory bodies are also often required to report summarily or periodically to the legislature. ORS 192.210 to 192.250 set forth the procedure that the drafting attorney must be familiar with when requiring these reports.

17. DELAYED OPERATIVE DATE.

Often a bill that creates a new state agency requires administrative machinery to be set up before the bill is fully operative. For example, the appointment of an agency's director may be required prior to the date on which the agency begins operation.[59] The following language in combination with a delayed operative date may be used:

> **SECTION _____. The Director of the Department of _____ may be appointed before the operative date of section _____ of this (year) Act and may take any action before that date that is necessary to enable the director to exercise, on and after the operative date of section _____ of this (year) Act, the duties, functions and powers of the director pursuant to section _____ of this (year) Act.**

[58] E.g., section 18, chapter 508, Oregon Laws 2007; section 8, chapter 510, Oregon Laws 2011.
[59] See chapter 12 of this manual for a discussion of the use of operative dates.

CHAPTER NINE

FISCAL PROVISIONS

This chapter provides an overview of fiscal provisions and related matters that a drafting attorney may encounter. An attorney cannot rely solely on the material in this chapter when preparing a bill that involves fiscal matters. The law applicable to and the procedures followed by agencies change from time to time. ORS chapters 291, 292, 293 and 294 are relevant when the draft relates to fiscal affairs of a state agency. Chapter 12 of this manual deals with issues involving effective dates and emergency clauses.

1. APPROPRIATIONS.

An appropriation is "the setting aside or designation by express direction or by implication of particular funds for the discharge of definite and specified obligations or liabilities."[1] Under Article IX, section 4, of the Oregon Constitution, no money may be expended from the Treasury except pursuant to an appropriation. Thus, any bill that requires the expenditure of moneys requires an appropriation of those moneys, either in the bill itself or in another bill (such as an agency budget bill). A continuing appropriation fulfills the requirement of Article IX, section 4.[2] Continuing appropriations are discussed under "Expenditure Limitations" below.

The Treasury consists of the General Fund and "other funds." The General Fund consists primarily of revenues received by the state from the personal income tax and corporate income and excise taxes. Typically, appropriations are made from the General Fund in specific amounts for a limited period of time. "Other funds" are funds that are "separate and distinct" from the General Fund. They are typically "continuously appropriated" by statute for certain purposes. Note that the characterization of revenue received by the state as either General Fund moneys or as moneys separate from the General Fund may have constitutional implications, e.g., under the surplus revenue refund or kicker provisions in Article IX, section 14. Conversely, an attempt to characterize revenues that are traditionally considered General

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[1] Shattuck v. Kincaid, 31 Or. 379, 391 (1897).
[2] Holmes v. Olcott, 96 Or. 33 (1920).

Fund revenues in an attempt to bypass the kicker may not be successful. For discussion of this issue, see opinion LC 3924 (Feb. 6, 2015).

To specify that moneys should go into the General Fund, a statute should direct an official to deposit the moneys there. The treasurer's office recommends, for example, the following language: "Moneys recovered under this section shall be paid to the department and deposited with the State Treasury for credit to the General Fund and are available for general governmental expenses."

a. Provisions on Other Subjects in Appropriations Bills.

Article IX, section 7, provides that "Laws making appropriations, for the salaries of public officers, and other current expenses of the State, shall contain provisions upon no other subject."

In general, this means that bills making appropriations may not contain other substantive provisions. For purposes of this rule, expenditure limitations are treated as appropriations.[3]

A major exception to this rule, however, was established in the Evanhoff case,[4] in which the Oregon Supreme Court held that an Act designed to accomplish a particular purpose may include a provision appropriating the moneys necessary to accomplish that purpose. Thus, an Act that creates an agency or program also may appropriate moneys to pay the expenses of that agency or program.

Under Evanhoff, a policy bill that modifies an existing program may contain an appropriation to pay for the modification only. For example, if a policy bill changes the eligibility requirements for an existing program to include more people, then the bill may appropriate moneys to pay for the costs of the newly eligible people. The bill **may not** appropriate moneys to pay for people who are currently eligible or any other components of the program that already exist.

A helpful rule of thumb is that an Evanhoff appropriation -- that is, an appropriation contained in a policy bill -- should specifically cite one or more section numbers. For example, an appropriation should be made to an agency "to carry out the provisions of sections 2 to 4 of this [year] Act." If it is difficult to tie an Evanhoff appropriation to a specific section, then it is likely that the appropriation is impermissible under Article IX, section 7.

The Attorney General has opined that Article IX, section 7, prohibits a bill that appropriates moneys for current expenses from also including provisions appropriating moneys for capital construction or reflecting a "major policy change."[5]

b. Other Constitutional Limitations Relating to Appropriations.

In addition to Article IX, section 4, there are several other constitutional provisions relating to appropriations. Article I, section 5, provides that no money may be appropriated

[3] See 33 Op. Att'y Gen. 402, 406-407 (1967).
[4] Evanhoff v. State Ind. Acc. Comm., 78 Or. 503 (1915).
[5] 33 Op. Att'y Gen. 402, 408-409 (1967). See also 33 Op. Att'y Gen. 417 (1967).

for the benefit of any religious or theological institution.[6] Article V, section 15a, authorizes the Governor to veto single items in appropriation bills. Article IV, section 24, provides that no special Act making compensation to any person claiming damages against the state shall be passed. (The enactment of ORS 30.260 to 30.300 in 1967 makes it unlikely that a drafting attorney ever will be asked to draft a bill of this sort.)

c. Appropriation of Specific Amounts.

A section appropriating a specific amount of money must designate all of the following:

(1) The state officer or agency to which the appropriation is made (note that appropriations should be made at the agency level, and not to divisions or offices within an agency; note also that appropriations may not be made to local governments, private entities or other entities outside of state government, see section j *infra*);

(2) The source of the appropriation (almost always the General Fund);

(3) The amount of the appropriation;

(4) The period for which it is appropriated (usually, but not necessarily, a biennium beginning on July 1 of an odd-numbered year and ending on June 30 of the next odd-numbered year); and

(5) The purpose or purposes for which the moneys are appropriated.

This is the most common type of appropriation, and it takes the following form: <spm approp-sec>

SECTION __. There is appropriated to the Oregon Department of Administrative Services, for the biennium beginning July 1, (year), out of the General Fund, the amount of $1,400,000 for the purpose of carrying out the provisions of sections ___ to ___ of this (year) Act.

Generally, moneys remaining at the end of the designated period are no longer available for expenditure because, under ORS 293.190, the moneys revert to the source from which they were appropriated. In making an appropriation for a project that may not be completed within a single biennium, it is necessary that the unexpended portion of the appropriation be available until completion of the project, without reverting. The following is an appropriation for capital purposes:

SECTION __. There is appropriated to the Oregon Department of Administrative Services, out of the General Fund, the amount of $50,000 for the purpose of erecting a bicycle shed on the Capitol Mall. This appropriation is available continuously until expended for the purpose specified in this section.

With an appropriation that does not revert automatically, all of the moneys may not be expended in completing the project contemplated by the appropriation. If unexpended and unobligated moneys remain when the project is completed, a provision somewhat like the following example should be used to avoid another bill at a later session to transfer that unexpended balance back to its source:

SECTION __. Not later than the 60th day after completion of the project described in section _____ of this (year) Act, the Director of the Oregon Department of Administrative Services shall

[6] See Dickman v. School Dist. 62C, 232 Or. 238 (1961), *cert. denied,* 371 U.S. 823 (1962) (invalidating statute providing for free textbooks for students of parochial school).

certify the completion of the project and the amount of the unobligated balance of the appropriation made by section _____ of this (year) Act. Upon certification, the unobligated balance reverts to the General Fund.

The phrase "in addition to and not in lieu of any other appropriation" may be placed at the beginning of any appropriation to an agency that is in addition to its biennial appropriation in order to indicate that the subsequent appropriation is not intended to supersede the earlier one.

d. Adjustments to Appropriations.

Appropriations are frequently adjusted, particularly during even-year sessions. Numerous examples of increases and decreases to appropriations (and expenditure limits) may be found in "rebalance" budget bills, such as chapter 99, Oregon Laws 2018.

A different type of appropriation adjustment is found in chapter 1, Oregon Laws 1982 (second special session) (directing Executive Department to reduce allotments). Note that ORS 291.261, enacted in 2003, permits the Oregon Department of Administrative Services to reduce allotments to avoid a deficit without legislative action.

e. Appropriations for Building Projects.

In drafting an appropriation for a building project, the drafting attorney must consider whether some of the money appropriated is to be expended for the acquisition of real property. If authority to purchase real property is intended, that authority should be expressly stated. The following example does not provide for the acquisition of real property but does authorize the construction, furnishing and equipping of a specified project:

A BILL FOR AN ACT

Relating to a shop building for Oregon Institute of Technology.

Be It Enacted by the People of the State of Oregon:

SECTION 1. In addition to and not in lieu of any other appropriation, there is appropriated to the Oregon University System, out of the General Fund, the sum of $414,360 for planning, constructing, altering, repairing, furnishing and equipping a shop building at Oregon Institute of Technology, to be expended as follows:

(1) Shop building.....$322,960

(2) Equipment.....91,400

SECTION 2. The appropriation made by section 1 of this (year) Act is available continuously until expended for the purposes specified in section 1 of this (year) Act. However:

(1) Except for planning, the Oregon University System may not begin any project or allow any contract to be let for such project without first reporting to the Emergency Board.

(2) Not later than the 60th day after completion of the project described in section 1 of this (year) Act, the president of the State Board of Higher Education shall certify to the Oregon Department of Administrative Services the completion of the project and the amount of the unobligated balance of the appropriation made by section 1 of this (year) Act. Upon certification, the unobligated balance reverts to the General Fund.

A provision similar to subsection (1) of section 2 in the example is usually used when appropriating moneys for a building project. Examples include section 2, chapter 223, Oregon Laws 1967.

An appropriation to prepare plans and specifications, and to locate and purchase land, for a particular building, may be drafted somewhat as follows:

> **SECTION 1. In addition to and not in lieu of any other appropriation, there is appropriated to the Oregon Department of Administrative Services, out of the General Fund, the sum of $250,000 for preparing plans and specifications, and locating and purchasing land, for a general mental hospital to be located within a 20-mile radius of the county courthouse of Multnomah County.**
>
> **SECTION 2. The Oregon Department of Administrative Services shall report to the Emergency Board before accepting plans and specifications or purchasing or contracting to purchase land for the project described in section 1 of this (year) Act.**

A provision similar to section 2 in the example is often used.

f. Initial Appropriation for New Agency.

The alternative to a lump sum appropriation for a new agency is an appropriation that segregates the amount appropriated into classes of expenditures based on the Governor's budget (even though the agency is not included in that budget). If the appropriation for a new agency is not included in the bill creating the agency, and the appropriation is not provided for in any other bill, then the Emergency Board probably will be called on to finance the new agency. All this is a matter of policy to be decided by the requester.

The expenses of organizing a new agency that is to be self-supporting may be met by a provision advancing moneys from the General Fund. Repayment to the General Fund out of receipts of the new agency can be specified. See section 4b of this chapter for an example.

g. For Current Biennium.

Occasionally an agency requires an additional appropriation or increased expenditure limitation during the biennium during which the session occurs. A deficiency for a past biennium is a "current expense of the state" within the meaning of Article IX, section 7.[7] An additional appropriation is worded in the same manner as the usual appropriation provision *except* that the time period should be expressed as "the biennium ending June 30, 2019" instead of "the biennium beginning July 1, 2017." This convention makes it easy to determine at a glance whether the section affects the current biennium or the following biennium. For example: <spm approp-addition> (modified)

> **SECTION 1. In addition to and not in lieu of any other appropriation, there is appropriated to the Oregon Department of Administrative Services, for the biennium ending June 30, (year), out of the General Fund, the amount of $250,000, which may be expended for . . .**

[7] Burch v. Earhart, 7 Or. 58, 66 (1879).

For an increase in an expenditure limitation, reference to intervening legislative or Emergency Board action may be required, for example: <spm ex-limit-adj-no> (modified)

> **SECTION 4. Notwithstanding any other law limiting expenditures of the Oregon Health and Science University hospital for the payment of expenses from fees, moneys or other revenues, excluding lottery funds and federal funds, collected or received by the Oregon University System for the Oregon Health and Science University, for the biennium ending June 30, (year), the limitation on expenditures established by law, as modified by legislative or Emergency Board action, is increased by $3,190,493.**

Appropriation and expenditure limitation bills that make fiscal adjustments for the current biennium require an emergency clause to make the bill effective "on its passage" because the Governor must sign the bills and the bills must take effect *before* the end of the current biennium.

h. Appropriation for Expenses of Interim Committees.

ORS 171.640 provides for the appointment of interim committees. If an interim committee is created by joint resolution (see ORS 171.610), moneys cannot be appropriated by the resolution (under Article IX, section 4, Oregon Constitution). An appropriation is enacted each session for the payment of expenses of the Legislative Assembly.[8] The joint resolution creating an interim committee may authorize it to expend a certain amount of the moneys already appropriated for legislative expenses. If the expenses of a committee are to be paid from some source other than the legislative appropriation, a bill must be used.

Specific authorization probably is necessary for an interim committee to accept and use moneys offered by other public or private sources.[9] An example is House Joint Resolution 52, paragraph (12) (1979). In a Letter of Advice (OP-6373) dated April 9, 1991, the Attorney General opined that certain legislative interim committees or studies cannot be funded from lottery funds.

Chapters 16 and 19 of this manual contain other provisions that may be included in a joint resolution creating an interim committee. The requester of a resolution to establish an interim committee should be advised, however, that under current practice, interim committees are more often created under the authority of the presiding officers. See ORS 171.640.

i. Emergency Clause for Appropriations.

The fiscal biennium begins on July 1 of the odd-numbered year. Because bills *normally* take effect on January 1 of the year following enactment, it is necessary to include an emergency clause in an agency budget bill or other regular biennial appropriation bill: <spm emer>

[8] For example, see chapter 577, Oregon Laws 2017.
[9] 29 Op. Att'y Gen. 284 (1959).

SECTION . This (year) Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this (year) Act takes effect July 1, (year).

Note that when the July 1 date is used, but the Governor signs the bill after July 1, the effective date is the date of the signature notwithstanding the date given in the bill.

An emergency clause may be included in any other appropriation bill if it is desired to have the moneys available for expenditure before the normal effective date. The clause may specify an effective date "on its passage" or on some specified date. Note that some legislators disfavor the use of emergency clauses and may request an appropriation bill that becomes effective on the normal January 1 effective date. There is no legal problem with doing this; the result is simply that the appropriation will not be available for expenditure until January 1.

j. Appropriations to non-state entities.

Members frequently request measures to provide moneys to local governments or private entities. Appropriations cannot be made directly to these entities. To provide funding to non-state entities, a drafting attorney should write an appropriation to the Oregon Department of Administrative Services or another appropriate state agency "for distribution to" the recipient for specified purposes. The following language can be used as a template for such appropriations:

SECTION 1. In addition to and not in lieu of any other appropriation, there is appropriated to the Oregon Department of Administrative Services, for the biennium beginning July 1, 2025, out of the General Fund, the amount of $6,000,000 for distribution to Marion-Polk Food Share, Inc., a domestic nonprofit corporation, for a capital expansion project.

2. EXPENDITURE LIMITATIONS.

a. Other Funds.

"Other funds" is a general term for funds or accounts in the State Treasury that are "separate and distinct" from the General Fund. Such funds are usually statutorily dedicated to a certain purpose and "continuously appropriated" to an agency.

A continuous appropriation is usually accomplished through a one-time statutory provision. (For an example, see ORS 401.552, reprinted in section 4a of this chapter.) When the Legislative Assembly has by past action continuously appropriated funds to an agency or for a purpose, a biennial appropriation is no longer required. Moneys that are deposited in a continuously appropriated account are immediately available for expenditure without further legislative action. Traditionally, continuing appropriations are made for activities that are fee-supported, such as occupational licensing, but continuously appropriated accounts are convenient in a wide variety of circumstances.

To prevent unfettered spending from continuously appropriated accounts, the Legislative Assembly imposes "expenditure limitations" on agencies. The effect of an expenditure limitation is to say, "Regardless of the amount collected, the agency may spend no more than $___ in the coming biennium (or for a certain purpose)." An example, including the title, is: <spm ex-limit-no-fed>

A BILL FOR AN ACT

Relating to the financial administration of the Oregon State Veterinary Medical Examining Board; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Notwithstanding any other law limiting expenditures, the amount of $85,735 is established for the biennium beginning July 1, (year), as the maximum limit for payment of expenses from fees, moneys or other revenues, including Miscellaneous Receipts, but excluding lottery funds and federal funds, collected or received by the Oregon State Veterinary Medical Examining Board.

SECTION 2. This (year) Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this (year) Act takes effect July 1, (year).

Much of the material relating to appropriations also applies to expenditure limitations. See section 1g of this chapter for an example of increasing an expenditure limitation for the current biennium.

b. Federal Funds.

The federal government transfers moneys to the state for certain purposes. With the exception of revenue sharing moneys, federal funds are processed in the same manner as any dedicated or continuously appropriated revenue. The Legislative Assembly imposes expenditure limitations on federal funds received by agencies: <spm ex-limit-fed>

SECTION __. Notwithstanding any other law limiting expenditures, the amount of $_____ is established for the biennium beginning July 1, (year), as the maximum limit for payment of expenses for _____ from federal funds collected or received by the Department of Transportation.

Many state programs operate with federal funding on which certain conditions are placed. In order to protect the federal funding when there is a potential for conflict, the following may be useful, but note that it also may be a questionable delegation and should be used only when the need for it is raised as an issue:

SECTION 4. Notwithstanding any provision of sections 1 to 3 of this (year) Act, the applicable federal laws and regulations shall apply in any case where federal funds are involved and the federal laws and regulations conflict with any of the provisions of sections 1 to 3 of this (year) Act or require additional conditions not authorized by sections 1 to 3 of this (year) Act.

3. LOTTERY ALLOCATIONS.

Revenues from lottery sales are transferred from the Oregon State Lottery Commission to the Administrative Services Economic Development Fund, a continuously appropriated sub-fund within the General Fund. Lottery proceeds are then *allocated* (not appropriated) to various agencies to finance specific projects. For example: <spm lottery-alloc>

> **SECTION __. There is allocated for the biennium beginning July 1, (year), from the Administrative Services Economic Development Fund, to the _____, the amount of $_____ for _____.**

Note that for purposes of the title, the allocation provision is "creating new provisions."

4. FUNDS AND ACCOUNTS.

Under ORS 291.001, the words "subaccounts," "accounts" and "funds" are interchangeable, and historical distinctions between the terms are eliminated, at least for drafting purposes.

a. Creating New Funds or Accounts.

When creating a creating a new "pot of money" and dedicating it to a specific purpose or continuously appropriating it to a specific agency for a specific purpose, a drafting attorney should create a new fund *"separate and distinct"* from the General Fund. There are many examples in statute of subfunds being created within the General Fund, but that is no longer the favored approach.

The section should also specify the *sources* and *uses* of the moneys in the fund.

Under ORS 293.140, interest earned by state funds is paid to the General Fund unless otherwise provided by law. When creating a new fund (or account), the drafting attorney should ask the requester for directions as to disposition of the interest.[10] If the requester wants the interest earned by the new fund to be paid into the fund, the draft must specifically indicate that the interest "earned by the fund shall be credited to the fund." For example: <spm interest-to-fund>

> **SECTION 1. The (name) Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned by the (name) Fund shall be credited to the fund.**

Do not put the provision about interest in a section separate and distinct from the section establishing the fund. The State Treasurer needs to find the interest provision and is more likely to do so if it is with the provision establishing the fund.

An example of a new "separate and distinct" fund is in ORS 401.552, establishing the Resiliency Grant Fund:

[10] Some accounts or funds may have enough money for their purposes without retaining their interest. For example, if an account is established for fees from issuance of a license, the fees are designed to cover the costs to the agency of regulating licensees, and the amount of the fee is set so that the agency will collect enough to cover its costs, the requester may want the interest to go to the General Fund for general governmental purposes.

401.552. The Resiliency Grant Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned by the Resiliency Grant Fund must be credited to the fund. The Resiliency Grant Fund consists of moneys deposited in the fund under ORS 401.551 and may include moneys appropriated, allocated, deposited or transferred to the fund by the Legislative Assembly or otherwise and interest earned on moneys in the fund. The moneys in the fund are continuously appropriated to the Office of Emergency Management for the purposes specified in ORS 401.551.

b. "Self-Sustaining" Activities; "Earmarked" or "Dedicated" Funds and Accounts.

Frequently, the financing of governmental activity is supplied by the direct recipients or beneficiaries of such activities. The revenue from each such activity is "earmarked" or "dedicated" solely for that particular activity. A fund or account is established by statute, and the money is *continuously appropriated* from the specific fund or account for a specific purpose.

One example of a self-sustaining account is the State Capitol Operating Account, which is under the control of the Legislative Administration Committee. All moneys received by the committee for the rental of quarters in the State Capitol are to be credited to the State Capitol Operating Account. ORS 276.003 provides that moneys credited to the account are continuously appropriated to the committee to pay the expenses of operating, maintaining, protecting and insuring the Capitol.

The receipts of most occupational and professional licensing boards from fees for licenses and other activities are used to pay the expenses of licensing and regulating the occupation or profession. Historically, this was be accomplished by depositing the receipts to the credit of a specified account within the General Fund and continuously appropriating all the moneys deposited in that account for the purpose of paying the expenses arising out of the activity. Examples are ORS 342.430 and 677.290. The *currently preferred* method is to deposit the moneys into a new, continuously appropriated account that is "separate and distinct" from the General Fund.

Since self-sustaining functions initially have to operate for a brief period before any revenue comes in, it may be necessary to give the operating agency a start-up loan. For example:

SECTION 9. (1) There is appropriated to the State Board of _____, for the biennium beginning July 1, (year), out of the General Fund, the amount of $4,500 for the purpose of carrying out the provisions of sections ___ to ___ of this (year) Act.

(2) When the board determines that moneys in sufficient amount are available in the State Board of _____ Fund created by section ___ of this (year) Act, but in no event later than June 30, (year+2), the board shall reimburse the General Fund without interest, in an amount equal to the amount from the General Fund appropriated and expended as provided in subsection (1) of this section. The moneys used to reimburse the General Fund under this subsection shall not be considered as a budget item on which a limitation is otherwise fixed by law, but shall be in addition to any specific biennial appropriations or amounts authorized to be expended from continuously appropriated moneys for any biennial period.

The State Treasurer maintains approximately 200 so-called unreceipted or checking accounts in the State Treasury. These accounts are maintained with the various agencies, and

records of the accounts are not maintained by the Oregon Department of Administrative Services. Many of the unreceipted or checking accounts are revolving funds, such as the Public Employees Retirement Fund. In this instance, the Public Employees Retirement System submits a claim to the ODAS for the total monthly retirement benefits. ODAS pays PERS a lump sum, which is deposited into the PERS checking account, then PERS issues individual retiree checks from that account. The same procedure is used for unemployment benefits, welfare benefits and numerous other activities where the volume and the nature of the disbursements make it more economical for the agency to issue checks than for ODAS to do so. In addition, many agencies initially deposit their revenue collections into one of these unreceipted or checking accounts. After issuing any refund checks that may be payable, the agency requests that the State Treasurer transfer the balance from its unreceipted or checking account to an account within the General Fund or to one of the separate funds. This transfer is then recorded by ODAS as a deposit to the individual agency's account within the General Fund or to a separate fund. The drafting attorney should consider whether the draft needs to contain special provisions authorizing or modifying these types of transactions.

c. One General Account for State Agency.

Some state agencies that administer several laws involving different activities have a single account into which all moneys received are deposited. In other words, even though the receipts from a particular self-sustaining activity are continuously appropriated for that activity, the moneys from many of such activities are deposited in the single account. The agency keeps internal accounting records to determine the receipts and expenditures for its various activities. ORS 423.097 is one example of a section creating a general account for a state agency.

A drafting attorney should *not* create a new account if the state agency that is to administer an activity already has one general account into which all its receipts are deposited.

If an attorney is asked to prepare a bill draft that creates a new source of moneys for an agency that already has a single account, the following language could be used to deal with receipts from the new source and to provide for the deposit of the moneys into the agency's general account:

> **SECTION ___. All moneys received by the _____ Department under sections ___ to ___ of this (year) Act shall be paid into the State Treasury and deposited to the credit of the Department of _____ Account. Such moneys shall be used by the Department of _____ for the purposes of sections ___ to ___ of this (year) Act.**

The section in the preceding example does not appropriate the moneys to the department. The appropriation already has been accomplished by the section that establishes the account. If the section that establishes the account does not continuously appropriate the moneys in the account, the appropriation must be done in a specific section. For example, if ORS 423.097, referenced above, did not continuously appropriate the moneys in the Department of Corrections Account, the drafting attorney could include a section like this:

> **SECTION ___. All moneys received by the Department of Corrections under section ___ of this (year) Act shall be paid into the State Treasury and deposited in the Department of**

Corrections Account. Such moneys are continuously appropriated to the department for the purposes of sections ___ to ___ of this (year) Act.

In creating a general account for a state agency to replace many separate accounts, it may be helpful to review chapter 414, Oregon Laws 1987.

d. Petty Cash Fund.

Many state agencies have statutes that establish petty cash funds. A general procedure for establishing a petty cash fund is provided by ORS 293.180. This procedure is satisfactory in most cases and a special statute is probably unnecessary. If a special statute is needed, see ORS 561.155 and 677.305 for examples.

e. Revolving Fund.

The establishment of a revolving fund for a state agency may be requested. Generally, a revolving fund statute permits a state agency to deposit designated moneys with the State Treasurer and to write checks against the revolving fund. The revolving fund is periodically reimbursed by drawing warrants against the appropriate funds or accounts to cover the checks issued. The following is typical:

SECTION ___. (1) When requested in writing by the Director of the Department of _____, the Oregon Department of Administrative Services shall draw a warrant on the Department of _____ Account in favor of the Department of _____ for use as a revolving fund. Warrants drawn to establish or increase the revolving fund, rather than to reimburse it, may not exceed the aggregate sum of $_____. The revolving fund shall be held in a special account against which the Department of _____ may draw checks.

(2) The Department of _____ may use the revolving fund for the purposes specified in section __ of this (year) Act.

(3) All claims for reimbursement of advances paid from the revolving fund are subject to approval by the Director of the Department of _____ and by the Oregon Department of Administrative Services. When such claims have been approved, a warrant covering them shall be drawn in favor of the Department of _____, charged against the appropriate funds and accounts and used to reimburse the revolving fund.

For another example, see ORS 1.007, which establishes a revolving fund for the Judicial Department.

ORS 279A.290 provides for Miscellaneous Receipts accounts for state agencies. These accounts can be used as revolving funds when one state agency performs services for another.

f. Investment of Moneys in a Fund Separate and Distinct From the General Fund.

ORS 293.723 addresses investment of moneys in various funds and accounts. As described earlier in this chapter, if a bill draft is silent on the disposition of interest earned by a fund, the interest will be paid to the General Fund in accordance with ORS 293.140. If interest earned by the fund is instead to be credited to the fund, the section creating the fund should specifically state that "interest earned by the fund shall be credited to the fund." See section 4a of this chapter.

In addition to decisions about the disposition of interest earned by a fund, the legislature may also specify how moneys in the fund are to be invested by the Oregon Investment Council and the State Treasurer. ORS 293.701 to 293.857 generally govern the investment of state funds. Under those laws, state funds may be invested separately (discretely) or as part of a pool. Funds invested as part of a pool are generally invested in the Oregon Short Term Fund, which is a lower risk investment vehicle. ORS 293.723 describes how the legislature should provide guidance to the State Treasurer regarding how moneys in a particular fund should be invested.

Under ORS 293.723, moneys in a fund separate and distinct from the General Fund must be invested as part of pooled moneys unless the law specifically states that moneys in the fund may be "invested." Language that requires interest earned by the fund to be retained by the fund is not enough to allow moneys in the fund to be discretely invested.

Put another way, if you want to allow the State Treasurer to discretely invest moneys in a fund, and therefore assume higher investment risk, the bill needs to say that the "moneys in the fund may be invested" or "may be invested as provided in ORS 293.701 to 293.857." Some form of the word "invest" must be used. *Do not use this "invest" language unless specifically requested to do so.*

If you want to require the State Treasurer to invest moneys in a fund in the pooled Oregon Short Term Fund, do not include language referring to "investment" of moneys in the fund. This is the standard default position.

g. Trust Fund or Account.

ORS 291.002 defines a trust fund as a "fund in the State Treasury in which designated persons or classes of persons have a vested beneficial interest or equitable ownership, or which was created or established by gift, grant, contribution, devise or bequest that limits the use of the fund to designated objects or purposes."

Numerous trust funds exist in the treasury. Many of these trust funds consist of moneys donated to the state. An example of this type of fund was the State Flag Donation Fund, which was established for the purposes of acquiring and sending state flags to units of the Armed Forces of the United States. Other trust funds include the Public Employees Retirement Fund, the State Accident Insurance Fund and the State Highway Fund.

A fund should not be called a trust fund unless it meets the definition of 'trust fund' in ORS 291.002.

5. STATE FINANCIAL PROCEDURES.

a. Allotment System.

The control procedures maintained by the Oregon Department of Administrative Services include the allotment system, which is prescribed by ORS 291.232 to 291.260. It was established (1) to ensure that the various state agencies operate their programs within legislatively established limitations or within the amounts appropriated, and (2) to avoid excessive expenditures early in the biennium that would deplete the appropriations. It also provides the method by which the Governor is able to reduce state agency expenditures in order to avoid a deficit.

At the beginning of each biennial period, each state agency files with ODAS an expenditure plan showing the amounts that it plans to spend during each three-month period of the biennium. Budget analysts review each agency's expenditure plan and then notify the agency whether the plan is approved. The agency in turn submits an allotment request for each three-month period of the biennium. The allotment, if approved, becomes the maximum amount that the agency can expend during the three-month period. If a requester asks for an exception to the allotment system, the drafting attorney may be well advised to consult with senior staff members.

See 42 Op. Att'y Gen. 332 (1982) for a general discussion of the allotment system.

b. Assessments for Governmental Service Expenses.

ORS 291.272 to 291.278 provide for the allocation of governmental service expenses among all state agencies. This system replaced the "tithing" system under which certain state agencies paid 10 percent of their revenues to the General Fund. As in the case of the older tithing system, ORS 291.272 to 291.278 recognize that many governmental costs are attributable to each state agency, regardless of the manner in which the agency is financed.

c. Audit and Warrant Clause.

The procedure for approval and payment of claims is set out in ORS 293.295 to 293.515, and it is unnecessary to have a provision in a bill with respect to this matter unless an exceptional procedure is being established.

6. FEES.

Fees often are established by statute, either as a fixed figure or as "not to exceed" a specified figure. Occasionally, the agency is given discretion to set fees, usually with the limitation that the fees not exceed the cost of providing the service or administering the program for which the fees are charged.

Under ORS 291.050 to 291.060, new or increased agency fees that are imposed after the end of a regular session must be ratified by the Legislative Assembly before the end of the next regular session, otherwise they are automatically rescinded.

7. LOCAL MANDATES.

Article XI, section 15, of the Oregon Constitution, generally requires the Legislative Assembly to provide moneys to a local government when the Legislative Assembly enacts a law that requires the local government to establish a new program or increase the level of services under an existing program. If the Legislative Assembly fails to do so, the local government is not required to obey the newly enacted law.

For the purposes of the local mandates provision, a "program" is any program under which a local government must provide specified services to persons, government agencies or the public generally. A "local government" includes all units of local government except school districts.

In lieu of appropriating and allocating moneys to a local government to pay the costs of a required state program, the Legislative Assembly may identify and direct the imposition of a fee or charge to be used by the local government to recover the actual costs of the program.

Article XI, section 15, also describes a variety of laws that require local governments to establish programs but to which the requirement for state funding does not apply. Perhaps the most important of these exceptions to the state funding requirement is any law approved by three-fifths of the members of each house of the Legislative Assembly.

The one instance in which noncompliance with Article XI, section 15, prevents the Legislative Assembly from validly enacting a law is described in Article XI, section 15 (6). That subsection requires approval by three-fifths of the membership of each house to enact a law that has an anticipated effect of "reduc[ing] the amount of state revenues derived from a specific state tax and distributed to local governments as an aggregate" during a specified distribution period.

A basic obligation of a drafting attorney who prepares a bill that may reduce the amount of state revenues derived from a specific state tax that are distributed to local governments is to notify the requester that the bill may require passage by three-fifths of the members of each house of the Legislative Assembly. Unlike a bill for raising revenue, the requirement for a "supermajority" is not required to appear in the title of the bill, but the attorney may choose to include it.

Similarly, when an attorney prepares any bill that imposes a requirement for a new program or an increased level of services for an existing program and the bill is not one of the class of bills excepted from the requirements of Article XI, section 15, the attorney should so inform the requester. The attorney can suggest the following five methods of complying with Article XI, section 15:

(1) Appropriate money (in the requested bill or an appropriation bill) to an agency (usually the Oregon Department of Administrative Services) for distribution to the local government to pay the usual and reasonable costs of the new program or the increased level of services under an existing program.

(2) Identify and direct the imposition of a fee or charge to be used by the local government to recover the actual costs of the new program or increased level of services.

(3) Obtain approval by three-fifths of the members of each house of the Legislative Assembly.

(4) Obtain approval by a simple majority of the members of the Legislative Assembly with no appropriation of moneys or identification of a charge or fee and allow local governments to comply with the law at their discretion.

(5) Make the program or service levels described in the bill optional and not mandatory.

8. CONTINUING RESOLUTION.

A new biennium begins on July 1 of each odd-numbered year. Generally, agency authority to spend money ends at the end of a biennium. If the Legislative Assembly has not enacted a budget for an agency by the beginning of the biennium, the agency usually has no authority to spend money. When the legislature knows that it will not complete budget work by July 1, it often enacts a measure called a "continuing resolution" to authorize spending until budgets are adopted. The "continuing resolution" is neither continuing nor a resolution. It is a bill that usually allows any agency for which a budget has not been adopted to spend an amount of money based on the amount authorized for the last quarter of the prior biennium. The bill appropriates the money necessary for those expenditures and subjects actual spending levels and final reconciliation to rules of the Oregon Department of Administrative Services. Usually, the substantive sections of the bill are repealed at the end of July. The bill contains an emergency clause, effective July 1. See chapter 493, Oregon Laws 2017, for an example of a continuing resolution.

If it is necessary to extend the "continuing resolution," a bill amending the section of the session law that repeals the substantive parts of the bill will accomplish the extension. (See chapter 626, Oregon Laws 2003.)

The continuing resolution for 2003 has been turned into boilerplate and may be used as a model (<boiler nobudget>). Like all boilerplate, it should be read carefully to be sure it fits the current circumstances.

9. DUTIES OF STATE TREASURER.

The State Treasurer simply acts as the bank for state agencies. Thus, a drafting attorney should not assign administrative duties to the Treasurer, such as transferring moneys once certain conditions are met. Those duties should instead be assigned to the subject agency.

For example, a drafting attorney should *not* create a provision like the following: "The balance of moneys received shall be transferred by the State Treasurer to the account of (agency)." Instead, the agency that receives the money should perform the transfer.

10. EMERGENCY BOARD.

The Emergency Board is a joint committee authorized under Article III, section 3, of the Oregon Constitution, to exercise specific, enumerated powers dealing with budgetary matters during the interim between legislative sessions. ORS 291.322 to 291.334 establish the Emergency Board and give it the constitutionally authorized powers.[11] See 37 Op. Att'y Gen. 130 (1974) for a general discussion of the Emergency Board.

In short, the Emergency Board has the power to *allocate* (not appropriate) additional moneys to state agencies from moneys previously appropriated to the Emergency Board; to increase (but not decrease) expenditure limits; and to approve, revise or amend certain agency budgets.

A drafting attorney should be very cautious if a requester wishes to grant additional authority to the Emergency Board. The Emergency Board may not be given powers other than those specified in the Constitution. For example, the Emergency Board cannot be given the power to approve state agency actions.[12, 13]

A special purpose appropriation to the Emergency Board may be made as follows: <spm approp-spec-purp>

> **SECTION ___. (1) In addition to and not in lieu of any other appropriation, there is appropriated to the Emergency Board, for the biennium beginning July 1, (year), out of the General Fund, the amount of $_____, to be allocated to _____ (agency) for _____ (purpose).**
>
> **(2) If any of the moneys appropriated by subsection (1) of this section are not allocated by the Emergency Board prior to December 1, (year+1), the moneys remaining on that date become available for any purpose for which the Emergency Board lawfully may allocate funds.**

[11] If the Emergency Board were not specifically authorized by the Constitution, the exercise of its powers would likely violate Article III, section 1. See 25 Op. Att'y Gen. 139 (1951).

[12] Gilliam County v. DEQ, 114 Or. App. 369 (1992) (invalidating statute that provided for Emergency Board ratification of agency rules; a legislative veto is not among the powers authorized by Article III, section 3); Planned Parenthood Association v. Department of Human Resources, 297 Or. 562 (1984) (holding that the Emergency Board cannot be granted supervisory power over decisions the Department of Human Resources is statutorily authorized to make). Note that ORS 291.375 (2) is probably unconstitutional under this line of cases.

[13] Note that many Attorney General Opinions about the Emergency Board were issued prior to Gilliam County or Planned Parenthood. Be wary, therefore, of citing pre-1984 Attorney General opinions for the proposition that the legislature may delegate to the Emergency Board authority that is not specifically mentioned in the Constitution.

CHAPTER TEN

SPECIAL CLAUSES

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1. CLAUSES RELATING TO BILL'S APPLICATION (SAVING CLAUSES).

Many bills raise issues relating to the application of the bill. These issues may involve deciding whom the bill applies to, the circumstances the bill applies to, and the time period the bill applies to. These issues are frequently considered in court cases interpreting if a bill was intended to have "retroactive" effect. "Retroactivity" is another way of expressing the issue. (Does the bill apply to persons licensed before the effective date of the bill? Does the bill apply to conduct that occurs before the effective date of the bill?) The drafting attorney must be aware of the issues of application raised by the draft and deal with those issues by an appropriate clause. The alternative is confusion about the draft's application and the possibility of litigation, as described below.

> The question of the so-called "retroactive" or "retrospective" effect of a new law is not, or should not be, a question of adjudication. Its answer is not to be sought in judicial precedents. "Retroactivity" is in the first instance a question of legislative draftsmanship. When it becomes a problem, the problem is a failure of drafting, probably reflecting in turn a failure to give adequate attention to the policy choices involved.[1]

The drafting attorney must consider existing conditions in drafting a bill. If a request is based on a situation of a named person, or a case that is currently in litigation, or any other set of specific circumstances, the attorney needs to ask the requester if the bill is intended to cover the person, litigation or other specific circumstances. If the requester wants to affect existing conditions, the failure of the attorney to include an appropriate clause designed to ensure application to those existing conditions may result in a bill that does not accomplish the requester's goals.

Even if the request is not based on a set of specific circumstances, the decision on a bill's application is almost always a policy decision that must be made by the requester. The attorney can alert the requester to the issue by including a clause in the draft that reflects the "normal" application of the bill (prospective application only for all persons and events). Mentioning the clause in a cover letter or memorandum should eliminate any subsequent question about the requester's intent with respect to the bill's application.

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[1] Whipple v. Howser, 291 Or. 475, 488 (1981) (Linde concurring).

Clauses designed to deal with the application of the bill traditionally have been referred to as "saving clauses." This terminology is used because these clauses often "save" rights and obligations that existed before the bill's effective date. As can be seen from the examples in this chapter, the term is somewhat misleading because clauses relating to the application of a bill can either "save" or extinguish existing rights, subject only to constitutional limitations on the legislature's power to retroactively change the rules (e.g., prohibitions on ex post facto laws and laws impairing the obligations of contracts).

a. Rules of Construction in Absence of Clause.

Appendix J of this manual cites several cases establishing rules of construction that are used by the courts in determining if the Legislative Assembly intended that a particular bill be applied retroactively. In each of these cases, the law in question did not contain language indicating the intent of the Legislative Assembly. The general rule of these cases is that a bill will usually only be applied prospectively, but there are enough qualifications to this rule that it is unwise for a drafting attorney to rely on the general rule. For instance, the Oregon Court of Appeals has found that even the use of the past tense by an attorney may indicate legislative intent that a law be applied retroactively.[2] In addition, several cases have allowed retroactive application for "procedural or remedial" laws.[3] However, the Court of Appeals has said that determining whether a statute applies retroactively does not depend on placing labels on the type of enactment.[4]

As already noted, there are some constitutional provisions that automatically limit the application of a new law. For example, existing insurance policies may be immune from the application of a new law by reason of the Contract Clauses of the Oregon and U.S. Constitutions. The new law need not contain any provision to produce that result. However, there are two good reasons why a drafting attorney should never rely on the Constitutions to determine the application of a bill. First, failure to include an application clause may mean that the resulting law will generate extended litigation to determine the impact of the constitutional provision, litigation that could be avoided by the inclusion in the bill of a short clause on application. Second, including the clause will alert the requester to the limitations imposed by the Constitutions on the retroactive effect of the bill.

In addition to the constitutional provisions, there are several statutes that generally regulate the application of certain new laws. Unlike the constitutional provisions, the statutory provisions eliminate the need for special clauses if the bill being drafted falls in the described categories. The statutory provisions include: ORS 161.035 (amendment or repeal of criminal statute as affecting prosecution and punishment of persons who violated the law); ORS 182.080 (effect of repeal or amendment of statute authorizing state agency to collect, receive and expend moneys); ORS 174.070 (effect of repeal of validating or curative Act); ORS 174.080 (effect of repeal of repealing Act); and ORS 174.090 (effect of repeal of repealing constitutional provision).

[2] State ex rel. Dwight v. Justice, 16 Or. App. 336 (1974).
[3] See, e.g., Fish & Wildlife Dept. v. Land Conservation and Development Commission, 288 Or. 203 (1979).
[4] Newell v. Weston, 150 Or. App. 562 (1997).

These statutory saving clauses automatically apply to any bill that is drafted, unless the bill expressly provides otherwise. In addition, ORS 174.520 provides a saving clause for preexisting law repealed when *Oregon Revised Statutes* was enacted in 1953, in case any provision of *Oregon Revised Statutes* derived from a preexisting statute is held unconstitutional. ORS 174.530 also saves the Acts from which ORS sections were derived for the purpose of applying rules of construction relating to repeal or amendment by implication or for the purpose of resolving any ambiguity.

Despite the statutory provisions listed above, the only safe course is for the drafting attorney to address problems relating to a bill's application by including an appropriate clause in the draft.

b. General Form of Clause.

The Oregon Supreme Court has noted with disapproval the use of an application clause that tells the reader what the Act does not apply to without indicating what the Act does apply to.[5] For instance, the following clause *should be avoided*:

> **SECTION ____. Section ___ of this (year) Act does not apply to an action, suit or other proceeding commenced before the effective date of this (year) Act.**

This language tells the reader only what the new law does not apply to without giving any idea as to what other restrictions might apply to the application of the new law. For instance, does the law apply to an action commenced after the effective date of the Act, but based on conduct that occurred before the effective date of the Act? The better approach is to make a positive statement that limits the application of the bill. For instance: <spm savings>

> **SECTION ____. Section ___ of this (year) Act applies only to actions, suits or other proceedings commenced on or after the effective date of this (year) Act.**

Note that clauses relating to application of a bill are almost always included in a separate section. These clauses are usually temporary in nature and will not be codified in ORS.

Clauses relating to the application of a bill should not be prepared until the other sections of the bill have been drafted, including any repealer clause. The entire bill must be considered when drafting an adequate clause on the application of the bill's provisions.

The use of broad statements as to the effect of a law should almost never be used. For instance, the following clause *should be avoided*:

> **SECTION ____. Section ___ of this (year) Act does not affect any duty or right accruing, accrued or acquired, or liability incurred, before the effective date of this (year) Act.**

This type of clause is so general in nature that it is difficult to determine what it does. Litigation could easily result from efforts to determine what is (and what is not) a "duty or right accruing, accrued or acquired" before the effective date of the Act.

[5] Whipple v. Howser, 291 Or. 475 (1981).

c. Repeals (Express and Implied).

It may be necessary to include a saving clause indicating the effect of the repeal of a statute. If the statute repealed is a "criminal statute," ORS 161.035 usually is adequate. If the statute repealed is not a "criminal statute" and a specific saving clause is needed, one of the following examples may help:

SECTION _____. Section ___ of this (year) Act does not relieve a person of any obligation with respect to a tax, fee, fine or other charge, interest, penalty, forfeiture or other liability, duty or obligation accruing under the law repealed by this (year) Act. After the operative date of the repeals made by this (year) Act, the Department of _____ may undertake the collection or enforcement of such tax, fee, fine, charge, interest, penalty, forfeiture or other liability, duty or obligation.

OR

SECTION _____. If section ___ of this (year) Act is repealed, unless otherwise specifically provided in the repealing Act, section ___ of this (year) Act remains in force for the assessment, imposition and collection of the tax and all interest, penalties or forfeitures that have accrued or may accrue in relation to the tax for the calendar year in which the tax is repealed.

OR

SECTION _____. The repeal of ORS _____ by section _____ of this (year) Act does not relieve a person of any obligation with respect to a contribution, tax, fine, interest, penalty or other liability, duty or obligation accruing under ORS _____ prior to the effective date of the repeal by section _____ of this (year) Act.

OR

SECTION _____. Notwithstanding the repeal of ORS _____ by section __ of this (year) Act, that statute remains in force for the purpose of collecting all withholding taxes and all interest, penalties or forfeitures that have accrued or may accrue in relation to the taxes in the period before such repeal.

If an Act is enacted that is inconsistent with a prior Act, the prior Act may be repealed impliedly to the extent of the inconsistency. If a bill is intended to be supplementary to an existing law, but the court might find that the existing law was repealed impliedly by the enactment of the bill, a specific clause in the bill stating its intent to save the existing law is necessary.

SECTION _____. Section ___ of this (year) Act is supplementary to, does not repeal, any law relating to the surface waters of this state.

OR

SECTION _____. Section ___ of this (year) Act is supplementary to any other law enacted before, on or after the effective date of this (year) Act providing for vocational education, and is intended to provide additional powers not in conflict with or exclusive of existing laws on the same subject.

OR

SECTION _____. The remedies provided in sections _____ to _____ of this (year) Act are cumulative, and no action taken by the Department of _____ constitutes an election by the state to pursue a remedy to the exclusion of any other remedy for which provision is made in this (year) Act or any other law.

OR

SECTION _____. The remedies provided in sections _____ to _____ of this (year) Act are in addition to all other remedies, civil or criminal, existing under the laws of this state.

d. Temporary Law.

A special clause is essential for the success of temporary Acts. Without a special clause, a person affected by the Act may choose to disobey the Act in the hope that the final judgment based upon the failure to comply can be postponed until the Act lapses. The following, based on 1 U.S.C. 109, indicates the type of provision that can be written:

SECTION _____. The expiration of section ___ of this (year) Act does not release or extinguish any penalty, forfeiture or liability incurred under section ___ of this (year) Act. Section ___ of this (year) Act remains in force for the purpose of maintaining an action or prosecution for the enforcement of such a penalty, forfeiture or liability.

For provisions that may be helpful when a sunsetted law is extended, see section 8, chapter 12 of this manual.

e. Specific Types of Clauses by Subject Matter.

The following listing attempts to provide helpful examples based on the subject matter of the bill. These examples may be adapted to address application issues under most subject matter areas. In general, the examples should not be considered as a way to avoid drafting a specific clause that is keyed to the issues raised by a bill. The examples are only for the purpose of providing language that may be modified to fit a more specialized clause.

A. Actions and Proceedings; Changes in Procedures.

Changes to a statutory procedure almost always raise questions on application and retroactivity because the drafting attorney must assume that proceedings under the preexisting law will be in progress at the time the bill becomes effective. The issue then becomes whether the new procedure applies only to proceedings commenced on or after the effective date of the Act, or if the procedure applies to pending proceedings as well. The same issues arise when a bill changes the nature of the conduct that will allow a person to pursue a claim, whether through judicial or administrative proceedings. Again, it is necessary to determine whether the change applies only to conduct that occurs on and after the effective date of the Act, or also applies to conduct that occurs before the effective date of the Act. The following examples may be helpful:

SECTION _____. Sections 1 to 29 of this (year) Act become operative January 1, (year+1), and apply only to actions and proceedings that are commenced on or after that date. Actions and proceedings that are commenced before January 1, (year+1), shall continue to be governed by the law applicable to those actions and proceedings in effect immediately before that date.

OR

SECTION _____. The amendments to ORS _____ by section ___ of this (year) Act do not affect an act done or proceeding begun, or right accruing, accrued or acquired, or liability incurred, before the effective date of this (year) Act, under the law then in effect. A proceeding begun before the effective date of this (year) Act in accordance with the law then in effect may be completed after the effective date of this (year) Act as if this (year) Act had not been enacted.

OR

SECTION _____. Section ___ of this (year) Act applies only to conduct giving rise to a cause of action under section 1 of this (year) Act that occurs on or after the effective date of this (year) Act.

OR

SECTION _____. Section ___ of this (year) Act applies to actions and proceedings, commenced before, on or after the effective date of this (year) Act.

OR

SECTION _____. Section ___ of this (year) Act applies both to petitions filed within the time allowed by ORS 116.253, and not finally adjudicated or decided before the effective date of this (year) Act, and to petitions filed on or after the effective date of this (year) Act.

A clause that preserves an existing cause of action, in an Act amending or repealing a statute that authorizes the cause of action, also may require that the cause of action preserved be sued upon within a specified period after the effective date of the amending or repealing Act (in effect, creating a "window of opportunity" for a party to bring an action). For example:

SECTION _____. An employees' trust created before the effective date of this (year) Act is not invalid as violating any rule of law against perpetuities or the suspension of the power of alienation of title to property, unless the trust is terminated by a decree of a court of competent jurisdiction in a suit begun within one year after the effective date of this (year) Act.

OR

SECTION _____. Unless an action to contest the validity of the consolidation is brought in the circuit court not later than the 60th day after the date on which the district boundary board declared the districts consolidated, it is presumed conclusively that all election procedure was correct and that the district was consolidated regularly.

Requests for changes to statutes of limitations or other statutory deadlines present particular problems. The following examples cover some of the possible alternatives:

SECTION _____. The amendments to ORS 12.110 by section 1 of this (year) Act apply only to causes of action arising on or after the effective date of this (year) Act.

OR

SECTION _____. The amendments to ORS 12.110 by section 1 of this (year) Act apply to causes of action arising before, on or after the effective date of this (year) Act, but do not operate to revive a cause of action barred by the operation of ORS 12.110 ((year-2) Edition) before the effective date of this (year) Act.

OR

SECTION _____. The amendments to ORS 12.110 by section 1 of this (year) Act apply to causes of action arising before, on or after the effective date of this (year) Act, and operate to revive a cause of action barred by the operation of ORS 12.110 (20__ Edition) before the effective date of this (year) Act if an action is commenced within the time allowed by ORS 12.110 as amended by section 1 of this (year) Act.

B. Contracts.

Constitutional limitations on impairing the obligations of contracts must be borne in mind when attempting to give retroactive effect to bills that impact contracts. However, as noted above, the inclusion of a clause that indicates that the law does not impact existing contracts is almost always a good idea. Examples of clauses that may be useful follow:

SECTION _____. Section ___ of this (year) Act does not apply to a sale, or to a contract to sell, made before the effective date of this (year) Act.

OR

SECTION _____. Section ___ of this (year) Act does not affect a contract made before the effective date of this (year) Act. However, section ___ of this (year) Act applies to a renewal or extension of an existing contract on or after the effective date of this (year) Act as well as to a new contract made on or after the effective date of this (year) Act.

OR

SECTION _____. Section ___ of this (year) Act does not confer or impair a right or defense created by or arising out of a contractor's bond executed before the effective date of this (year) Act.

OR

SECTION _____. ORS _____, as amended by section 2 of this (year) Act, does not affect a contract, sales agreement or security agreement made before the effective date of this (year) Act. However, ORS _____, as amended, applies to a renewal or extension of an existing contract, sales agreement or security agreement on or after the effective date of this (year) Act as well as to a new contract, sales agreement or security agreement made on or after the effective date of this (year) Act.

A requester may wish to declare in statute what is believed to be an existing common law rule. If this is the case, constitutional provisions prohibiting the impairment of contracts would not apply. For example:

SECTION _____. (1) Section ___ of this (year) Act, being declaratory of existing law, applies to contracts of sale of real property executed before, on or after the effective date of this (year) Act.

(2) If the application of section ___ of this (year) Act to contracts of sale of real property executed before the effective date of this (year) Act is held to be unconstitutional, the Legislative Assembly intends that section ___ of this (year) Act nevertheless apply to contracts executed on or after the effective date of this (year) Act.

C. Licenses.

Changes in laws relating to licenses usually raise questions about the application of the new law to existing licenses. The following examples provide some ideas on dealing with these problems:

SECTION _____. Section ___ of this (year) Act does not apply to an individual who was practicing psychiatry lawfully in this state on the effective date of this (year) Act.

OR

SECTION _____. The board shall issue a license to practice massage to an applicant who does not have a diploma from a school of massage but who has been practicing massage in this state continuously for at least one year immediately before the effective date of this (year) Act, who not later than 90 days after the effective date of this (year) Act:

(1) Furnishes satisfactory evidence of good moral character and ethical practice;

(2) Applies for a license; and

(3) Pays the fee required by section _____ of this (year) Act.

OR

SECTION _____. An individual licensed under ORS chapter 603 as of the day immediately preceding the effective date of this (year) Act, who is subject to ORS chapter 603 on and after the effective date of this (year) Act, need not obtain a license under ORS 603.025, as amended by section ___ of this (year) Act, until the license issued to the individual before the effective date of this (year) Act under ORS chapter 603 has expired. The individual is considered to be licensed under and subject to ORS chapter 603 on and after the effective date of this (year) Act, according to the nature and character of the business conducted by the individual, until the expiration of the license.

OR

SECTION _____. A person licensed under ORS chapter 725 as of the day immediately preceding the effective date of this (year) Act is considered to be licensed under and subject to ORS chapter 725 during the period beginning on the effective date of this (year) Act and ending July 1, (year+1). A person not licensed under ORS chapter 725 but who holds a license under ORS chapter 727 as of the day immediately preceding the effective date of this (year) Act is considered to be licensed under and subject to ORS chapter 725 during the period beginning on the effective date of this (year) Act and ending July 1, (year+1). After the effective date of this (year) Act, only one license may be issued for each office, regardless of whether that office was licensed under both ORS chapters 725 and 727 and whether the two licenses were held by different individuals. The board shall investigate each license described in this section to determine if a person is entitled to a continuation of a license. Every license in effect on June 30, (year+1), shall be continued in force as long as the standards are maintained as provided under ORS chapter 725.

OR

SECTION _____. (1) Section ___ of this (year) Act does not apply retroactively. Section ___ of this (year) Act does not affect the validity of, or authorize the cancellation of, a license issued

before the effective date of this (year) Act to any practitioner of medicine and surgery or osteopathy and surgery, on account of anything that occurred before the effective date of this (year) Act. However, this section does not prevent the revocation of a license on any ground that was a cause for revocation before the effective date of this (year) Act.

(2) The repeal of ORS chapter 681 ((year-2) Edition) by section ___ of this (year) Act does not affect the validity of a license issued under that chapter before the effective date of this (year) Act. On and after the effective date of this (year) Act, licenses issued under that chapter are governed by section ___ of this (year) Act.

The following examples are useful for converting a licensing period from one period to another (e.g., from a calendar year to a fiscal year). Another example of an amendment to such a section, made several years later to extend its application, may be found in section 5, chapter 314, Oregon Laws 1965.

SECTION _____. Licenses issued by the board under ORS _____ that are effective on June 30, (year-1), expire on July 1, (year+1). The board shall credit on the fee for a license renewed under ORS _____ for the fiscal year beginning July 1, (year+1), the sum of $2.50, representing part of the fee for the license issued or renewed for the calendar year (year+1) under ORS _____ as that section read before its amendment by section _____ of this (year) Act.

OR

SECTION _____. Notwithstanding ORS ___ and ___, for those persons to whom a license was issued under ORS _____ prior to the effective date of this (year) Act, the expiration date of which is before June 30, _____, the State Department of _____ shall issue on that expiration date, upon application therefor by the licensee, a license that is valid until June 30, _____. The department shall charge for such a license a prorated portion of the annual license fee based upon the period of time from the date of license issuance until June 30, _____.

To provide that a section, such as a section increasing license fees, does not apply to a current licensing period, the following may be useful:

SECTION _____. The amendments to ORS 633.700 by section _____ of this (year) Act apply to license periods that begin on or after January 1, (year +1).

D. Permits.

Changes in laws relating to permits raise the same problems as changes in laws relating to licenses. The following examples may help:

SECTION _____. Section ___ of this (year) Act does not affect any right to waters or to the use of any waters vested or inchoate before the effective date of this (year) Act.

OR

SECTION _____. Section ___ of this (year) Act controls applications for permits to appropriate water made to the Water Resources Department under ORS 537.130 that on the effective date of this (year) Act are pending determination by the department.

OR

SECTION _____. Any person or public agency claiming a right to appropriate ground water under section ___ of this (year) Act may obtain from the Water Resources Department within three years after the effective date of this (year) Act a certificate of registration as evidence of a right to appropriate ground water under section ___ of this (year) Act. Failure of a person or public agency to request a certificate of registration under this section within such period creates a presumption that the person or public agency has abandoned the claim.

E. Taxation.

In amending personal and corporate income and excise tax laws, saving existing rights under former law may be desired. There are many forms that have been followed in writing such clauses. The notes following some of the sections compiled in ORS chapters 305 to 323 may suggest appropriate language. In the corporate tax laws, the term "taxable year" is used in place of "tax year." For provisions that preserve the obligation to pay taxes after the repeal or amendment of a tax law, see "Repeals (Express and Implied)" earlier in this chapter.

F. Boards, Commissions and Other State Agencies.

In connection with the transfer of functions from one agency to another, several saving clauses may be needed. These are discussed in appendix A of this manual.

When qualifications for board members are changed, the term of incumbents may be "saved" as follows:

SECTION _____. Nothing in the amendments to ORS _____ by section ___ of this (year) Act affects the term of office of any member of the _____ Board appointed prior to and serving on the effective date of this (year) Act. However, as vacancies occur, appointments shall be made in accordance with the qualifications specified in ORS _____, as amended by section _____ of this (year) Act.

2. CURATIVE OR VALIDATING CLAUSES.

A curative or validating clause is used by the Legislative Assembly to validate past actions taken without appropriate authority. Examples may be found in section 4, chapter 175, Oregon Laws 1999, and section 2, chapter 57, Oregon Laws 2014. A curative or validating clause differs from retroactive application of an Act. A curative or validating clause does not have prospective effect. Retroactive application of a change in the law sometimes is impossible or is inadequate or ineffective by itself to address past unauthorized actions. See section 2, chapter 15 of this manual for a more extensive discussion.

3. CONSTRUCTION CLAUSES.

Some bills have a provision that an act receive a liberal interpretation to carry out the purpose expressed in the bill. The provision for liberal interpretation ordinarily is not necessary. If an enactment by the legislative branch is competently drafted, there should be no need for the legislative branch to intrude into judicial branch functions by instructing how the enactment is to be construed.

If possible, the drafting attorney should settle potential questions directly rather than relying on a construction clause. For example, instead of stating "This section shall not be construed in such a manner as to . . . ," it is better to state "This section does not. . . . " About the only justification for a construction clause is to indicate that the law is to be interpreted in

favor of one group and against another (e.g., in favor of employees and against employers). The following is an example of the more traditional clause:

> **SECTION _____. This (year) Act shall be applied to the extent practicable in favor of affording all service voters an opportunity to exercise fully the voting rights granted to them by this (year) Act.**

If construction of a constitutional provision is in doubt, the drafting attorney may wish to specify how a court test can be implemented.[6] Since the Supreme Court is a coequal of the Legislative Assembly, an Act should not order the Supreme Court to give a matter priority on the court docket. It is proper, however, for an act to contain a request from the Legislative Assembly that the Supreme Court give priority to deciding any matter concerning the Act.

4. INTERPRETATION CLAUSES.

There are some recognized rules, as well as general statutory provisions, relating to interpretation of legislative Acts, words and phrases with which a drafting attorney must become familiar. See appendix J of this manual. Too often these rules are needlessly repeated in the draft.

However, if the requester desires an interpretation different from that reached by the rules of construction, the draft should contain a section setting forth the desired interpretation.

Every Uniform Act contains an interpretation provision, somewhat as follows:

> **SECTION _____. This (year) Act shall be so interpreted as to effectuate its general purpose to make uniform the law of those states that enact it.**

5. GENERAL REPEALS.

A draft should never contain a general repeal clause providing that "all laws and parts of laws in conflict with this (year) Act are repealed." Such a provision is useless because such laws and parts of laws are repealed by implication in any event. Moreover, the difficulty with a general repeal clause or repeals by implication is that of determining whether an irreconcilable conflict exists between a subsequent Act and a prior Act or part of the prior Act. A general repealing clause fails to disclose the legislative purpose as to an earlier Act and thereby adds to the burden of construction a question that properly should be settled by the Legislative Assembly. The drafting attorney must determine whether a bill requires or makes desirable the repeal of an existing statute. That issue should not be left up to the courts, which can resolve the question only after expensive and time-consuming litigation. If the repeal of one or more existing sections is necessary or desirable, the draft should include a specific repeal provision that specifies the sections repealed. Only as a last resort should a drafting attorney use the phrase "Notwithstanding any other provision of law," a phrase that impliedly amends or repeals any number of unspecified statutes. This phrase is an indication of inadequate research and lazy drafting.

[6] See ORS 250.044 for an example that provides for expedited Supreme Court review.

To protect a specific existing law or all existing laws from possible implied repeal, a bill may state that no conflict is intended. An example of this type of provision is found earlier in this chapter under "Repeals (Express and Implied)."

Chapter 13 of this manual contains a discussion of specific repeals.

6. SEVERABILITY CLAUSES.

A severability clause provides that if any part of a bill is held unconstitutional, the remainder is not be affected. The inclusion of a severability clause in a bill is not needed; a severability provision is made applicable by ORS 174.040 to all Acts passed in Oregon. Requesters may insist on severability clauses, but more often the clause is included in model language provided by the requester. The attorney should remove the clause and discuss with the requester or lobbyist if necessary. Further, the courts in Oregon generally have followed this principle.[7] If, however, the legislative intent is that an entire Act be declared invalid if any part of it is held unconstitutional, a nonseverability clause should be included.[8]

The following are examples of nonseverability clauses:

SECTION _____. The Legislative Assembly considers each part of this (year) Act to be essentially and inseparably connected with and dependent upon every other part. If any part of this (year) Act is held unconstitutional, the Legislative Assembly intends that the remainder of this (year) Act be void and of no effect.

OR

SECTION _____. If any part of this (year) Act is declared unconstitutional, no other part of this (year) Act shall become operative and all sections amended or repealed by this (year) Act shall remain in effect the same as if this (year) Act had not been enacted.

7. UNIT AND SECTION CAPTIONS.

For a very long bill, the use of unit and section captions makes the bill more understandable.[9] If unit and section captions are used, the drafting attorney must be sure they accurately represent the substance of the units and sections of the bill. An amendment to a captioned bill may require amendment of the unit and section captions.

If unit and section captions are used, it is *essential in all cases* that a section substantially as follows be inserted near the end of the bill: <spm captions>

SECTION _____. The unit and section captions used in this (year) Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this (year) Act.

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[7] See, e.g., Standard Lumber Co. v. Pierce, 112 Or. 314 (1924); Fullerton v. Lamm, 177 Or. 655 (1946); Foltz v. State Farm Mutual Auto Insurance Co., 326 Or. 294 (1998); Advocates for Effective Regulation v. City of Eugene, 176 Or. App. 370 (2001); Outdoor Media Dimenisons v. Dept. of Transportation, 340 Or. 275 (2006).

[8] City University v. State, Educational Policy and Planning, 320 Or. 422 (1994).

[9] See, e.g., chapters 33 and 615, Oregon Laws 1993.

If only unit captions or only section captions are used, the commands <spm captions-unit> or <spm captions-sec> will insert the proper language.

A section like this is necessary because in its absence the captions become law and must be amended in future bills rather than being adjusted by ORS editors if the section is subsequently amended. In one instance, a court relied on unit and section captions in discerning legislative intent because the section in the Act relating to those captions provided that they were used only for convenience in "*locating or explaining*" (court's emphasis) provisions of the Act.[10]

ORS 174.540 provides that, as used in ORS, title heads, chapter heads, division heads, section and subsection heads or titles, and explanatory notes and cross-references, are not a part of the law. An exception occurs with the Oregon Rules of Civil Procedure in which the headings and captions become part of the law. Also, certain constitutional sections were adopted with captions, a fact noted in the source notes following such sections.

8. STATUTE OF LIMITATIONS.

If the requester wishes to create a new cause of action, the drafting attorney must establish a statute of limitations. If the attorney fails to provide a statute of limitations, ORS 12.140 will probably provide a 10-year statute of limitations. ORS 30.275 (Oregon Tort Claims Act) provides a good example:

> (9) Except as provided in ORS 12.120, 12.135 and 659A.875, but notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action, an action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300 shall be commenced within two years after the alleged loss or injury.

[10] See State ex rel. Penn v. Norblad, 323 Or. 464 (1996).

CHAPTER ELEVEN

PENALTIES AND SANCTIONS

1. PROHIBITION AND PENALTY LOCATION
2. SEPARATE SUBSECTIONS
3. "NO PERSON SHALL"; UNNECESSARY WORDS
4. SPECIFICITY
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A drafting attorney can exercise great ingenuity in the area of penalties and sanctions, and should consider other options beyond simply making a prohibited action punishable as a criminal offense. A penalty or sanction is intended to deter as well as punish. What discomfort inflicted by the law has the greatest potential of preventing violations? A criminal penalty may not fit the situation. Often far greater deterrent effect can be achieved by a penalty that has a sure and certain financial impact on the violator.

1. PROHIBITION AND PENALTY LOCATION.

Except for criminal statutes of the type compiled in ORS chapters 161 to 169, the penalties for violation of provisions of an ORS chapter usually are collected in the ".990 to .999" sections of the chapter. Consequently, the penalties for violation of the Act should be collected in a single section to permit their compilation in the ".990 to .999" sections of the ORS chapter in which the remainder of the bill is compiled. This requires the separation of the penalty from the prohibition, as in this example:

> **SECTION 1. A person may not intentionally deface, alter or change a voter's precinct memorandum card other than in a manner authorized by section _____ of this (year) Act.**
>
> **SECTION 2. Violation of section 1 of this (year) Act is a Class C misdemeanor.**

Be aware that referencing multiple sections in a penalty section could inadvertently create a split series.

If drafting a criminal statute of the type compiled in ORS chapters 161 to 169, the drafting attorney should not split the prohibition from the penalty because both will be compiled as one section. For example:

> **SECTION _____. (1) A person commits the crime of _____ if the person initiates or circulates a report or warning of an impending bombing or other crime or catastrophe, knowing that the report or warning is false or baseless and that it is likely to cause evacuation of a**

building, place of assembly or facility of public transport, or to cause public inconvenience or alarm.

(2) _____ is a Class A misdemeanor.

2. SEPARATE SUBSECTIONS.

If a bill contains different penalties, they should be stated in separate subsections of the penalty section.

It is not necessary to amend the ".990 to .999" penalty sections in the ORS chapter in which the sections are to be compiled merely to create a new penalty. If the penalty is stated in a separate section of the bill, the ORS editors may compile the penalty provision in the appropriate ORS ".990 to .999" penalty section as a new subsection.

3. "NO PERSON SHALL"; UNNECESSARY WORDS.

A discussion of the use of the phrase "no person shall" is found in chapter 4 of this manual. Drafting attorneys should use "a person may not . . ." instead.

Under the Criminal Code, violations, misdemeanors and felonies are classified (ORS 153.012, 161.535 and 161.555), with the penalty for each class specified (ORS 153.018, 161.605, 161.615, 161.625 and 161.635). The penalty for a prohibited action should be identified by class. This is preferable to formerly used language that provided that the prohibited act was "a misdemeanor punishable by up to one year in jail and a fine not to exceed $_____, or both." Classification tends to standardize penalties as well as to shorten drafts.

In stating a penalty, the words "upon conviction" are unnecessary.

The phrase "in the discretion of the court" is unnecessary.

Words giving a name to an offense (such as "is guilty of larceny") usually are unnecessary if the punishment is set forth, because what the crime is called should make no difference. The technique of the Criminal Code in this respect is different and if a name is to be given a crime, that name should follow the Criminal Code nomenclature.

The phrase "either directly or indirectly," or "either directly or by artifice, scheme, subterfuge, device or trick" is unnecessary. It scarcely could be argued that a prohibition lacking one of these phrases could be violated indirectly with impunity. As a general rule, the prohibition should be stated in a straightforward manner. If no qualifications are specified, as a rule none will be inferred.

4. SPECIFICITY.

A sweeping provision such as "violation of any provision of this (year) Act is a misdemeanor" must be avoided. The draft must enumerate the sections that are subject to the criminal penalty. The drafting attorney should not provide a penalty for violation of sections

that cannot, by their nature, be violated, such as definitions, statements of intent, administrative provisions (unless punishing administrators is intended), saving clauses and the like.

5. DIFFERENT KINDS OF CRIMINAL PENALTIES.

The choice of a penalty depends on the purpose to be accomplished by the prohibition and the seriousness of the offense; it is a choice that must be made by the requester of the bill. The three options are violations (punishable only by a fine, ORS 153.018), misdemeanors (punishable by fines and up to one year in jail, ORS 161.615 and 161.635) and felonies (punishable by fines and 5 to 20 years in jail, ORS 161.605 and 161.625).

A drafting attorney may wish to suggest to the requester that penalties in statutes already existing can be made applicable to a new prohibition by adding the material to and making it a part of an existing ORS chapter or series of ORS sections. The new penalty will then be similar to existing penalties prescribed for offenses of similar nature. The following examples give some idea of the various types of penalties that can be used:

a. Misdemeanor.

One of the most common penalties is a misdemeanor:

SECTION _____. Violation of section _____ of this (year) Act is a Class A misdemeanor.

If conduct is declared to be an offense but no specific penalty or classification is stated, ORS 161.555 provides that the offense is considered a Class A misdemeanor. However, drafting attorneys should indicate that the offense is a Class A misdemeanor and not rely on ORS 161.555 if the intent is to create a Class A misdemeanor. It is also desirable to avoid specifying a different penalty for every crime if the schedule in ORS 161.505 to 161.685 can be made to fit.

b. Violation.

If a fine is to be the only penalty, the penalty section should use the classifications provided by ORS 153.018 for violations. An offense that is declared to be a "violation" without using a classification is a Class B violation. ORS 153.015. Attorneys should indicate that the offense is a Class B violation and not rely on ORS 153.015 if the intent is to create a Class B violation.

c. Minimum Penalties.

Minimum periods of imprisonment for felonies provided by law prior to 1989 were abolished by ORS 137.120, which provides for an indeterminate sentence not to exceed the maximum term prescribed by law. In 1989, indeterminate sentencing for felonies was replaced by a system of sentencing guidelines that prescribes minimum periods of imprisonment based on the severity of the crime and the defendant's criminal history.

Sentencing guidelines are adopted and amended by the Oregon Criminal Justice Commission through the administrative rulemaking process. The legislature can direct the commission to amend the guidelines. See, e.g., section 20, chapter 423, Oregon Laws 1995. Note that the commission is already required by law to modify the guidelines when the legislature creates new crimes or amends existing crimes. ORS 137.667. The legislature can direct the commission to rank a crime at a certain crime seriousness level. See, e.g., ORS 163.426.

In the last few decades, minimum periods of imprisonment have been established through the initiative process. See, e.g., ORS 137.700 et seq. Although some statutes still prescribe minimum fines and periods of imprisonment for misdemeanors, in recent years the Oregon Legislative Assembly has been inclined to prescribe only maximum fines and periods of imprisonment.

d. Cumulative Penalties for Continuing Violation.

If the failure to comply with statute can result in an ongoing violation, the drafting attorney may want to provide that each day of violation is a separate offense. For instance:

> **SECTION _____. Failure to comply with section _____ of this (year) Act is a Class A violation for each day a person fails to comply.**

e. Enhanced Penalty for Subsequent Offenses.

Creating an enhanced penalty for repeated violations is a complicated task, involving determinations as to when previous violations are considered to have occurred and whether the subsequent violation must take place within a specific period of time. For examples of statutes that have provided enhanced penalties for subsequent offenses, see ORS and 161.610 and 163.160.

f. Criminal Forfeiture and Oregon Racketeer Influenced and Corrupt Organizations Act (ORICO).

When creating a new crime, drafting attorneys should consider whether to authorize criminal forfeiture of instrumentalities and proceeds of the crime. Criminal forfeiture is most commonly authorized for crimes that result in wrongfully obtained property or proceeds that are of some value. See ORS 131.550 to 131.600. This can be accomplished by adding the section creating the new crime to the list in ORS 131.602. The drafting attorney should not simply indicate in the draft that instrumentalities and proceeds are subject to forfeiture.

A drafting attorney may also want to consider whether violation of a new crime should give rise to remedies under ORICO. These remedies are most commonly authorized for drug and property crimes and certain person-to-person offenses. See ORS 166.715 to 166.735. This can be accomplished by adding the section creating the new crime to the list in ORS 166.715.

g. Constitutional Issues.

When creating a new crime or enhancing the penalty for a crime, a drafting attorney should consider potential constitutional issues specific to criminal law. For example, the drafting attorney should consider ex post facto prohibitions when determining the application of the new crime or enhancement. Article I, section 10, U. S. Constitution and Article I, section 21, Oregon Constitution. Proportionality should be considered when classifying a crime or when creating a mandatory sentence. Article I, section 16, Oregon Constitution. A drafting attorney should also be familiar with the limitations on restraining free expression created by Article I, section 8, of the Oregon Constitution.

6. JURISDICTION OVER PARTICULAR OFFENSES.

The circuit courts in Oregon are courts of general criminal jurisdiction. Although authorized to do so by Article VII (Original), section 12, Oregon Constitution, the Legislative Assembly has not given criminal jurisdiction to county courts. ORS 3.132 provides that circuit courts have concurrent jurisdiction with municipal courts over violations of the charter and ordinances of any city within the circuit court's judicial district.

Justice courts and municipal courts have jurisdiction over violations and misdemeanors. ORS 51.050 and 221.339.

7. STATUTES OF GENERAL APPLICATION TO CRIMES AND CRIMINAL PROCEDURE.

A drafting attorney should become familiar with the content of ORS chapter 161 when drafting a statute relating to crimes and criminal procedure. If the drafting attorney decides to add a crime to the Criminal Code, some of these statutes become automatically applicable to the crime. See ORS 161.005.

8. CRIMINAL SENTENCE REDUCTIONS REQUIRING A SUPERMAJORITY.

Article IV, section 33, of the Oregon Constitution, provides that a two-thirds vote of all the members elected to each house is required to pass a bill that reduces a criminal sentence approved by the people through the initiative or referendum process.

Because section 33 was enacted at the same time that the mandatory minimum sentences found in ORS 137.700 and 137.707 were enacted (Ballot Measure 11 (1994)), it is clear that the supermajority requirement was intended to apply to those sentences. What is less clear is to what other sentences it might apply. Muddying the water further is the fact that both ORS 137.700 and 137.707 have been legislatively amended to add new crimes to the lists that require mandatory minimum sentences, and for some crimes the legislature has authorized, pursuant to a two-thirds vote, the imposition of a sentence less than the mandatory minimum

(see ORS 137.712). The legislatively-added crimes found in ORS 137.700 and 137.707 do not require the supermajority for sentence reduction, because they were not approved by the people through the initiative or referendum process. Whether a sentence originally approved by the people, that has been subsequently reduced by a two-thirds vote of the legislature, still requires a supermajority to be further reduced is a question that requires thorough analysis.

The following statutes were enacted through the initiative and referendum process. They contain criminal provisions that, if amended, may have the effect of reducing a criminal sentence. If a drafting attorney is asked to amend one of the following statutes, the drafting attorney must carefully analyze the effect of the amendments to determine if a reduction of a criminal sentence might result. If it would, the constitutional supermajority requirement is triggered and the title of the bill must reflect the requirement ("providing for criminal sentence reduction that requires approval by a two-thirds majority").

ORS 137.700 and 137.707 – Ballot Measure 11 in 1994. These sections establish mandatory minimum sentences for specified crimes. They require that defendants convicted of one of the crimes listed serve the full statutory minimum sentence with no reduction for good time, etc. Reducing the minimum sentences (except as noted later) or allowing a reduction in a sentence for good time, etc., would require a supermajority. ORS 137.700 (2)(a)(B) and (C), (b) and (c) and ORS 137.707 (4)(a)(B) and (C), (b) and (c) (citing 2017 Edition in both instances) were legislatively added; therefore, reductions in sentences prescribed by those provisions would not require a supermajority. Modifying the sentences authorized by ORS 137.712 would probably not require a supermajority, but expanding the class of persons eligible for sentences in ORS 137.712 would require a supermajority.

ORS 137.123 – Part of Ballot Measure 10 in 1986. This section deals with the imposition of concurrent and consecutive sentences. If a drafting attorney is asked to amend subsection (2) or (5), the drafting attorney must analyze the effect of the amendment. Subsection (3) was added by the legislature.

ORS 137.635 – Ballot Measure 4 in 1989. This section requires imposition of determinate sentences for specified felonies. It also requires the defendant to serve the entire determinate sentence without reduction for good time, etc. The statute does not set out specific lengths of sentences. It is possible that some amendments to this section would require a supermajority. Any amendment would need to be analyzed for its effect.

ORS 137.690 and 813.011 – Ballot Measure 73 in 2010. These sections create mandatory sentences for repeat offenders. Analysis is required, particularly regarding the interplay between ORS 813.010 (5) and 813.011.

ORS 161.067 – Also part of Ballot Measure 10 in 1986. The section deals with determining the number of separately punishable offenses. Amendments to this section would probably not require a supermajority.

ORS 163.105 – Amended by Ballot Measure 7 in 1984. The ballot measure amendment to this section created a mandatory death or life imprisonment sentence for aggravated murder. A reduction of the sentence would require a supermajority.

ORS 164.061, 475.907, 475.925 and 475.930 – Ballot Measure 57 in 2008. These sections establish mandatory minimum sentences for certain controlled substance and property offenses. Ballot Measure 57 also increased the presumptive sentences in ORS 137.717 and made imposition mandatory in certain circumstances. It is an open legal question as to whether reducing the presumptive sentences in ORS 137.717 requires a supermajority, as these sentences were legislatively reduced, pursuant to a two-thirds vote, in 2009.

ORS 166.416, 166.418 and 166.438 – Ballot Measure 5 in 2000. This ballot measure created and amended criminal provisions related to the transfer of firearms. Analysis is required.

ORS 498.164 – Ballot Measure 18 in 1994. This section regulates the use of dogs or bait to hunt black bears or cougars.

ORS 680.990 (2) – The result of a 1978 initiative. This section raises the same issues as ORS 774.990. Analysis is required.

ORS 774.990 – Ballot Measure 3 in 1984. This section provides that violations relating to the Citizens' Utility Board are Class A misdemeanors. See ORS 774.120 (1) and (5) and 774.140. If a drafting attorney is asked to amend the section to provide that violation is something less than a Class A misdemeanor or is asked to repeal the section, it may have the effect of reducing a sentence. Analysis is required.

9. OTHER SANCTIONS.

In addition to criminal penalties, other sanctions are:

a. Civil Action.

A drafting attorney may authorize a public entity or a private party to bring a civil action as a sanction. ORS 496.705 is an example of a statute giving the state a cause of action against an offender. ORS 30.198 gives a cause of action to a person injured by the commission of the crime of intimidation, and ORS 30.200 authorizes a district attorney to bring a civil claim against a person engaging in intimidation. A civil sanction giving a damaged person a cause for treble damages appears in ORS 105.810.

Freund v. De Buse, 264 Or. 447 (1973), discusses the civil consequences of violation of a statute. The Oregon Supreme Court has determined that a private right of action for violation of a statutory duty may be created by the legislature either expressly or impliedly. Doyle v. City of Medford, 356 Or. 336 (2014).

b. Civil Penalty.

A civil penalty is one that may be imposed and collected by the enforcing agency without filing an action in court. ORS 441.705 to 441.745 provide sample language for authorizing imposition of civil penalties. If the drafting attorney intends to create a civil penalty, the draft should refer to "civil penalties" *and avoid reference to* "fines," "monetary penalties" and other

variations. The term "fine" should be used only when a monetary sanction is to be imposed for the commission of a crime or violation.

ORS 183.745 establishes a standardized procedure for imposition of civil penalties. The procedure will automatically apply to any penalty that the drafting attorney denominates a "civil penalty," unless the draft specifically indicates a contrary intent. Specific aspects of the procedure found in ORS 183.745 may be modified by an exception. See, e.g., ORS 441.712 ("Notwithstanding ORS 183.745 . . ."). ORS 205.125 and 205.126 provide standardized enforcement procedures for civil penalties.

To clarify that the procedure for imposition of civil penalties is to apply (and to alert the requester and agency of the provisions of ORS 183.745), the following standard phrase should be used: <spm civil-penalty>

SECTION ___. Civil penalties under section __ of this (year) Act shall be imposed in the manner provided by ORS 183.745.

The language of the draft must not authorize imposition of civil penalties "for violation of any of the provisions of this (year) Act." The drafting attorney should search the provisions of the bill to determine which sections or subsections should be subject to the civil penalty and specify those provisions in the section authorizing the civil penalty.

Significant policy issues that should be raised with the requester and, if appropriate, addressed in the draft, include:

1. The amount of the penalty to be imposed.

2. Whether the amount of the penalty is to be determined by the agency rather than by the legislation (i.e., should the draft authorize a range of penalties?).

3. What particular violations subject a person to the penalty (e.g., violations of the statutory provisions? violation of any rules adopted pursuant to rulemaking authorization?).

4. Whether the legislation should contain a provision allowing for remission or mitigation (see, e.g., ORS 441.720).

5. Disposition of amounts collected.

6. Whether the civil penalty is to be the exclusive remedy.

The following language addresses some of these issues and may be helpful:

SECTION _____. (1) In addition to any other liability or penalty provided by law, the Director of _____ may impose a civil penalty on a person for any of the following:

(a) Violation of any of the terms or conditions of a license issued under ORS _____.

(b) Violation of any rule or general order of the _____ Department that pertains to a facility.

(c) Violation of any final order of the director that pertains specifically to the facility owned or operated by the person incurring the penalty.

(d) Violation of ORS _____ or of rules required to be adopted under ORS _____.

(2) A civil penalty may not be imposed under this section for violations other than those involving _____ or a violation of ORS _____ or of the rules required to be adopted by ORS _____

unless a violation is found on two consecutive surveys of the facility. The director in every case shall prescribe a reasonable time for elimination of a violation:

(a) Not to exceed 30 days after first notice of a violation; or

(b) In cases where the violation requires more than 30 days to correct, such time as is specified in a plan of correction found acceptable by the director.

SECTION _____. (1)(a) After public hearing, the Director of _____ by rule shall adopt a schedule establishing the civil penalty that may be imposed under section _____ of this (year) Act. However, the civil penalty may not exceed $500 for each violation.

(b) Notwithstanding the limitations on the civil penalty in paragraph (a) of this subsection, for any violation involving _____ or a violation of _____ or rules required to be adopted under _____, a penalty may be imposed for each day the violation occurs in an amount not to exceed $500 per day.

(2) The penalties assessed under subsection (1) of this section shall not exceed $6,000 in the aggregate with respect to a single facility within any 90-day period.

SECTION _____. A civil penalty imposed under section _____ of this (year) Act may be remitted or reduced upon such terms and conditions as the Director of _____ considers proper and consistent with the public health and safety.

SECTION _____. In imposing a penalty pursuant to the schedule adopted pursuant to section _____ of this (year) Act, the Director of _____ shall consider the following factors:

(1) The past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation.

(2) Any prior violations of statutes, rules or orders pertaining to facilities.

(3) The economic and financial conditions of the person incurring the penalty.

(4) The immediacy and extent to which the violation threatens the public health or safety.

SECTION _____. All penalties recovered under sections _____ to _____ of this (year) Act shall be paid into the State Treasury and credited to the General Fund and are available for general governmental expenses.

c. Suspension or Revocation of License.

ORS chapters 670 to 704 contain examples of provisions for suspension or revocation of a license or permit to do business. Due process requires that a criminal conviction resulting in the denial or revocation of a license to do business must be relevant to fitness for licensing. ORS 497.415 contains provisions regarding revocation or denial of wildlife law licenses, tags and permits.

d. Unlawful Practice Under ORS Chapter 659A.

If a bill draft addresses the relationship between an employer and an employee, the drafting attorney should consider making the prohibited activity an unlawful employment practice under ORS chapter 659A. See, e.g., ORS 659A.303 (employer prohibited from using genetic information in hiring, etc.). Existing unlawful employment practices are codified at ORS 659A.029 to 659A.360.

If a bill draft prohibits discrimination in providing services based on classifications declared to be invalid by the draft, the drafting attorney should consider making the prohibited activity an unlawful practice under ORS chapter 659A. See, e.g., ORS 659A.403 (unlawful discrimination in public accommodations).

A draft can make the prohibited activity an unlawful practice or unlawful employment practice by adding the section containing the prohibition to ORS chapter 659A and declaring the practice to be either an unlawful practice or unlawful employment practice. See ORS 659A.001 (defining unlawful practice and unlawful employment practice).

If a drafting attorney adds a new section to ORS chapter 659A, declares the prohibited practice to be either an unlawful practice or an unlawful employment practice, and does nothing else, the sole remedy for an aggrieved person will be the administrative procedures provided in ORS 659A.800 to 659A.865. Almost all unlawful practices and unlawful employment practices are also subject to enforcement by a civil action under ORS 659A.885. If ORS 659A.885 is amended to provide a civil action, the drafting attorney must determine whether the requester would prefer to have a civil action under ORS 659A.885 (2) (no punitive damages or jury trial; de novo review on appeal) or 659A.885 (3) (punitive damages, jury trial available; no de novo review on appeal).

e. Unlawful Trade Practice.

If a draft prohibits certain activities by persons engaged in commercial activities, the drafting attorney should consider making violation of the prohibition an unlawful trade practice under ORS 646.605 to 646.652. The prohibited activity can be made an unlawful trade practice by amending ORS 646.608 to include a reference to the new section. Unlawful trade practices are subject to enforcement by the Attorney General and district attorneys (ORS 646.632) and by private civil action (ORS 646.638).

f. Bond Provision.

A surety bond in favor of the state may be used to provide protection of the public if the person putting up the security defaults. The bonds are appropriate for construction projects or other types of activity when default is based on a clear finding of fact. For example:

SECTION _____. (1) Every person proposing to construct a domestic sewerage system shall file with the agency a surety bond in an amount required by the agency, but not to exceed $25,000. The bond must be executed in favor of the State of Oregon and its form is subject to approval by the Attorney General.

(2) The agency may permit the substitution of other security for the bond, in such form and amount as it considers satisfactory. The form of the other security is subject to approval by the Attorney General.

(3) The bond or other security shall be forfeited in whole or in part to the State of Oregon by a failure to follow the plans and specifications approved by the agency in the construction of the domestic sewerage system or by a failure to have the system maintained and operated in accordance with the rules of the agency. The bond or other security shall be forfeited only to the extent necessary to obtain compliance with the approved plans and specifications or the rules of the agency. The agency may expend the amount forfeited to obtain compliance with the approved plans and specifications of its rules.

(4) If a failure as described in subsection (3) of this section occurs and part of the bond or other security remains unforfeited, any person, including a public body, who has suffered loss or damage by reason of the failure has a right of action upon the bond or other security and may bring a suit or action in the name of the State of Oregon for the use and benefit of the person. This remedy is in addition to any other remedy that the person who suffered loss or damage may

have against the person who failed to follow the approved plans and specifications of the rules of the agency.

(5) If the ownership of the domestic sewerage system is acquired or its operation and maintenance assumed by a public body, the bond or other security is terminated as security for the purposes of this section. The agency shall return the bond or other security to the person who filed it.

ORS 658.419 contains another example. Provisions that accomplish the same purpose as a statement under oath are contained in ORS 305.810, 305.815 and 305.990.

g. Adverse Presumption.

It usually is not clear whether an adverse presumption merely shifts the burden of going forward with the presentation of evidence. An adverse presumption relating to proof of an element of a crime may be problematic. State v. Rainey, 298 Or. 459 (1985).

The following example illustrates this type of provision:

SECTION _____. The finding of fish, taken out of season, is prima facie evidence that the fish were taken by the person who has control over the place where the fish were found.

Other examples are contained in ORS 273.241, 496.690 and 506.610.

h. Denial of Standing to Sue.

The requester may find it advantageous, in enforcing a regulatory law, to deny standing to sue to any person who does not comply with the requirements of the law. The following example is based on ORS 345.210:

SECTION _____. A career school may not bring or maintain an action in any court in this state for a cause arising out of its doing business as a career school in this state unless the career school alleges and proves that it held a valid license to operate as a career school in this state at the time the cause of action arose.

CHAPTER TWELVE

NORMAL EFFECTIVE DATE; EMERGENCY CLAUSE; EFFECTIVE DATES; APPLICABLE DATES; OPERATIVE DATES; DOUBLE AMENDING; LIMITED DURATION; REFERENDUM; SPECIAL ELECTIONS

1. NORMAL EFFECTIVE DATE.

Since the enactment of ORS 171.022 in 1999, the normal effective date for Acts of the Legislative Assembly is January 1 of the year after passage of the Act.[1] A bill can take effect on another date only if there is a provision in the bill for that effective date. The provision could be an emergency clause, an early effective date (nonemergency), a delayed effective date or a section ordering a legislative referral of the Act to an election. Bills referred to the people by a statewide referendum petition also take effect on a date other than the normal effective date.

2. EMERGENCY CLAUSE.

a. Generally.

An emergency clause is a provision that allows an Act to take effect *before* the 91st day after the end of the session. The effective date can be either on passage or on a specific date that is after passage but before the 91st day after the end of session. If the Governor does not sign the bill until after the date specified in the emergency clause, the bill becomes effective on the date the Governor signs the bill.[2] Because it is difficult to predict the exact date of adjournment sine die, a good practice is to use an emergency clause on a regular session bill only if the bill is intended to take effect before November 1 (odd-year sessions) or early June (even-year sessions) of the session year.

Use of an emergency clause must comply with Article IV, section 28, of the Oregon Constitution, which provides that "[n]o act shall take effect, until ninety days from the end of

[1] Prior to 1999, the normal effective date was 90 days after the end of session.
[2] *Armstrong v. Asten-Hill Co.*, 90 Or. App. 200 (1988), *citing Bennett Trust Co. v. Sengstacken*, 58 Or. 333 (1911) and *Thomas v. Hoss*, 143 Or. 41 (1933).

the session at which the same shall have been passed, except in case of emergency; which emergency shall be declared in the preamble, or in the body of the law." Although the Oregon Constitution allows for the declaration of an emergency in the preamble, the practice of this office is to make the declaration in the body of the bill and in a standardized form (see subsection b of this section). When an emergency is declared in the body of the bill, the clause "declaring an emergency" must appear in the bill title.

An emergency clause applies to the *entire bill* and *must not* contain any other provision. If the drafter needs an emergency clause for some parts of the bill and a different effective date for other parts of the bill, the drafter should use an emergency clause for the bill and an operative date section for the other parts of the bill (see section 6 of this chapter).

Any Act that does not become effective earlier than 90 days after the end of session may be subject to a referendum,[3] which means that an emergency clause prevents an Act from being referred to the people.[4] The Governor has the authority to veto an emergency clause,[5] thereby protecting the right of the people to a statewide referendum petition. The veto of an emergency clause causes the bill to have a normal effective date. [6] The referendum right is preserved for all tax measures, which is why tax measures may not include an emergency clause (see subsection c of this section). An Act that is referred to and approved by the people becomes effective 30 days after the date on which the Act is approved by the voters.[7]

General guidance for when to use an emergency clause is: (1) when an Act is to take effect before the 91st day after adjournment sine die; (2) when an Act makes additional appropriations for the current biennium; or (3) when an Act makes appropriations for the next biennium. General guidance for when not to use an emergency clause is: (1) when an Act contains a provision regulating taxation or exemption; or (2) when the effective date of an Act is after November 1 of an odd-year session or early June of even-year session.

In Oregon, the question of whether an emergency exists for the purpose of the use of an emergency clause is a legislative matter, not a judicial matter. The courts will not examine the facts to determine if an emergency exists in fact.[8]

b. Form.

When the legislative intent is to have a bill effective on passage, the following form of emergency clause is used: <spm emer>

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[3] Article IV, section 1 (3)(a), Oregon Constitution.
[4] *Sears v. Multnomah County*, 49 Or. 42 (1907); *Multnomah County v. Mittleman*, 275 Or. 545 (1976).
[5] Article V, section 15a, Oregon Constitutuion.
[6] *Lipscomb v. State*, 305 Or. 472 (1988).
[7] Article IV, section 1 (4)(d), Oregon Constitution. *See also Portland Pendleton Motor Transp. Co. v. Heltzel,* 197 Or. 644 (1953). For a discussion about when an Act that is subsequently referred to the people becomes enacted*, see Am Energy, Inc. v. City of Sisters*, 250 Or. App. 243 (2012).
[8] *Kadderly v. City of Portland*, 44 Or. 118 (1903); *Stoppenback v. Multnomah County*, 71 Or. 493 (1914); *Simpson v. Winegar*, 122 Or. 297 (1927); *Greenberg v. Lee*, 196 Or. 157 (1952); *Multnomah County v. Mittleman*, 275 Or. 545 (1976).

SECTION . This (year) Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this (year) Act takes effect on its passage.

When the legislative intent is to have a bill provide for a specific effective date *after* passage but *before* the 91st day after the end of session, specify the date when the bill is to become effective (such as "July 1, 2019") as follows:

SECTION . This (year) Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this (year) Act takes effect July 1, (year).

c. Tax Bills.

Under Article IX, section 1a, Oregon Constitution, an emergency may not be declared "in any act regulating taxation or exemption." The primary purpose of this provision is to preserve the right of the people to refer by petition every bill regulating taxation or exemption. The provision also has the effect of creating awkward problems when tax bills must coincide with state fiscal years. One solution is to defer the effective date until July 1 of the year following enactment. Another solution is to prescribe an effective date that provides that the bill takes effect on the 91st day after the date the Legislative Assembly adjourns sine die and to include an applicable date provision (see section 5 of this chapter).

Even though adding an emergency clause to a tax bill is not constitutionally allowed, the improper addition of an emergency clause to a tax bill does not render the Act itself invalid.[9] When the Oregon Supreme Court struck an improperly added emergency clause, the court concluded that the effective date of the remaining provisions of the bill would be 90 days after the end of the session.[10] Please note that this decision was made before ORS 171.022 was enacted and when the normal effective date was 90 days after the end of session. Presumably, such a measure now would become effective on January 1 of the year following enactment.

3. EARLY EFFECTIVE DATES (NONEMERGENCY).

A bill prescribes an early effective date (nonemergency) if the Act is to take effect on a date that is *after* the 90th day after the end of session and *before* the normal effective date of January 1 of the year after passage. When an early effective date is prescribed in the body of the bill, the clause "prescribing an effective date" must appear in the bill title.

The following language should be used in the bill when prescribing an effective date on the 91st day after the end of session: <spm e91>

SECTION . This (year) Act takes effect on the 91st day after the date on which the (year) regular session of the Legislative Assembly adjourns sine die.

If a requester wants an Act to take effect on a specific date between the 91st day and January 1 of the year following the session, the date can be prescribed in the bill. An example

[9] *Advance Resorts of Am. v. City of Wheeler*, 141 Or. App. 166 (1996); 42 Op. Att'y Gen. 277, 281 (1982).
[10] *Mt. Sexton Properties, Inc. v. Dep't of Revenue*, 306 Or. 465 (1988).

of the language to use in the bill when prescribing a specific effective date between the 91st day after the end of session and January 1 of the year following the session is:

SECTION __. This (year) Act takes effect on October 1, (year).

4. DELAYED EFFECTIVE DATES.

A bill prescribes a delayed effect date if the Act is to take effect after the normal effective date (on or after January 2 of the year following the legislative session). When a delayed effective date is prescribed in the body of the bill, the clause "prescribing an effective date" must appear in the bill title. The following language should be used when prescribing a delayed effective date:

SECTION __. This (year) Act takes effect on March 1, (year+1).

5. APPLICABLE DATES.

a. Generally.

An applicable date can provide a similar effect to an effective or operative date or can assist in the interpretation of a bill. While a provision that establishes an applicable date can be a powerful tool when drafting tax bills (see subsection c of this section), the provision should be used carefully for nontax bills.

An applicable date is considered to be "creating new provisions" for purposes of the bill title.

b. Nontax Bills.

For nontax bills, a provision with an applicable date should provide clarity for the interpretation of the bill but should not take the place of an effective or operative date. Drafting attorneys are discouraged from relying on an applicable date to establish an effective or operative date in a nontax bill because applicable dates are not tracked for purposes of the A & R Tables. If a drafter relies on an applicable date to establish the effective or operative date of the bill, a conflict could be missed during a conflicts check. An example of the proper use of an applicable date for a nontax bill is:

SECTION __. (1) The amendments to ORS 339.133 by section 1 of this 2019 Act become operative on July 1, 2019.

(2) The amendments to ORS 339.133 by section 1 of this 2019 Act apply to school years beginning on or after July 1, 2019.

An applicable date also can be useful for statutes that have multiple steps in a process. An operative date may be needed to begin the administrative functions of the process while an applicability date is required for the general application of the process. Subject areas in which this may occur include the budget process, elections and health insurance because administrative functions may need to occur before the budget is finalized, the election is held or the health insurance is made available to the consumer. An example of the proper use of an applicable date in this instance is:

SECTION __. (1) Section 1 of this 2019 Act becomes operative on July 1, 2020.
(2) Section 1 of this 2019 Act first applies to elections held on or after January 1, 2021.

c. Tax Bills.

Although an emergency clause cannot be included in a bill "regulating taxation or exemption," a bill relating to certain types of taxes can be given *retroactive application* (sometimes a rather tenuous distinction) by adding an appropriate provision. An example of that provision is:

SECTION __. Sections 1 to 8 of this (year) Act apply to tax years beginning after December 31, (year-1).

OR

SECTION ___. The amendments to ORS ___ by section ___ of this (year) Act apply to property tax years beginning on or after July 1, (year).

OR

SECTION __. Section ___ of this (year) Act applies to all tax years, the returns for which are open to audit or adjustment on the effective date of this (year) Act.

OR

SECTION __. Section ___ of this (year) Act first applies to taxes levied by cities for the fiscal year beginning July 1, (year-1).

6. OPERATIVE DATES.

a. Generally.

An operative date section is a provision that allows parts of a bill to become operative at a later date than the rest of the bill. An operative date section may be necessary if multiple effective dates are required for a bill, if a section needs to be further amended at a later date, if administrative actions are required before a statute is fully implemented, or if operation of the entire bill is delayed until a future event occurs. It would be improper to authorize certain actions to be taken before an Act becomes effective, which is why an operative date section is used.

When an operative date section is used, the entire bill takes effect on the effective date of the bill, but a specified part of the Act does not become operational until the date specified in the operative date section. Operative date provisions should always be in a separate section than the substantive provisions of a bill. For purposes of the bill title, an operative date is considered to be "creating new provisions."

b. Multiple Effective Dates.

If some sections of an Act need to be implemented before other sections of the Act are implemented, use an effective date for the sections that become implemented first and an

operative date section for the sections that need to be implemented later. For example, a drafter may need an emergency clause for some sections of a bill, but may need the normal effective date for other sections of the bill. Remember that the entire bill will take effect on the effective date of the bill, but only the sections specified in the operative date section will become effective on the later date. Below is an example of when an emergency clause is needed for some sections of the bill and a normal effective date for other sections of the bill:

SECTION 12. Section 11 of this 2019 Act becomes operative on January 1, 2020.

SECTION 13. This 2019 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2019 Act takes effect on its passage.

c. Further Amendments.

If a program is being phased in or will be changed at a later day, the statute that creates the program may need to be amended twice in the same bill to reflect those policy choices. The following is an example of how to phase in or change a program with the use of operative dates:

SECTION 2. Section 1 of this 2019 Act becomes operative on January 1, 2020.

SECTION 4. Section 1 of this 2019 Act, as amended by section 3 of this 2019 Act, becomes operative on January 1, 2022.

d. Administrative Actions.

When using an operative date, distinguish between actions that are authorized on and after the effective date and actions that are not authorized until the operative date. The use of separate sections helps maintain this important distinction, as shown in the example below:

SECTION 11. Section 7 of this 2019 Act and the amendments to ORS 677.265 by section 9 of this 2019 Act become operative on January 1, 2020.

SECTION 12. The Oregon Medical Board may take any action before the operative date specified in section 11 of this 2019 Act that is necessary for the board to exercise, on and after the operative date specified in section 11 of this 2019 Act, all of the duties, functions and powers conferred on the board by section 7 of this 2019 Act and the amendments to ORS 677.265 by section 9 of this 2019 Act.

SECTION 13. This 2019 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2019 Act takes effect on its passage.

e. Contingent on Future Event.

Usually, an entire Act becomes effective on the effective date of the bill and only part of the Act is subject to an operative date delay. Occasionally, however, the operation of the entire bill may be delayed until a future event occurs.

Making the operation of all or parts of a bill contingent on a future event should be approached with extreme caution. Article I, section 21, Oregon Constitution, prohibits passage of any law "the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." The purpose of this provision is to prevent unlawful

delegation of legislative authority. However, as the Oregon Supreme Court said in *Marr v. Fisher*:

> While the legislature cannot delegate its power to make a law, it is well settled that it may make a law to become operative on the happening of a certain contingency or future event.[11]

The test used by the *Marr* court was whether the Act was complete in and of itself when it was passed by the Legislative Assembly and approved by the Governor. If so, the Legislative Assembly has the power to make the Act operative upon the happening of a specific event.[12]

When an Act or a part of an Act is to become operative contingent upon the happening of a future event, the drafter should think about how people reading the law are going to determine if the future event happened. In the *Marr* case, the determination was easy because the future event was a vote of the people on a bill referred by the legislature to a specific election. For other situations, a drafter may consider including a provision that specifies a date by which action must be taken or that requires an agency to submit a report to the appropriate legislative committee and to the Legislative Counsel upon the fulfillment of the contingency.

The following examples may suggest appropriate language for making an operative date contingent on a future event:

SECTION 6. (1) Sections 1 to 4 of this 2019 Act become operative on the date the Department of Transportation adopts rules under section 5 of this 2019 Act.

(2) The department must adopt rules under section 5 of this 2019 Act no later than January 1, 2021.

OR

SECTION 18. (1) Sections 10 and 13 of this 2019 Act become operative on the day after the date the Department of Human Services receives the necessary waivers from the Centers for Medicare and Medicaid Services.

(2) The Director of Human Services shall notify the interim committees of the Legislative Assembly related to health care and the Legislative Counsel upon receipt of the waivers or denial of the waiver request.

7. TEMPORARY CHANGES (DOUBLE AMENDING).

a. Generally.

Sometimes the Legislative Assembly decides to make a temporary change to a permanent law. This decision could require creative drafting because a drafter should avoid amending permanent law with temporary provisions. One approach for capturing the legislative intent is to create a temporary section that notwithstands the permanent law and provides the temporary provision. Another approach is to amend the permanent law so that it will read a certain way for a limited period, and then amending the law again to read another way thereafter (double amending).

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[11] 182 Or. 383, 388 (1947).
[12] *Id*.

b. Temporary section.

A new section setting forth the temporary provisions is sometimes preferable to a double amendment. This technique can be used when most of the ORS section can be left in place but some requirement, such as a license fee, needs to be changed for a short period. For example:

> **SECTION 1. Notwithstanding ORS 418.020, for the period beginning July 1, (year), and ending _____, the credit allowed under ORS 418.020 shall be reduced . . . .**

c. Double amending.

If the temporary changes to a permanent provision are extensive or when a separate, temporary section may cause confusion, the drafter should double amend the new section or the ORS section.

When amending a section the second time, the text of the second amendment should be based on the section *as it is amended* by the first amendment by removing the bracketed text and making the bold text lightface. This procedure is used even when the second amendment restores the section back to the original text. This practice avoids any possible constitutional questions about setting out amended sections in full.[13] Examples of double amending are:

> **SECTION 1. A licensee must complete at least 10 hours of training in good manners.**
>
> **SECTION 2.** Section 1 of this 2019 Act is amended to read:
>
> **Sec. 1.** A licensee must complete at least [*10*] **12** hours of training in good manners.
>
> **SECTION 3. The amendments to section 1 of this 2019 Act by section 2 of this 2019 Act become operative on July 1, 2021.**
>
> **OR**
>
> **SECTION 2.** ORS 123.456 is amended to read:
>
> **123.456.** A licensee must complete at least [*10*] **12** hours of training in good manners.
>
> **SECTION 3.** ORS 123.456, as amended by section 2 of this 2017 Act, is amended to read:
>
> **123.456.** A licensee must complete at least [*12*] **15** hours of training in good manners.
>
> **SECTION 4. (1) Section 1 of this 2017 Act becomes operative on July 1, 2017.**
>
> **(2) The amendments to ORS 123.456 by section 3 of this 2017 Act become operative on July 1, 2020.**

Note that an operative date section is required to specify when the second version becomes effective.

If a section has been double amended during a previous legislative session and the operative date of the sections may require the drafter to amend both versions of the section, then both versions of the section will be retrieved when the section is brought up for drafting in DW370. Amend the sections based on legislative intent as follows:

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[13] *See* Article IV, section 22, Oregon Constitution.

- For *permanent changes* that will apply to both versions of the bill, *amend both sections identically*.
- For *permanent changes that apply only to the future version* because the changes are to become operative on the same date that the future version becomes operative, *amend only the future version*.
- For *temporary changes that apply only to the current version* and go away when the future version becomes operative, *compress and expand the versions* as explained below.
- For *permanent changes that are altered between the current and future versions*, *compress and expand the versions* as explained below.

Compressing and expanding multiple versions of a section may seem tedious, but the approach is necessary to set out the amendments in full and to clearly show changes to statute. Without compressing and expanding versions, language in the current version would change or disappear for the future version without any clear visual cues for why the changes or disappearance occurred. To compress and expand multiple versions, do the following:

1. Compress the two versions by removing the delayed operative date for the future version. If the delayed operative date is in its own section, repeal that section so that the future version becomes operative on the effective date of the bill in which the changes are being made. If the delayed operative date is in a section that has other provisions, change the operative date to the effective date of the bill in which the changes are being made. These changes result in the future version of the section becoming the new current version of the section.
2. Amend the new current version of the section to match the old current version. Make any other amendments requested for the purpose of the current legislation.
3. Create a new future version of the section by further amending the new current version of the section to match the old future version, with any amendments requested for the purpose of the current legislation.
4. Include an operative date section for the new future version of the section.

An example of the compression and expansion of multiple version is as follows:

SECTION 1. Section 4, chapter 1, Oregon Laws 2017, is amended to read:

Sec. 4. (1) Section 1 [*of this 2017 Act*]**, chapter 1, Oregon Laws 2017,** becomes operative on July 1, 2019.

(2) The amendments to ORS 123.456 by section 3 [*of this 2017 Act*]**, chapter 1, Oregon Laws 2017,** become operative on [*July 1, 2020*] **the effective date of this 2019 Act**.

SECTION 2. ORS 123.456, as amended by section 3, chapter 1, Oregon Laws 2017, is amended to read:

123.456. A licensee must complete at least [*15*] **12** hours of training in good manners **and must complete at least 20 hours of community service**.

SECTION 3. ORS 123.456, as amended by section 3, chapter 1, Oregon Laws 2017, and section 2 of this 2019 Act, is amended to read:

123.456. A licensee must complete at least [*12*] **15** hours of training in good manners and must complete at least [*20*] **40** hours of community service.

SECTION 4. The amendments to ORS 123.456 by section 3 of this 2019 Act become operative on July 1, 2020.

Sometimes the Legislative Assembly decides that the current version should not be further amended as provided by the future version. In that situation, follow steps 1 and 2 above to compress the versions, but do not make any other changes to create future versions.

8. PROVISIONS OF LIMITED DURATION ("SUNSET" PROVISIONS).

a. Generally.

If an Act or sections of an Act need to be of limited duration, use one of the following provisions (commonly referred to as "sunset" provisions):

SECTION __. Section 1 of this (year) Act is repealed on January 2, (year + number of years effective).

OR

SECTION __. Section 1 of this (year) Act is repealed on June 30, (year + odd number of years effective).

The sunset repeal date should be either (1) January 2 of any year, or (2) June 30 of an even-numbered year. These dates avoid the necessity of "lapse language" to extend sunsets during a regular legislative session. There are *two exceptions* to this rule: (1) A June 30 sunset in an odd-numbered year may be imperative if the temporary provisions are dependent on a fiscal year or the biennial budget cycle; or (2) The sunset date is for an interim committee or interim task force, in which case the sunset date is December 31, (year following session year), in most cases.

b. Extending Duration of "Sunsetted" Legislation.

The Legislative Assembly sometimes will decide that an Act of limited duration (a law with a specific date of repeal or "sunset" date) should either be extended for a longer duration or should become permanent.

If the date on which the Act is scheduled for repeal is January 2 of any year or June 30 of an even-numbered year, the continuance of the Act beyond that date does not usually present any serious legal or administrative problems that must be considered and dealt with by the drafter. In such cases, the drafter may simply prepare a section that repeals or amends the section in the previous legislation that established the sunset date. A sunset date that is later than January 1 after the end of a regular legislative session provides assurance that the repeal or amendment of the sunset date will take effect prior to the sunset date and that the affected legislation will remain continuously in effect.

c. Avoiding Lapse of Legislation.

If the sunset date is a date that may be earlier than the date by which the Governor must approve or veto a bill,[14] a possibility exists that the "sunsetted" legislation may lapse. For example, suppose that a section enacted during the 2015 session has a sunset provision for June 30, 2019. If the Legislative Assembly decides during the 2019 session to make that section permanent, then the sunset provision must be repealed. However, even with an emergency clause that makes the repeal of the sunset provision effective on June 30, 2019, there is no assurance that the Governor will sign the bill on or before that date. If the Governor signs the bill *after* June 30, 2019, there is a period of time during which the repeal of the affected legislation takes effect.

If a repeal of affected legislation takes effect, the Legislative Assembly may need to reenact the section to make the section effective again. ORS 174.080 declares that "[w]henever a statute which repealed a former statute, either expressly or by implication, is repealed, the former statute shall not thereby be revived unless it is expressly so provided[.]" At present, there is no consensus among authorities in this state as to whether the passage of a bill simply repealing a sunset provision, and taking effect after the sunset date, constitutes a clear expression of intent under ORS 174.080 sufficient to revive the affected legislation. Even if the affected legislation is revived by the passage of a bill repealing the sunset provision, uncertainty is created concerning the validity of actions taken or obligations incurred under the affected legislation during the period in which the legislation is lapsed. Therefore, to avoid the legal and administrative problems caused by a temporary lapse of legislation under the circumstances described, the following example may be useful: <spm lapse>

> **SECTION 1. Section 2, chapter 1, Oregon Laws 2015, is repealed.**
>
> **SECTION 2. If this 2019 Act does not become effective until after June 30, 2019, the repeal of section 2, chapter 1, Oregon Laws 2015, by section 1 of this 2019 Act revives section 1, chapter 1, Oregon Laws 2015. If this 2019 Act does not become effective until after June 30, 2019, section 1 of this 2019 Act shall be operative retroactively to that date, and the operation and effect of section 1, chapter 1, Oregon Laws 2015, shall continue unaffected from June 30, 2019, to the effective date of this 2019 Act and thereafter. Any otherwise lawful action taken or otherwise lawful obligation incurred under the authority of section 1, chapter 1, Oregon Laws 2015, after June 30, 2019, and before the effective date of this 2019 Act, is ratified and approved.**
>
> **SECTION 3. This 2019 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2019 Act takes effect June 30, 2019.**

The lapse language from the previous example may be revised for circumstances when a sunset is extended instead of repealed. For example:

> **SECTION 1.** Section 20, chapter 10, Oregon Laws 2015, is amended to read:
>
> **Sec. 20.** Section 19, chapter 10, Oregon Laws 2015, is repealed on June 30, [*2019*] **2021**.
>
> **SECTION 2. If this 2019 Act does not become effective until after June 30, 2019, the amendments to section 20, chapter 10, Oregon Laws 2015, by section 1 of this 2019 Act revive section 19, chapter 10, Oregon Laws 2015. If this 2019 Act does not become effective until after**

[14] *See* Article V, section 15b, Oregon Constitution.

June 30, 2019, this 2019 Act shall be operative retroactively to that date, and the operation and effect of section 19, chapter 10, Oregon Laws 2015, shall continue unaffected from June 30, 2019, to the effective date of this 2019 Act and thereafter. Any otherwise lawful action taken or otherwise lawful obligation incurred under the authority of section 19, chapter 10, Oregon Laws 2015, after July 1, 2019, and before the effective date of this 2019 Act, is ratified and approved.

SECTION 3. This 2019 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2019 Act takes effect June 30, 2019.

In a bill of limited duration, a saving clause to save rights and liabilities that accrue while the law is in effect may be necessary. See chapter 10 "Clauses relating to bill's application (saving clauses)."

d. Reversion of Appropriated Moneys to General Fund When Act Expires.

If moneys are appropriated from the General Fund for the purposes of an Act and the remainder of the moneys is to revert to the General Fund when the Act expires, the following language may be appropriate:

SECTION __. All moneys appropriated by section ___ of this (year) Act that are unexpended and unobligated on the date of the repeal of section ___ of this (year) Act shall revert to the General Fund and be available for general governmental expenses.

If some of the moneys are federal in origin, the provision for their reversion to the General Fund should be omitted if, in fact, the moneys must go elsewhere under federal law.

If appropriating the remainder of the moneys for another purpose, the following may be appropriate:

SECTION __. All moneys appropriated by section ___ of this (year) Act that are unexpended and unobligated on the date of the repeal of section ___ of this (year) Act, after allowing a period of six months for the presentation of additional claims, are appropriated to the Emergency Fire Cost Account to be available for expenditure in the manner of other moneys in that account.

Moneys appropriated for a limited period, such as a biennium, automatically revert to their source at the expiration of the period.

If moneys were collected by some authority under a temporary Act and the legislative intent is to distribute the remainder of the moneys for another purpose when the Act expires, consider the following:

SECTION ____. Any balance in the Animal Disease Account that is unexpended and unobligated on the date of repeal of section ___ of this (year) Act, and all moneys that would have been deposited in the Animal Disease Control Account had section ___ of this (year) Act remained in effect, shall be transferred to and deposited in the Hog Cholera Account, and are appropriated for expenditure in the manner of other moneys in the Hog Cholera Account.

e. Tax Credits.

ORS 315.037 provides that any tax credit enacted by the Legislative Assembly on or after January 1, 2010, applies for a maximum of six tax years beginning with the initial tax

year for which the credit is applicable, unless the Legislative Assembly expressly provides for another period of applicability. It may be helpful to remind requesters of this provision if they do not ask for a certain sunset.

For tax credits enacted on or after January 1, 2010, without an applicability end date, the Legislative Assembly by law will need to directly extend the credit prior to the end of the applicable six-year period or the credit will not apply after the end of the six-year period. This may be accomplished by enacting an applicability provision.

Note that ORS 315.037 does not apply to tax credits enacted prior to January 1, 2010, or to tax credits enacted by initiative or referendum. Note also that the application of ORS 315.037 can be avoided by adding an applicability clause, which is currently standard procedure, or by indicating that a tax credit applies "notwithstanding ORS 315.037."

f. Health Insurance Mandates.

ORS 743A.001 provides that a statute mandating specific types of health insurance coverage is "repealed on the sixth anniversary of the effective date of the statute." ORS 743A.001 does not apply to statutes that became effective before July 13, 1985, to statutes specified ORS 743A.001 (4) or if "the Legislative Assembly specifically provides otherwise." If a requested health insurance mandate falls within the types of mandates described in the statute, it is important to remind the requester of this provision.

Most of the health insurance mandates are found in ORS chapter 743A. If a requester wishes to exempt a mandate from the effect of ORS 743A.001, add a subsection stating that "this section is exempt from ORS 743A.001." For example, see ORS 743A.012 (6).

In the editing process, we do not remove statutes that have likely been "repealed" by the operation of ORS 743A.001.

9. REFERENDUM.

a. Generally.

An Act may be referred by the Legislative Assembly to the people for their approval or rejection.[15] If an Act is referred to the people, the referred Act bypasses the Governor and the referred question is voted on at the next regular general election or at a special election ordered by the Legislative Assembly.[16] If a bill is to be referred to the people, the bill must include a referendum clause. When a referendum clause is in the bill, the bill title must include the clause "providing that this Act shall be referred to the people for their approval or rejection" <spm refertitle>.

When a bill is referred to the people, the Legislative Assembly may prepare a ballot title for the bill under ORS 250.075. (See subsection h below.) If a ballot title is not provided by

[15] Article IV, section 1, Oregon Constitution.
[16] Article IV, section 1 (4)(c), Oregon Constitution.

the Legislative Assembly, a ballot title must be provided by the Attorney General.[17] ORS 251.255 provides for space in the voters' pamphlet for the printing of arguments for and against Acts referred by the Legislative Assembly. ORS 251.245 provides for the appointment of a joint legislative committee to prepare and file a voters' pamphlet argument advocating for a referred Act. A drafter should remind members of the opportunity to file this free argument.

Acts that are referred by the Legislative Assembly and adopted by the people take effect 30 days after the election.[18] More information about the effect of an effective date or operative date provision in an Act referred by the Legislative Assembly to the people is explained in *Portland Pendleton Motor Transp. Co. v. Heltzel*.[19]

A regular general election occurs on the first Tuesday after the first Monday in November of each even-numbered year.[20] A primary election takes place on the third Tuesday in May of each even-numbered year.[21] A special election on a referred Act may be held on same date as the next primary election or on another date. A list of authorized dates for legislatively prescribed elections is provided in ORS 171.185.

b. Forms for Referendum Clause at Statewide General or Primary Election.

The following form is standard for submission of an Act at a general election: <spm general-act>

> **SECTION __. This (year) Act shall be submitted to the people for their approval or rejection at the next regular general election held throughout this state.**

The following form is standard for submission of an Act at a primary election: <spm primary-act>

> **SECTION __. This (year) Act shall be submitted to the people for their approval or rejection at a special election held throughout this state on the same date as the next primary election.**

c. Referral at Special Election.

A drafter may be asked to refer an Act to the people at an election date that is different than the date of the primary election or the general election. Since the primary and general elections are the only two regularly scheduled statewide elections, an Act that is referred to another "special election" must usually be accompanied by a separate special election bill. The special election bill calls the election, appropriates moneys to conduct the election and sets the election procedures. Special procedures are needed because the existing law for statewide elections applies only to primary and general elections. While there are several ways to refer an Act to a special election, in each case the drafter must be careful to ensure that a

[17] *See* ORS 250.075.
[18] Article IV, section 1 (4)(d), Oregon Constitution.
[19] 197 Or. 644 (1953). *See also* 29 Op. Att'y Gen. 287 (1959).
[20] ORS 254.056 (1).
[21] ORS 254.056 (2).

separate special election bill takes care of the election process. See section 10 of this chapter for details and examples of special election bills.

If requested to allow submission of an Act at a special election, or at the primary or general election if the special election bill does not pass, the drafter should insert the appropriate language in the referendum clause of the Act being referred: <spm special-act-op>

> **SECTION __. This (year) Act shall be submitted to the people for their approval or rejection at a special election held throughout this state on the date specified in section ___, chapter ___, Oregon Laws (year) (Enrolled _____ Bill ___). If a special election is not held throughout this state on the date specified in section ___, chapter ___, Oregon Laws (year) (Enrolled _____ Bill ___), this (year) Act shall be submitted to the people for their approval or rejection at** [insert either "**a special election held throughout this state on the same date as the next primary election**" *or* "**the next regular general election held throughout this state**"]**.**

If requested to submit an Act at a special election *only*, the following language should be used (note that the Act will not be referred if the special election bill does not pass): <spm special-act>

> **SECTION __. This (year) Act shall be submitted to the people for their approval or rejection at a special election held throughout this state as provided in chapter ___, Oregon Laws (year) (Enrolled _____ Bill ___).**

d. Provision for Special Election if Act Referred.

When the Legislative Assembly does not refer an Act to the people but the possibility of the measure being referred by a statewide referendum petition exists,[22] the Legislative Assembly may direct that the bill be voted on at a special election if the bill is referred. The method of making that direction is in a separate bill. The drafter should consider whether an emergency clause is necessary, especially if the bill that is the subject of a statewide referendum petition is to be voted on at a special election.

If the Legislative Assembly directs a bill that is the subject of a statewide referendum petition to a special election held on the same date as the next primary election, use:

> **SECTION __. If _____ Bill ___ is referred to the people by petition under Article IV, section 1 (3)(b), of the Oregon Constitution, it shall be submitted to the people for their approval or rejection at a special election held throughout this state on the same date as the next primary election.**

If the Legislative Assembly directs a bill that is the subject of a statewide referendum petition to a special election that is being ordered by a special election bill as described above, use:

> **SECTION __. If _____ Bill ___ is referred to the people by petition under Article IV, section 1 (3)(b), of the Oregon Constitution, it shall be submitted to the people for their approval or rejection at:**

[22] *See* Article IV, section 1 (3)(a), Oregon Constitution.

(1) A special election held throughout this state on the date specified in section ___, chapter ___, Oregon Laws (year) (Enrolled _____ Bill ___); or

(2) If a special election is not held throughout this state on the date specified in section ___, chapter ___, Oregon Laws (year) (Enrolled _____ Bill ___), at [insert either "**a special election held throughout this state on the same date as the next primary election after the referendum is ordered**" o*r* "**the next regular general election held throughout this state after the referendum is ordered**"]**.**

See section 10 of this chapter for details and examples of special election bills.

e. Enactment Dependent on Election.

If a constitutional amendment must be approved by the people before an Act may be enacted, the Act may require a conditional effective clause. This clause is distinct from a referral clause, and also might be used for a bill if another measure (a joint resolution) that is making the underlying, required Constitutional change is referred to the people. An example of a conditional effective clause is:

SECTION ____. This (year) Act does not take effect (become operative) unless the amendment to the Oregon Constitution proposed by _____ Joint Resolution ___ (year) is approved by the people at the regular general election held in November (year). This (year) Act takes effect (becomes operative) on the effective date of that amendment.

f. Referendum Clause to Refer Act to Voters of One County.

Referral of a "local" Act to the voters of only one county was accomplished in chapter 774, Oregon Laws 1955, by sections substantially similar to the following:

SECTION __. (1) This (year) Act shall be submitted to the people of Marion County for their approval or rejection at the next regular general election held throughout this state.

(2) The Secretary of State shall set aside one page in the voters' pamphlet being mailed to Marion County electors and containing measures referred to the people to be voted on at the next regular general election held throughout this state in which arguments in support of this (year) Act may be printed, and shall set aside one page in which arguments against this (year) Act may be printed, which arguments in support and against may be furnished by any person. In case more material is offered than can be printed in the space allotted, the Secretary of State shall select the part of the material to be printed.

SECTION __. This (year) Act takes effect upon its approval by a majority of the registered electors of Marion County voting on the ballot measure presented under section ___ of this (year) Act.

The provisions of subsection (2) of the first section are now covered by ORS 251.255 and are included here only to illustrate a different procedure. Chapter 665, Oregon Laws 1977, is an example of a bill that was referred to the electors of three counties. Chapter 565, Oregon Laws 1987, is an example of a bill that was referred to the electors of a port district.

g. Referral by Local Government.

Occasionally, the Legislative Assembly may wish to require a local referendum. An example of a local referendum clause is:

SECTION __. Any ordinance adopted by a county governing body imposing a new motor vehicle fuel tax or an increase in the rate of an existing motor vehicle fuel tax shall be submitted to the electors of the county for their approval or rejection.

SECTION __. Any ordinance adopted by a city governing body imposing a new motor vehicle fuel tax or an increase in the rate of an existing motor vehicle fuel tax shall be submitted to the electors of the city for their approval or rejection.

h. Ballot Titles

When a bill is referred to the people, the Legislative Assembly may prepare a ballot title for the bill under ORS 250.075. ORS 250.035 specifies the form for a ballot title, including limits on the number of words that may be used, although these provisions may be modified or suspended in the bill. If the ballot title alters the statutory framework described in ORS 250.035, include the phrase "Notwithstanding ORS 250.035…. " For example:

SECTION 1. (1) Notwithstanding ORS 250.035, the ballot title for House Bill 4079 (year) shall be:

To preclude judicial review of the ballot title under ORS 250.085 (perhaps for the purpose of saving time to accommodate a special election), include the following:

(2) ORS 250.085 does not apply to the ballot title contained in subsection (1) of this section. The ballot title contained in subsection (1) of this section shall be printed in the voters' pamphlet and printed on, or included with, the ballot.

For examples of ballot title bills, see chapter 5, Oregon Laws 2002 (second special session), chapter 1, Oregon Laws 2002 (third special session), chapter 592, Oregon Laws 2003, and chapter 648, Oregon Laws 2003.

10. SETTING SPECIAL ELECTIONS.

A separate special election bill is needed if a measure is referred to the people at a date other than the date of the biennial primary or general election or if existing statutory election procedures need to be modified. The special election bill typically orders the election, appropriates money to pay for the election and sets the specific procedures. The drafter can determine whether to include ballot titles, financial estimates, explanatory statements, etc., in the special election bill. An example of a bill calling a special election is:[23]

AN ACT

Relating to a special election; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Except as otherwise provided in this 2003 Act, ORS chapters 250, 251 and 254 apply to the special election held on the measure submitted under House Joint Resolution 18

[23] For examples of other bills calling a special election, see chapter 17, Oregon Laws 1995, chapter 5, Oregon Laws 1997, chapter 570, Oregon Laws 1997, chapter 911, Oregon Laws 1999, chapter 12, Oregon Laws 2002 (first special session), chapter 3, Oregon Laws 2002 (second special session), chapter 1, Oregon Laws 2002 (third special session), chapter 592, Oregon Laws 2003, and chapter 730, Oregon Laws 2003.

(2003).

SECTION 2. A special election shall be held throughout this state on September 16, 2003. The measure referred to in section 1 of this 2003 Act and that is otherwise referred to the people by the Legislative Assembly shall be submitted to the electors for their approval or rejection at the special election.

SECTION 3. (1) Notwithstanding ORS 250.035, the ballot title for House Joint Resolution 18 (2003) shall be:

AMENDS CONSTITUTION: AUTHORIZES STATE OF OREGON TO INCUR GENERAL OBLIGATION DEBT FOR SAVINGS ON PENSION LIABILITIES.

RESULT OF "YES" VOTE: "Yes" vote authorizes state to incur general obligation debt for savings on pension liabilities.

RESULT OF "NO" VOTE: "No" vote does not authorize state to incur general obligation debt for savings on pension liabilities.

SUMMARY: This measure amends the Oregon Constitution to authorize the State of Oregon to incur debt to finance pension liabilities of the state at a lower cost to the state and to pay costs of issuing and incurring indebtedness. The measure authorizes the Legislative Assembly to enact implementing legislation.

The measure specifies that indebtedness authorized by the measure is a general obligation of the state, backed by the full faith and credit and taxing power of the state, except ad valorem taxing power. The measure limits the amount of indebtedness outstanding at any time to one percent of the real market value of property in the state.

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(2) ORS 250.085 does not apply to the ballot title contained in this section. The ballot title prepared under this section shall be in the voters' pamphlet and as provided in section 8 of this 2003 Act.

SECTION 4. (1) Notwithstanding ORS 250.125, 250.127 and 250.131, the estimate of financial impact for House Joint Resolution 18 (2003) to be printed in the voters' pamphlet and as provided in section 8 of this 2003 Act shall be:

This measure has no direct financial effect to state or local government expenditures or revenues. However, general obligation indebtedness provides the lowest cost alternative among financing mechanisms. To the extent that the State of Oregon uses the authority to issue general obligation indebtedness rather than using more costly financing mechanisms, the State of Oregon should experience lower financing costs.

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(2) ORS 250.131 does not apply to the financial estimate contained in this section. The financial estimate contained in this section shall be printed in the voters' pamphlet and as provided in section 8 of this 2003 Act.

SECTION 5. (1) Notwithstanding ORS 251.205, 251.215, 251.225, 251.230 and 251.235, the explanatory statement to be printed in the voters' pamphlet for House Joint Resolution 18 (2003) shall be:

This measure amends the Oregon Constitution to authorize the State of Oregon to incur debt to finance the pension liabilities of the state at a lower cost to the state and to pay costs of issuing and incurring indebtedness. The measure authorizes the Legislative Assembly to enact implementing legislation.

The measure specifies that indebtedness authorized by the measure is a general obligation of the state, backed by the full faith and credit and taxing power of the state, except ad valorem taxing power. The measure limits the amount of indebtedness outstanding at any time to one percent of the real market value of property in the state.

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(2) ORS 251.235 does not apply to the explanatory statement contained in this section. The explanatory statement contained in this section shall be printed in the voters' pamphlet.

SECTION 6. (1) Arguments relating to the measure referred to in section 1 of this 2003 Act may be filed with the Secretary of State under ORS 251.245 and 251.255, except that an argument shall be filed not later than the date set by the Secretary of State by rule.

(2) Notwithstanding ORS 192.410 to 192.505 relating to public records, an argument filed under this section is exempt from public inspection until the fourth business day after the deadline for filing the argument.

SECTION 7. (1) The Secretary of State shall cause to be printed in the voters' pamphlet the number, ballot title and text of the measure referred to in section 1 of this 2003 Act and the financial estimate, explanatory statement and arguments relating to the measure. The Secretary of State shall also cause to be printed in the voters' pamphlet any other material required by law. Notwithstanding ORS 251.026, the Secretary of State shall include in the voters' pamphlet the information or statements described in ORS 251.026 that the Secretary of State considers applicable to the election on the measure referred to in section 1 of this 2003 Act. Notwithstanding ORS 251.285 and subject to ORS 251.008, the measure referred to in section 1 of this 2003 Act shall be the only measure included in the voters' pamphlet prepared under this section.

(2) Not later than the 10th day before the election, the Secretary of State shall cause the voters' pamphlet to be mailed to each post-office mailing address in Oregon and may use any additional means of distribution necessary to make the pamphlet available to electors.

(3) In preparing the voters' pamphlet under this section, the Secretary of State is not required to comply with ORS chapter 279B relating to competitive bidding.

SECTION 8. (1) Notwithstanding the deadline in ORS 254.085, the Secretary of State shall prepare and deliver to each county clerk by the most expeditious means practicable a certified statement of the measure referred to in section 1 of this 2003 Act. The Secretary of State shall include with the statement the number, financial estimate and full ballot title of the measure, and any other information required by law. The Secretary of State shall keep a copy of the statement.

(2) The county clerks shall print on the ballot the number, financial estimate and full ballot title of the measure, along with any other material required by law. In lieu of printing the financial estimate, the summary portion of the ballot title or other material required by law on the ballot, a county clerk may include with the ballot the complete text of the ballot title, the financial estimate and any other material required by law.

SECTION 9. (1) The Secretary of State may adopt rules governing the procedures for conducting the election on the measure referred to in section 1 of this 2003 Act as may be necessary to implement sections 1 to 9 of this 2003 Act.

(2) Notwithstanding ORS 254.465, the election on the measure referred to in section 1 of this 2003 Act shall be conducted by mail in all counties in this state as provided under ORS 254.470. [Note: This subsection is now obsolete due to amendments to ORS 254.465.]

SECTION 10. **This 2003 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2003 Act takes effect on its passage.**

CHAPTER THIRTEEN

CREATING NEW LAW; REPEALS; AMENDMENTS; CONFLICTING AMENDMENTS; ALTERNATIVES TO AMENDMENTS

A bill does one or more of the following:

Creates new law;
Repeals existing law; or
Amends existing law.

This chapter details the techniques of drafting sections that create, repeal or amend law. This includes how and why series are created and used, dealing with conflicts when multiple bills amend the same sections of law and amending or repealing session laws that are not compiled in ORS.

1. DRAFTING NEW SECTIONS.

a. Creating New Law.

A clause introducing a new section is not necessary if the bill has an enacting clause. An example of a section creating new law follows:

> **SECTION 1. A district boundary board may not assign to any school district a number previously assigned to another school district that became nonexistent after January 1, 1979, because of dissolution, abandonment, consolidation or any other reason.**

b. Creating New ORS Sections.

The drafter does not assign ORS numbers to new sections. ORS numbers are assigned to new sections during the compilation process following the end of odd-year sessions.

2. ADDING TO AND CREATING NEW SERIES.

a. What are Series and How are They Created?

A "series" is a consecutive string of ORS sections created by a bill with an explicit reference within the bill, e.g., "sections 2 to 10 of this (year) Act."[1] When the provisions are codified during compilation, the reference to "sections 2 to 10 of this (year) Act" could be replaced by ORS section numbers (e.g., "ORS 123.220 to 123.320") and a series is thus created.

Series may share penalties, definitions, rulemaking authority or other provisions applicable to the series to allow it to operate together as a coherent whole. Adding to a series allows those provisions to be applied to newly enacted sections.

Just as there are provisions that apply to a series, provisions also can apply to an entire ORS chapter.[2] Note, though, that headings, subheadings and any other divisions in an ORS chapter outline alone *do not create a series*. A series exists only by an enactment of the legislature and not because the sections were placed together consecutively or in the same chapter under the same heading.

Other provisions apply to a code or a set of chapters. For example, when a new section is added to the Insurance Code,[3] certain definitions will apply,[4] those regulated by the code must comply with the new section,[5] the Department of Consumer and Business Services may institute rulemaking to implement the new section[6] and violating the new section implicates penalties.[7]

b. When to Add to an Existing Series.

Although the drafter does not assign a new section a specific ORS section number, the drafter should consider where the new section fits within the codified statutes and whether the new section should be added to and made a part of an existing series,[8] with special consideration of the following:

A. Definitions. The existing series contains definitions that the drafter intends to apply to the new sections.

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[1] See section 2e of this chapter and appendix G of the Form & Style Manual on creating series.
[2] E.g., ORS 734.014 begins "As used in this chapter:" and thereafter defines several terms.
[3] ORS 731.004 ("ORS chapters 731, 732, 733, 734, 735, 737, 742, 743, 743A, 743B, 744, 746, 748 and 750 may be cited as the Insurance Code.").
[4] ORS 731.052 ("Except where the context otherwise requires, the definitions given in the Insurance Code govern its construction.").
[5] ORS 731.022 ("No person shall transact insurance in this state or relative to a domestic risk without complying with the applicable provisions of the Insurance Code.").
[6] ORS 731.244 ("[T]he Director of the Department of Consumer and Business Services may make reasonable rules necessary for or as an aid to the effectuation of the Insurance Code.").
[7] ORS 731.988 (1) ("A person that violates any provision of the Insurance Code . . . shall forfeit and pay to the General Fund of the State Treasury a civil penalty . . . .").
[8] The use of series here and elsewhere in the chapter includes "chapter or code."

For example, if a new section will use the term "uninsured motorist coverage" and the definition in ORS 742.500[9] matches the drafter's intent, the new section can be "added to and made a part of ORS 742.500 to 742.506."

B. Penalties. The existing series contains penalties that the drafter intends to apply to the new section.

If the drafter creates a new section that will impose a duty on an insurer, for example, and wants violation of the section to subject the insurer to a civil penalty, the drafter should provide that the new section is "added to and made a part of the Insurance Code."[10]

C. Rulemaking authority. An agency is given rulemaking authority that the drafter wants to utilize in implementing the new sections.

For example, if a new section is "added to and made a part of the Insurance Code," the Director of the Department of Consumer and Business Services may adopt rules to implement it without further explicit authority.[11]

D. Miscellaneous. There may be other reasons for adding to a series like those mentioned above. Generally, the reasons are because an existing series has general provisions that apply to the individual statutes within the existing series and the drafter wants those general provisions to apply to the new section.

c. Determining the Appropriate Series, Chapter or Code.

In identifying an appropriate series to add a new section, use only explicit ORS references to the series. One way to find those references is to perform a STAIRS search. A better option may be to use the series database.

The series database is located at "W:\Series Database\Chapter Files\".[12] The database includes a read-only Excel XLSX file (or workbook) for each ORS chapter. Each file includes three pages (or tabs) that can be flipped between in the bottom-left of the window. The "Series" page shows the series numbers, any series name, the number of times the series is referenced in ORS and the number of notes there are on the series. The "Mentions" page shows the series numbers and each ORS section that references the series. The "Series History" page shows any available notes on the series' history. For example, for ORS chapter 100, the Series History shows:

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[9] ORS 742.500 ("As used in ORS 742.500 to 742.506 . . . (5) 'Uninsured motorist coverage' means . . .").
[10] ORS 731.259 ("The Department of Consumer and Business Services may require an insurer to provide a written notice to an insured to fully effectuate any law the department is responsible for enforcing . . ."); ORS 731.988 (1) ("A person that violates any provision of the Insurance Code . . . shall forfeit and pay to the General Fund of the State Treasury a civil penalty . . . .").
[11] ORS 731.244 ("[T]he Director of the Department of Consumer and Business Services may make reasonable rules necessary for or as an aid to the effectuation of the Insurance Code.").
[12] For more information on using the series database, see the other resources in "W:\Series Database\Database Instructions\".

Series Number	Year	Note
100.005 to 100.627	2013	100.005 to .625 expanded to 100.005 to .627
100.301 to 100.320	2007	100.305 to .320 expanded to 100.301 to .320
100.635 to 100.910	xxxx	split series = 100.015 and 100.635 to .910

The drafter should check the series database file for the appropriate chapter(s) for the new sections and determine if a substantive reason justifies adding the new sections to one of the series. *If there is a substantive reason, add it; if not, do not.* A section should not be added to a series simply to instruct the ORS editor on where to compile the section. A more detailed description of the use of the series database is at section 8 of this chapter.

Do not add to any named short titles or codes from outside their ORS chapters except for these seven multichapter series:

Bank Act	ORS chapters 706 to 716
commercial fishing laws	ORS chapters 506 to 513
Insurance Code	ORS chapters 731 to 750
Oregon Vehicle Code	ORS chapters 801 to 826
Public Contracting Code	ORS chapters 279A to 279C
Uniform Commercial Code	ORS chapters 71 to 79
wildlife laws	ORS chapters 496 to 501

d. The Mechanics of Adding to an Existing Series.

The adding provision appears in a stand-alone section of the bill, typically immediately before the section to be added. For example:

<spm added>

SECTION 1. Section 2 of this (year) Act is added to and made a part of ORS 123.220 to 123.330.

To add to an ORS chapter rather than an ORS series use the following form:

SECTION 1. Section 2 of this (year) Act is added to and made a part of ORS chapter 123.

To add to an ORS code use the following form:

SECTION 1. Section 2 of this (year) Act is added to and made a part of the Oregon Vehicle Code.

If adding more than one new section to an ORS series, chapter or code, use only one "adding" section. This is true whether the section adds a consecutive group of sections or adds sections found throughout the bill.

<spm adds>

SECTION 1. Sections 2 to 4 of this (year) Act are added to and made a part of ORS 123.090 to 123.150.

OR

SECTION 1. Sections 2 to 4, 9, 11 and 14 of this (year) Act are added to and made a part of ORS 123.090 to 123.150.

e. Dealing with Nested Series.

Consider the example of placing a new section of law that prohibits driving a vehicle on a highway unless the passengers wear crash helmets. Assume that the only place the section could be compiled logically is in ORS chapter 123. Within that chapter, one section imposes a penalty for violation of ORS 123.300 to 123.800. If the new section is added to that series, the penalty provision will apply. Another section defines the term "crash helmets" for purposes of ORS 123.500 to 123.600. They are two different series. What should be done to apply both the definition and the penalty to the new section?

Visualize two buckets: one larger than the other and the smaller inside the larger. A pebble may be dropped only into the larger bucket and fall outside the smaller bucket; if a pebble is dropped into the smaller bucket, it lies inside both.

Similarly, if a smaller series is contained within a larger series, when a new section is added to the larger series, the new section is *not* added to the smaller series. However, if the new section is added to the smaller series, the new section is also added to the larger series. In the example, since the new section is to be a part of both ORS 123.300 to 123.800 and ORS 123.500 to 123.600, it should be added to and made a part of the latter, smaller series.

If neither the definition nor penalty should apply to the new section, the new section should not be made a part of either series. It should be simply drafted as a new law in a stand-alone section, or, if applicable, it should be added to and made a part of ORS chapter 123. After the session, the ORS editors may compile the new section and may write an appropriate note or adjust the series references in the definition and penalty provisions to clearly exclude the new section from these references.

If the new section should be incorporated within the smaller series but not the larger series, the drafter must use some technique other than adding. The drafter might amend the definition or penalty section to explicitly include or exclude a new section from the series. For example:

SECTION 1. ORS 123.300 is amended to read:
123.300. **Except as provided in section 2 of this 2019 Act,** a person who fails to comply with any of the provisions of ORS 123.300 to 123.800 is subject to . . .

OR

SECTION 1. ORS 123.500 is amended to read:
123.500. For the purposes of ORS 123.500 to 123.600 **and section 2 of this 2019 Act**:
(1) "Crash helmet" means ...

The drafter always should check the series database or do a STAIRS search when adding new sections to an existing ORS series.

f. Splintered Series.

A series may become "splintered" when the sections of a bill are not codified sequentially. For example, an Act with sections 1 to 10 used as a series may include as section 10 a penalties section, which by practice is codified near the end of the ORS chapter. If new sections are later enacted and are to be made a part of this prior Act, it is possible to reference only the nonpenalty provisions. However, if the penalty should apply to the new sections, those sections will need to be referenced explicitly.

A series also could become splintered if a series is subsequently amended or added to so many times that the series must be renumbered or if parts of the series need to be moved to other portions of the chapter or to new chapters entirely. Splintered series are identified on the "History" page of the database files. Exercise caution in adding to a splintered series. A section can *never* be added to and made a part of more than one series.

g. No Requirement to Set Forth Entire Series in Bill.

The Oregon Constitution provides that when an Act is revised, its amended sections must be set forth at length.[13] This provision does not apply if a bill merely adds new sections to an existing ORS chapter or series.[14]

h. Use of "this Act."

In adding a new section to a series, the drafter should never use the phrase "this Act" alone. Such a reference may be construed as directed to the original Act that created the series.[15] Instead, the drafter should indicate specifically whether the reference is to:

(a) The present Act adding the section to the series, in which case use "this (year) Act";

or

(b) The original Act that created the series to which the new section is being added. If codified, simply use the specific series by its ORS numbers. If uncodified, cite to the specific session law.[16]

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[13] Article IV, section 22, Oregon Constitution; see section 4c of this chapter.

[14] Brown v. City of Silverton, 97 Or. 441 (1920) (merely adding to an existing Act without modifying it does not implicate Article IV, section 22); Martin v. Gilliam County, 89 Or. 394 (1918) (impermissible to apply an Act to a new actor not previously regulated by simply referencing chapter).

[15] State v. Davis, 207 Or. 525 (1956) ("The 1937 act repeated the words 'contrary to this act' but it is clear that the use of the words 'this act' when found in an amendatory act refer back and apply to the original act as amended.").

[16] See section 18b, chapter 3, of this manual and section 6 of this chapter.

References to "this (year) Act" by itself with no further reference limiting the section also should be avoided. Legislative Counsel will ordinarily translate references to "this (year) Act" to include all sections in the bill, including any amended ORS sections. This can lead to errors or unintended consequences.[17]

3. REPEALS.

In drafting new law, a careful search must be made for provisions that might be plainly or implicitly inconsistent. If a bill conflicts with or supersedes existing statutes, expressly repealing those inconsistent statutes prevents confusion and difficulty that might arise later in construing and applying the bill.

The body of the bill must specify if it repeals an existing statute section. The text of the law being repealed does not need to be set forth as it must in amendments.[18] A single section is sufficient to repeal a number of statutes. Each section in the chapter or series must be enumerated individually. A repeal cannot be directed to an ORS chapter or series of sections. If the section is compiled in ORS,[19] the repeal is directed to the ORS number and not to its session law section. For example:

SECTION 1. ORS 123.100, 123.110, 123.120 and 123.125 are repealed.

NOT

SECTION 1. ORS 123.100 to 123.125 are repealed.

Never include a general repeal clause, such as "all laws and parts of laws in conflict with this 2019 Act are repealed."[20]

Wherever a repealed section is referred to in another section, amend the latter section to adjust the reference. To find all references to a repealed statute, perform a search in STAIRS.

ORS editors can delete a repealed section if it is the first or last number in a series. However, if the reference to the repealed section is within a string cite, the reference must be explicitly removed by amendment. For example, in a bill that repeals ORS 123.600:

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[17] In State v. Rothman, 69 Or. App. 614 (1984), the court had to interpret the Legislative Counsel's codification of section 41 (1), chapter 777, Oregon Laws 1979, part of the Oregon Pharmacy Act, which contained the provision, "Violation of any provision of *this 1979 Act* (emphasis added) . . . is a misdemeanor . . . ." One section within the 1979 Act was a housekeeping edit to ORS 475.992, which was part of the Controlled Substances Act and already provided for felony penalties. In codification, Legislative Counsel copied all sections in the 1979 Act, including ORS 475.992, to replace "this 1979 Act." The court held that while statutes certified by the Legislative Counsel are prima facie evidence of the law, they are not conclusive, and here "Legislative Counsel went beyond [its ORS 173.160] authority in its codification of the Oregon Pharmacy Act."

[18] Bird v. County of Wasco, 3 Or. 282 (1871).

[19] If the section is not codified, see section 6 of this chapter on repealing session law.

[20] The problem of repeal by implication is considered in chapter 10 of this manual, as well as a specific provision to protect existing law from possible implied repeal. See also Dolan v. Barnard, 5 Or. 390 (1875) (invalidating an Act declaring that "all Acts or parts of Acts inconsistent with this Act are hereby repealed.").

- If ORS 123.800 refers to the series "ORS 123.500 to 123.600" or "123.600 to 123.700," then the reference in ORS 123.800 may remain.

- If ORS 123.850 has a string cite, such as "ORS 123.580, 123.590 and 123.600," amend ORS 123.850 to delete "123.600."

Several statutes relate to the effect of a repeal.[21] By statutory law, repealing a criminal statute does not affect prosecutions or punishments of violations of criminal statutes occurring prior to the effective date of the repeal.[22] Prior law is not automatically revived when a law repealing the prior law is itself repealed.[23] This is also true of repeals of constitutional provisions.[24] Similarly, repealing a validating or curative Act does not alone negate any prior validation.[25] ORS 182.080 explains the role of the Secretary of State in collecting and expending moneys of agencies who authorizing authority was repealed.

4. AMENDING EXISTING LAW.

a. Setting Forth Amended Sections at Length.

Article IV, section 22, of the Oregon Constitution, requires that any section amended "shall be set forth, and published at full length." This requires showing everything that has been inserted and deleted as well as what has not changed for each section.[26] The purpose of Article IV, section 22, is to ensure that legislatures are not "in the dark" regarding the true effects of a proposed bill under consideration.[27]

In setting forth an amended section at length, anything omitted is automatically deleted. For example, if a bill changes just one paragraph of a statute and that paragraph in amended form is the only one set out, the remainder of the section is deleted. The result is that no subordinate part of a section can be separately amended. No matter how small the changed part or how lengthy the unchanged part, the whole section must be set forth at length. *There are no exceptions.* Fortunately, "a violation of [Article IV, section 22] is relatively easy to avoid."[28]

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[21] See also appendix J of this manual.
[22] ORS 161.035 (4) ("When all or part of a criminal statute is amended or repealed, the criminal statute or part thereof so amended or repealed remains in force for the purpose of authorizing the accusation, prosecution, conviction and punishment of a person who violated the statute or part thereof before the effective date of the amending or repealing Act.").
[23] ORS 174.080.
[24] ORS 174.090.
[25] ORS 174.070.
[26] City of Portland v. Stock, 2 Or. 69 (1863).
[27] Kerr v. Bradbury, 193 Or. App. 304 (2004).
[28] State v. Norris, 188 Or. App. 318 (2003).

The constitutional provision limits the means of the legislature in drafting amendments by a method that conveys no meaning standing alone, but depends upon a proper interpolation, substitution or elimination in comparison with the original statute.[29]

Statutes complete within themselves and exhibiting on their face their purpose and scope are constitutional even though they may amend or modify existing laws by implication.[30] This constitutional provision also does not bar adding new sections to an existing Act without modifying or altering its provisions.[31] An Act that does not revise a previous Act, but simply amends a section of that Act, need only set forth the amended sections.[32]

An Act "subjecting all tax levying districts . . . to the budget laws provided for counties" was invalidated because the Act was construed to amend the county budget law and therefore required setting forth in full the section of the county budget law as amended.[33] The application of this ruling should be considered in connection with cases holding, in similar situations, that a supplemental Act or Act amending by implication does not come within the scope of Article IV, section 22.[34] Legislative approval or validation of administrative rules, water rights or sentencing guidelines are not subject to Article IV, section 22. Those documents need not be set forth in full, even if they have the same effect as statutory law.[35]

Regardless, a drafter should avoid any language that might appear to be amendatory of other sections if such other sections are not set out in full in the bill.[36]

b. Bill Title and Amendments.

The bill title *always* presents the amended sections in numerical order followed by the repealed sections in numerical order. Neither the title nor an amending clause in the body of a bill should recite that less than an entire section is being amended. For example, the

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[29] N. Counties Trust v. Sears, 30 Or. 388 (1895).
[30] Warren v. Crosby, 24 Or. 558 (1893).
[31] Brown v. City of Silverton, 97 Or. 441 (1920).
[32] Delay v. Chapman, 2 Or. 242 (1866) (The upheld amendatory Act "does not revise any act of the legislature, but simply introduces a new feature into the practice, without abolishing any remedy that existed before.").
[33] Martin v. Gilliam County, 89 Or. 394 (1918).
[34] Ebbert v. First Nat'l Bank, 131 Or. 57 (1929).
[35] State v. Norris, 188 Or. App. 318 (2003). This case left open whether amendments to rules or subsequent amendment to legislatively approved rules would require that they be set forth in their entirety.
[36] Query whether a court could have held unconstitutional section 9, chapter 442, Oregon Laws 1963, where "the total maximum poundage fee provided in ORS 583.046 is hereby increased to one and three-fourths cents per hundredweight on such milk," (previously codified at ORS 583.004, repealed by section 1, chapter 85, Oregon Laws 2013) given that section 5, chapter 638, Oregon Laws 1961, requires "each first handler in Oregon of Grade A milk shall pay to the State Department of Agriculture a poundage fee of not more than three-fourths of one cent per hundredweight on all Grade A milk purchased or handled by said handler" (previously codified at ORS 583.046, repealed by section 1, chapter 85, Oregon Laws 2013).

title cannot use "amending ORS 123.010 (2)," even though the only change being made to ORS 123.010 is in subsection (2).

c. Indicating Inserted or Deleted Matter.

When amending an existing statute, the draft must show every difference, *except capitalization*, between the original version and the amended version. Even changes in punctuation must be indicated. This practice is required by the rules of the Oregon House and Senate.

Changes are highlighted by bracketing and italicizing deleted material and bolding new material. When replacing material, deleted material traditionally comes before new material. If deleting two or more successive subsections or paragraphs, *each subsection or paragraph* must be enclosed entirely in brackets and italicized.

Some judgment is necessary in determining how much of existing law should be saved. If there are many deletions and insertions to a part of an existing ORS section, it may be simpler to bracket that entire part and set out the newly rewritten matter in boldface in its entirety. The important thing is to write the bill so that the effect of an amendment is intelligible.

d. Direct Amendments to Oregon Revised Statutes.

Whenever possible, an amendment should be directed to the ORS section and not to the original session law section. Any reference to an ORS section means the section as most recently amended.[37] It is generally unnecessary to refer to session laws that previously amended an ORS section when drafting an amendment to that section. An exception is made if the amended version has not yet been published in ORS. Examples:

SECTION 1. ORS 123.456 is amended to read:

OR

SECTION 1. ORS 123.456, as amended by section 7, chapter 9, Oregon Laws 2018, is amended to read:

OR

SECTION 1. ORS 123.456, as amended by section 7, chapter ___, Oregon Laws 2018 (Enrolled Senate Bill 7), is amended to read:

e. Form of Amendment.

[37] ORS 174.060.

Use a separate amending clause for each statute that is amended by a bill, even if the statutes are adjacent or part of a series. The amending clause immediately follows the section number of the bill. For example:

> **SECTION 1.** ORS 123.456 is amended to read:
> 123.456 . . . .
>
> **SECTION 2.** ORS 123.465 is amended to read:
> 123.465 . . . .

Sections in a bill that amend existing sections usually are arranged in the order of their ORS numbers, with the lowest section number first. However, departing from this practice to present the subject matter in a logical sequence is preferable.

f. Use of "this (year) Act" in Amended Section.

As with adding sections to series,[38] when referring to a new section in the same new bill, do *not* refer to "section 2 of *this* Act." The reference should be to "section 2 of *this (current year)* Act." If a new section refers to an existing ORS section amended by the same bill, the drafter does not refer to "section 1 of this (year) Act," but to the ORS statute being amended, e.g., "ORS 123.450." There is no need to refer to the ORS statute as "as amended in 2019," or "amended ORS 123.450" or anything else within the referencing sections of the bill. For example:

> **SECTION 1. Except as provided by section 2 of this 2019 Act and ORS 123.670, the Agency shall . . . .**
>
> **SECTION 2. The Agency may not . . .**
>
> **SECTION 3.** ORS 123.670 is amended to read:
> 123.670. The Agency *[shall]* **may not** . . . .

g. Effect of Amendment.

ORS 161.035 (4)[39] dictates what happens when there is an amendment to a criminal statute affecting prosecution or punishment for violation. The effect of an amendment of a statute adopted by reference is covered by ORS 174.060.[40] Judicial interpretation of the effect of repeals and amendments of statutes is also discussed in appendix J of this manual.

5. CONFLICTING AMENDMENTS.

[38] See section 2h of this chapter.
[39] See note 22.
[40] See chapter 14 of this manual.

A bill may amend an ORS section that is amended by another bill during the same session. When the two amendments are inconsistent, a conflict amendment may be necessary to resolve discrepancies and to make plain the legislative intent. Conflict amendments are prepared by the editors in the conflicts team in Publication Services. The legislative intent may be shown by further amending or repealing the amendment from the earlier bill. However, if the proposed amendments are not actually inconsistent, two or more amendments may be blended during compilation.See in-depth discussion of "CONFLICT AMENDMENTS" in section 7 of chapter 18 of this manual.

6. AMENDING OR REPEALING UNCODIFIED SECTIONS.

Only statutes of a general, public and permanent nature are compiled into ORS. Special, private, temporary, appropriation or similar Acts are not compiled. Sometimes session law sections not compiled in ORS will need to be subsequently amended or repealed. The proper form for such an amendment is as follows:

> **SECTION 1.** Section 100, chapter 1000, Oregon Laws 2015, is amended to read:
> **Sec. 100.** [*This 2015 Act*] **Chapter 1000, Oregon Laws 2015,** takes effect on July 1, [2020] **2024**.

In setting forth in full section 100, chapter 1000, Oregon Laws 2015, the word "Section" is abbreviated to "**Sec.**" This is to avoid confusion between the designation of the section being amended and the amendatory sections of the bill itself.

Direct the amendment to the text of the section *as most recently amended*. When amending an uncompiled session law section, the drafter should check for later amendments or repeals of the section by referring to the table of "Sections in Uncodified Law Amended, Repealed or 'Added To'" found in the back of the last volume of each session law edition. The edition in which the session law section is enacted and each edition following must be checked. During a legislative session, the A&R Tables in the current Weekly Cumulative Index to Legislative Measures will show any current amendments.

If the section being amended or repealed was previously amended, indicate the previous amendment in the amendatory or repealing clause of the bill. For example, refer to "section 10, chapter 1000, Oregon Laws 2019, as amended by section 1, chapter 1001, Oregon Laws 2019." It is not necessary, however, to identify these additional amendments in the *title* or *text* of the bill; a reference to "section 10, chapter 1000, Oregon Laws 2019," is sufficient.

In preparing an amendment or repeal of a session law section, the drafter should check for incorporations by reference of the session law section in ORS and for references to the session law section in ORS cross-references. A computer search will produce a list of the internal references and cross-references.

If a new section is being added to a series that has not been codified, the following form is used:

SECTION 1. Section 2 of this (year) Act is added to and made a part of sections ___ to ___, chapter 67, Oregon Laws 2017.

If the session laws sections are an early Oregon Act that does not have a session law chapter number, use the following forms:

SECTION 1. Section 8 of the 1854 Act entitled "An Act to establish an Institution of Learning in Washington County" passed by the Legislative Assembly of the Territory of Oregon on January 13, 1854, is amended to read:
Sec. 8. . . .

To add a new section to the early Oregon Act, the drafter may use this form:

SECTION 1. Section 2 is added to and made a part of the 1854 Act entitled "An Act to establish an Institution of Learning in Washington County" passed by the Legislative Assembly of the Territory of Oregon on January 13, 1854, as amended, to read:

For a repeal of an early Oregon Act:

SECTION 1. Section 15 of the 1854 Act entitled "An Act to establish an Institution of Learning in Washington County" passed by the Legislative Assembly of the Territory of Oregon on January 13, 1854, is repealed.

7. ALTERNATIVES TO AMENDMENTS.

a. Repeal and Enactment in Lieu.

Sometimes, in amending a statute, the changes are so numerous that it is impracticable to indicate deletions and insertions. However, if the new legislation should have the same continuing effect as amending the section or will occupy the same status with respect to other statutes and court interpretations, repeal the original statute and enact the new "in lieu thereof."[41] It is best to avoid using this construction if possible. When enacting a new section in lieu of a repealed section, do not use the phrase "this Act" alone in the new section.[42] Reference to the Act creating the new section must be "this (year) Act."

If drafting a bill to enact only *one new section* in lieu of another section, use the following form:

SECTION 1. ORS 123.660 is repealed and section 2 of this 2019 Act is enacted in lieu thereof.

If the bill proposes to enact *more than one new section* in lieu of *one repealed section*, the following form is used:

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[41] Inland Navigation Co. v. Chambers, 202 Or. 339 (1954) ("Where a new statute continues in force provisions of an old statute, although in form it repeals them at the moment of its passage, a right of action created by the old statute is not thereby destroyed.").
[42] See section 2h of this chapter for a further discussion of the confusion caused by the use of "this Act."

SECTION 1. ORS 123.670 is repealed and sections 2 and 3 of this 2019 Act are enacted in lieu thereof.

To avoid confusion about references to the repealed sections, *do not enact several new sections in lieu of several repealed sections.*[43]

When a new section is enacted in lieu of a repealed section, the ORS editors are authorized to substitute the ORS number assigned to the new section for the ORS number of the repealed section in any other ORS sections that referenced the repealed section. Therefore, it ordinarily is not necessary to amend sections that reference the repealed section to adjust references to the repealed section if a new section is enacted in lieu.

This is not the case when the new statute is "substantially different in the nature of its essential provisions" from the prior statute.[44] If the new section enacted in lieu of another statute plausibly could be considered substantially different, adjust the references to the repealed section to point to the replacement. For example:

SECTION 1. ORS 123.222 is repealed and section 2 of this 2019 Act is enacted in lieu thereof.

SECTION 2. . . .

SECTION 3. ORS 123.555 is amended to read:
123.555. The provisions of [*ORS 123.222*] **section 2 of this 2019 Act** apply only if...

b. Editorial Substitutions.

The drafter may authorize Legislative Counsel to substitute words in the compiled ORS without amending each individual section of ORS.[45] This is a means of avoiding numerous amendments to adjust sections affected by a transfer of functions or a change in terminology. *It is not a means of avoiding a section-by-section check of all parts of the statutes affected by a bill.* In each case, determine whether Legislative Counsel can make the substitution. If there is any doubt, amend the section.

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[43] For example, if "ORS 123.010, 123.020 and 123.030 are repealed and sections 2 to 4 of this 2019 Act are enacted in lieu thereof," which of the new sections is referred to by a reference to "ORS 168.020" in another, unaffected section?

[44] ORS 174.060 ("When one statute refers to another, either by general or by specific reference or designation, the reference shall extend to and include, in addition to the statute to which reference was made, amendments thereto and statutes enacted expressly in lieu thereof unless a contrary intent is expressed specifically or unless the amendment to, or statute enacted in lieu of, the statute referred to is substantially different in the nature of its essential provisions from what the statute to which reference was made was when the statute making the reference was enacted.").

[45] A complete list of authorized editorial substitutions is contained in the Preface of Volume 1 of ORS. E.g., section 256, chapter 59, Oregon Laws 1999 (authorizing substitution of words designating "2___" or "_____ (year)" for words designating "19__" or "19xx" or other words or notations designating the year in a date in which blanks appear); section 1, chapter 578, Oregon Laws 1985 (authorizing substitution of sex neutral nouns or articles for nouns or pronouns that are not sex neutral).

For example, in transferring agency functions, a provision authorizing Legislative Counsel to substitute words designating the new agency for words designating the old agency in other statute sections can be added. Note that the provision authorizing the substitution does not accomplish the transfer, it just provides the cleanup of existing statutes.[46] The transfer itself must be handled separately in appropriate sections. For example:

<spm name-change>:

SECTION ___. (1) The amendments to ORS _____ by section ___ of this (year) Act are intended to change the name of the <<Old Agency>> to the <<New Agency.>>

(2) For the purpose of harmonizing and clarifying statutory law, the Legislative Counsel may substitute for words designating the <<Old Agency,>> wherever they occur in statutory law, other words designating the <<New Agency.>>

<spm name-change2>:

SECTION ___. For the purpose of harmonizing and clarifying statutory law, the Legislative Counsel may substitute for words designating the <<Transferring Agency>> or its officers, wherever they occur in [insert ORS chapter or series], other words designating the <<Receiving Agency>> or its officers.

The drafter must ensure that the language accomplishes the purpose of the draft. Boilerplate or suggested language gives a drafter a starting place. An example might look as follows:

SECTION 5. (1) Any reference in ORS chapter 123 to the Old Agency shall be considered a reference to the New Agency with respect to regulation of framistans.

(2) For the purpose of harmonizing and clarifying statutory law, the Legislative Counsel may substitute for words designating the Old Agency in ORS chapter 123, words designating the New Agency.

When using a section that directs the Legislative Counsel to make a substitution, try to be specific. For example, enumerating the sections involved can limit the authority to the ORS chapter or series enumerated.

8. SERIES DATABASE PROCEDURES.

References to the series database and to STAIRS or Legislaw searches have been made in this manual. These tools are particularly important in amending ORS sections, and their use is imperative in repealing sections or adding to existing series and chapters.

It is much easier to demonstrate the use of the series database, which includes current references only to ORS series and chapters, than to describe it, but the following paragraphs should be useful for reference purposes. The series database is located at W:\Series Database\Chapter Files\.

For example, the pages in the series database appear as follows:

[46] Chapter 8 and appendix A of this manual discuss the form of provisions transferring a function from one agency to another.

Series page

Series Number	Series Name	Mentions	History
Chapter 240	State Personnel Relations Law	151	0
240.235 to 240.250		4	0

The series number in the leftmost column is the ORS series. The Series Name column is the official name, if any, given to the series in statute. The two right columns show the number of times the series is referenced in ORS ("Mentions") and the number of historical notes there are on the series ("History").

Mentions page

Statute Number	Series Number
523.510	Chapter 523
523.610	Chapter 523
523.710	Chapter 523
523.410	523.030 to 523.050
523.320	523.210 to 523.380
523.340	523.210 to 523.380

The series number in the right column is the ORS series referred to; the numbers in the left column are ORS sections that contain references to that series.

History page

Series Number	Year	Note
660.002 to 660.210	2005	former chapter 660 references renamed 660.002 to .210
660.300 to 660.364	2001	285A.443 to .449 renumbered and added to to become 660.300 to .339
660.300 to 660.364	2009	660.300 to .339 expanded to 660.300 to .364

The series number in the left-hand column is the ORS series for which there is a note, followed by the relevant year and the note. Notes are usually to record expansion, shrinkage or renumbering of a series, but there are some atypical special notes as well.

The series database is useful in determining whether to add a section to and make it a part of an ORS series or chapter. When creating a new section, the drafter should check for any series references that would require adding the new section to and making it a part of such a series.

If reference is made in an ORS section to an entire ORS chapter, an entry in the series database is made; in this case, a number such as "Chapter 138" would appear in the Series Number column. Chapter series entries are particularly helpful in locating references to "this chapter."

It sometimes happens that one finds an entry in the series database for a reference but, upon checking the place where the reference should be, none can be found. The drafter should consult the Chief Editor.

Another source of information for series references is the computer system. By keying the section number in STAIRS, a list of all ORS sections where that number appears can be generated. The list can be printed if the drafter so desires. See also "NUMBERS-REFERRED-TO SEARCH" in chapter 2 of this manual.

CHAPTER FOURTEEN

ADOPTION BY REFERENCE; LEGISLATIVE CLASSIFICATIONS

This chapter discusses two special problems the drafting attorney encounters when drafting bills. The first of these problems is the adoption of statutes by reference. When should a bill *adopt* another statute *by reference*? What is the best way to do this?

The second of the problems involves finding a classification that includes only the group of persons, cities, counties, activities, etc., that are to be covered in a bill without violating federal or state constitutional provisions.

1. ADOPTION BY REFERENCE.

A bill can adopt by reference all or a part of an existing law.

a. Adopting by Reference.

There are a number of reasons to adopt another statute by reference. One reason is to reduce the length of the bill. For example, by adopting the Administrative Procedures Act by reference and making it apply to the bill being drafted, it becomes unnecessary to provide a similar, detailed procedure in the bill.

Another reason to adopt a statute by reference is to provide a uniform procedure for many similar cases. When a general procedure is adopted by reference in many different statutes, changes in the procedure for all those statutes may be made by amending only the statute setting forth the general procedure. For example, if each new bill that authorizes a vote adopts the same election procedure, elections become more uniform and the election laws become easier to administer.

On the other hand, adoption by reference has its disadvantages. When a law is adopted by reference in a new bill, the reader is forced to look to the adopted law to find out what the new bill provides. The reader thus must look at two or more different places in ORS to find out what the law is. This inconvenience is not the only disadvantage. Sometimes the adopted provision does not exactly apply to the new provision. If the adopted provisions are adjusted, the reader must apply the modifications to the adopted provisions and then apply both to the new provision. If the adopted provisions are not adjusted, a question is presented as to what extent the adopted provisions are incorporated into the bill.

There is still another difficulty with adoption by reference. Amendments may be made later to the provisions adopted (but not set forth) in the new bill without regard to the effect of those amendments on the new bill. Through the use of a numbers-referred-to search (on

STAIRS or other appropriate computer program or through the series database) those sections can be identified. Too often drafting attorneys fail to take into consideration the effect of an amendment on the provisions adopted by reference.

Whether another statute should be adopted by reference in a new bill is a question of judgment. The drafting attorney must weigh the advantages and disadvantages in each case. Within certain limits, legislation by reference is desirable; carried beyond those limits, it can have unfortunate consequences.

b. Effect of Adopting by Reference.

Generally speaking, the effect of an adoption of another statute by reference in a new bill is the same as though the provisions adopted had been incorporated bodily into the bill. To adopt by reference, reference is made to a particular statute (such as a provision that something be done "in the manner provided in ORS chapter 183").

In Oregon, both general and particular references may accomplish the incorporation not only of the provisions of the law in force on the date the adopting bill becomes law but also subsequent amendments to the adopted statute. ORS 174.060 provides:

> 174.060. When one statute refers to another, either by general or by specific reference or designation, the reference shall extend to and include, in addition to the statute to which reference was made, amendments thereto and statutes enacted expressly in lieu thereof unless a contrary intent is expressed specifically or unless the amendment to, or statute enacted in lieu of, the statute referred to is substantially different in the nature of its essential provisions from what the statute to which reference was made was when the statute making the reference was enacted.

Because of ORS 174.060, if the bill is *not* to incorporate future amendments to the adopted statute, words should be added to the bill that disclose this intent. A reference to the ORS section followed by reference to the edition of ORS in which the version being voted upon is found may suffice; e.g., ORS 184.730 (1993 Edition). This procedure is so cumbersome, however, that it should be used sparingly. The reader not only has two places to seek the law, but the places are in different editions of ORS.

The repeal of a statute adopted by a general or particular reference may create problems concerning the operation of that statute as a part of the adopting statute. In Oregon, in the case of an adoption by reference, a repeal of the adopted provisions probably would not delete those provisions from the adopting statute. As the court said in State v. Dobson:

> The general rule is that, where an act adopts the whole or a portion of another statute, "the subsequent amendment or repeal of the adopted statute has no effect upon the adopting statute unless it is also repealed expressly or by necessary implication."[1]

ORS 174.060, indicating an intent to include subsequent amendments, changes the rule stated above by the court *only* to the extent of including subsequent *amendments*, not a repeal.

[1] 169 Or. 546, 551 (1942); see also State v. Gray, 40 Or. App. 799 (1979).

c. Adopting a Federal Law or Statute of Another State.

A distinction must be made between adoption by reference of Oregon statutes and adoption of a statute or rule of another state or a federal statute or rule. In adopting by reference an Oregon statute, under ORS 174.060 the adoption generally will include future amendments to the adopted statute. However, in adopting the statute or rule of another jurisdiction (state or federal) by reference, there is a question as to whether the reference constitutionally can adopt the statute or rule of the other jurisdiction including *future amendments*. The cases are not clear on this point. There are a number of cases holding that the attempt to adopt future amendments to a statute or rule of another jurisdiction is an unconstitutional delegation of legislative authority. In adopting by reference a statute of another jurisdiction, the drafting attorney must give serious consideration to this problem.[2] The attorney should be cautious about phrases like "as amended from time to time."

The federal Internal Revenue Code, or a specific section of the federal Internal Revenue Code, may be adopted by reference. However, with the narrow exception described below, the adoption will not include future amendments to the Internal Revenue Code section adopted. Article IV, section 32, Oregon Constitution, contains an exception to the general rule that the Legislative Assembly cannot delegate its legislative power; section 32 permits the Legislative Assembly to define income, for purposes of state income tax law, by reference to the Internal Revenue Code. This exception applies only to taxable income for income tax purposes.[3] For this reason, the Legislative Assembly passes a bill each session "reconnecting" the Oregon statutes to the most recent amendments to the Internal Revenue Code.[4]

Conformity with federal regulations can be accomplished constitutionally by the method used in ORS 632.516.[5] That section provides:

> 632.516. The State Department of Agriculture shall, in accordance with the applicable provisions of ORS 632.905 to 632.980, establish standards and grades for walnuts and filberts by rules or regulations enacted pursuant to ORS chapter 183. The grades shall conform, as far as practicable or applicable in this state, to the official grades and standards prescribed by the United States Department of Agriculture. The grades may be changed from time to time as may be necessary.

Examples of statutory provisions adopting by reference federal regulations or regulations formulated by a private national organization, such as the National Board of Fire Underwriters, are as follows:

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[2] Hillman v. Northern Wasco County PUD, 213 Or. 264 (1958) (overruled on other grounds by Maulding v. Clackamas County, 278 Or. 359 (1977)).
[3] See Seymour v. Dept. of Revenue, 311 Or. 254 (1991).
[4] See, e.g., chapter 527, Oregon Laws 2017 (Enrolled Senate Bill 701).
[5] Seale v. McKennon, 215 Or. 562 (1959).

SECTION _____. The rules adopted from time to time by the Department of _____ after it has considered changes in the federal regulations are the state rules. In no event may the state rules as adopted by the Department of _____ be more restrictive than the federal regulations.

OR

SECTION _____. The Department of _____ shall adopt the substantive provisions of the applicable code or rule issued by an appropriate agency of the federal government, together with any amendments or alterations therein that are made from time to time by the federal agency. However:

(1) Nothing in this section requires the adoption or continuance in force of a code or rule, or amendment or addition thereto, that the Department of _____ finds to be impracticable in the light of local conditions; and

(2) Nothing in this section prevents the Department of _____ from adopting any substitute or additional code or rule that it finds to be desirable in the light of local conditions to promote safety or the public welfare.

OR

SECTION _____. The Department of _____ shall adopt and enforce rules for heating installations. Rules establishing minimum safety standards and specifications may conform to standards and specifications of the Society of Automotive Engineers that are current at the time the rules are adopted.

d. Making References Specific.

When possible, references should be definite rather than indefinite. In rare cases the adoption of a statute by reference to the general area of subject matter without reference to such statute in terms of a specific section number may be desired but generally it is a practice to be avoided. Certainly, "hereinbefore," "hereinafter," "preceding," "following" or similar terms should never be used in making references to sections. Phrases like "except where otherwise specifically provided" and "as provided in this (year) Act" and "Notwithstanding any other provision of law," should be omitted entirely. Instead, the drafting attorney should use a specific reference. Vague references raise questions as to the application of the section and cause difficulties in compiling the statute in ORS.

2. LEGISLATIVE CLASSIFICATIONS.

The legislature may grant privileges or immunities to one citizen or class of citizens as long as similarly situated people are treated the same.[6] When class legislation is attacked, it is usually on the ground that the legislation violates the privileges and immunities clause and equal protection clause of the U.S. Constitution and the privileges and immunities clause of the Oregon Constitution.[7] Special or local legislation is prohibited in certain cases specified in Article IV, section 23, Oregon Constitution.

[6] State v. Savastano, 354 Or. 64 (2013).
[7] Article I, section 20, Oregon Constitution.

a. Legislation Affecting Cities and Counties.

Cities are granted home rule by Article XI, section 2, Oregon Constitution.

City charters adopted by the voters are subject to the Constitution and criminal laws of the state.[8] The limitation implies that a city ordinance may not prescribe for particular criminal conduct a penalty more severe than that prescribed by a state statute for the same criminal conduct.[9]

State laws of general applicability may also supersede powers of a city. As set forth in the Supreme Court's decision in LaGrande/Astoria v. PERB, the determination as to whether a statute prevails depends on the following:

> When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.
>
> Conversely, a general law addressed primarily to substantive social, economic or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local community's freedom to choose its own political form. In that case, such a state law must yield those particulars necessary to preserve that freedom of local organization.[10]

The decisions in La Grande/Astoria v. PERB, along with several following decisions,[11] reflect a judicial disposition to enlarge the role of the Legislative Assembly and to diminish the role of the courts in determining what the role of city governments shall be in their relationship to the state.

Counties are granted optional home rule by Article VI, section 10, Oregon Constitution, which provides that the charter of a home rule county is required to "prescribe the organization of county government."

As counties adopt home rule charters, consideration must be given to the effect of state statutes on counties having charters and county ordinances adopted under such charters. [12] It should be straightforward to find charters online or in a law library.

Constitutional county home rule was originally envisioned as a way for counties to avoid having to go to the Legislative Assembly to change general laws affecting county operations.

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[8] Article XI, section 2, Oregon Constitution.
[9] City of Portland v. Dollarhide, 300 Or. 490, 502 (1986).
[10] La Grande/Astoria v. PERB, 281 Or. 137, 156, aff'd on reh'g, 284 Or. 173 (1978).
[11] See Medford Firefighters Assn. v. City of Medford, 40 Or. App. 519 (1979); City of Roseburg v. Roseburg City Firefighters, 292 Or. 266 (1981); Denton Plastics, Inc. v. City of Portland, 105 Or. App. 302 (1991); Springfield Utility Board v. Emerald People's Utility District, 339 Or 631 (2005); Thunderbird Mobile Club LLC v. City of Wilsonville, 234 Or. App. 457 (2010).
[12] Fischer v. Miller, 228 Or. 54 (1961); 30 Op. Att'y Gen. 388 (1962); Etter, "County Home Rule in Oregon Reaches Majority," 61 Or. L. Rev. 5 (1982).

While counties without charters obtain a grant of legislative power under ORS 203.035 and operate under the general laws of the state, charter counties obtain their powers from, and operate under, their charters. The Oregon courts have nevertheless treated general law counties and home rule counties the same.[13]

As a result, the primary difference at this time between a home rule county and a general law county is that a home rule county may alter its structural organization and may eliminate or change the status of county elected officers. Organizationally, a general law county may only change the number of county commissioners and change the county surveyor to an appointed position.[14]

One final issue relating to county home rule is the extent to which county charters and ordinances are subject to the judicial doctrines arising out of city home rule cases. See Multnomah Kennel Club v. Dept. of Revenue, in which, although the issue before the court involved county powers based on a statute and the constitutional section pertaining only to counties, the court relied on certain home rule cases involving only cities.[15]

b. Privileges and Immunities of Citizens; Equal Protection.

Oregon courts have recognized that the controlling principles that guide the courts in determining questions of alleged unconstitutional discrimination or class legislation are the same whether one invokes the equal protection clause of the Fourteenth Amendment to the United States Constitution or the privileges and immunities provision (Article I, section 20) of the Oregon Constitution.[16]

However, while the controlling principles may be identical, the Oregon Supreme Court has adopted a different method of analyzing challenges to class legislation under Article I, section 20, Oregon Constitution, than the method used by federal courts when considering challenges to laws or regulations under the Equal Protection Clause of the Fourteenth Amendment.[17] One consequence of this difference in Oregon jurisprudence may be to limit to some degree the discretion that the Legislative Assembly previously exercised when enacting legislation that provided for classification of things or persons. When drafting a bill creating classifications, the drafting attorney must consider this feature of Oregon law.

The privileges and immunities clauses prohibit the granting to a citizen, or class of citizens, of privileges or immunities which upon the same terms do not belong equally to all citizens. The equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits as discriminatory legislation in favor of particular persons and against

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[13] Caffey v. Lane County, 298 Or. 183, (1984); Multnomah Kennel Club v. Dept. of Revenue, 295 Or. 279, 284 (1983).
[14] ORS 203.035, 204.005.
[15] 295 Or. 279, 284 (1983); see also Opinion Request OP-5849 (July 10, 1985), in which the opinions regarding county home rule similarly relied on home rule cases involving only cities.
[16] Plummer v. Donald M. Drake Co., 212 Or. 430 (1958); School Dist. 12 v. Wasco County, 270 Or. 622 (1974).
[17] Hewitt v. SAIF, 294 Or. 33, 42 (1982) ("While the fourteenth amendment forbids curtailment of rights belonging to a particular group or individual, article I, section 20, prevents the enlargement of rights."); Hunter v. State of Oregon, 306 Or. 529 (1988); State v. Orueta, 343 Or. 118 (2007).

others in like condition. These provisions mean that not only must an Act treat all persons covered by it alike, under the same conditions, but also the *classification* of persons must be identifiable, reasonable and natural. For example, an employers' liability law that applies to employees of private corporations but not to employees of individuals and partnerships might be held void on the ground that there is no reasonable basis for exempting employees of individuals and partnerships. On the other hand, the same law applied only to railroads probably would be upheld because this classification is not based on the *difference of employers*, but upon a difference in the *nature of employment*.

c. Cases Where Special or Local Laws Are Prohibited.

Article IV, section 23, of the Oregon Constitution, enumerates several types of special or local laws that are prohibited. The drafting attorney should become familiar with this section because, contrary to popular belief, not all local and special laws are invalid. The section describes 14 subjects concerning which the Legislative Assembly may not enact special or local laws. It should be noted that the Oregon Supreme Court has declared that subdivision 7 of the section, relating to "laying, opening and working on highways," has been impliedly repealed, at least as a basis for defeating legislative appropriations for the construction of public roads.[18]

A "local law" is a law that applies to and operates exclusively upon a portion of the territory of the state and the people living therein and upon no other persons and property. A "special law" is one that is applicable only to particular individuals or things.[19]

In cases where local laws are prohibited, it is possible to resort to classification. For example, notwithstanding the ban on certain regulation of courts, it is possible to divide the counties, with respect to the procedure for summoning and impaneling grand and petit juries, into three classes and make some laws apply to one class only. The selection of a standard of classification is exclusively a legislative power, the exercise of which is not subject to control by the courts. However, any classification must be natural and reasonable, not arbitrary, and must be founded upon real and substantial differences in the local situation and necessities of the class of counties to which it applies. If a classification excludes from its operation counties differing in no material particular from those included in a class, the classification cannot be upheld. Counties may be classified upon the basis of differences in population; and, if such classifications are natural and reasonable, laws applicable to a single class will be regarded as general in their character and not local or special. Mere convenience of local communities, the financial necessities of particular counties and the conflicting views of citizens on the subject of the necessity of some particular procedure relating to summoning and impaneling jurors, would not be sufficient. An arbitrary selection cannot be justified by calling it a classification. The marks of distinction on which a classification is founded must in some reasonable degree account for or justify the restriction of the legislation.

Examples of both reasonable and arbitrary classifications can be found. A bill is general and constitutional if it applies to all counties having a population of more than 500,000, even

[18] Stoppenback v. Multnomah County, 71 Or. 493, 507 (1914).
[19] State v. Malheur County, 185 Or. 392 (1949).

if there is only one such county in Oregon, as long as the bill is drafted in such a way that it will apply to all other counties as rapidly as they acquire that population. A law applicable to all cities of fewer than 100,000 population was upheld in Southern Pacific v. Consolidated Freightways.[20]

On the other hand, in a case where special or local laws are prohibited, it is risky to make the bill apply to a county having a population of "not less than 64,540 and not more than 64,545," for example. The county might as well be named, for the bill in all likelihood never could apply to any other county. In other states where special or local laws are prohibited generally, Acts providing for the government of cities having a population of "from 23,000 to 35,000" and "from 50,000 to 100,000" have been upheld. But a classification based upon a difference in population of 1,000 has been declared unconstitutional. When resorting to classification on the basis of population, the classification should be flexible. For example, the following could be used: "in every judicial district comprising but one county and having a population of more than 90,000 but less than 125,000, according to the latest federal decennial census." To classify according to the census of 1990 or any *particular* census will make the bill local, because no other judicial district ever could come within the class even though it increased or decreased according to a later census so as to have approximately the same population. Classifications also may be made to depend upon population "according to the latest federal decennial census or an estimate or count under ORS 190.510 to 190.610, whichever is more recent."

Where the prohibition against local laws in Article IV, section 23, does not apply, a county, city or other locality may be named in an Act, but such naming seems to make legislators uncomfortable because of the popular belief that all local laws are unconstitutional.

[20] 203 Or. 657 (1955).

CHAPTER FIFTEEN

SPECIAL TYPES OF BILLS

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1. REVENUE BILLS.

The Oregon Constitution contains two provisions applicable to bills for raising revenue.

First, Article IV, section 18, requires bills for raising revenue to originate in the House of Representatives. This requirement is similar, but not identical, to the requirement set forth in Article I, section 7, of the United States Constitution, that federal bills for raising revenue originate in the U.S. House of Representatives.

Second, Article IV, section 25, requires bills for raising revenue to receive a three-fifths majority in each house of the Legislative Assembly for passage. In Dale v. Kulongoski, 322 Or. 240 (1995), the court, in reviewing the ballot title for the measure proposing the three-fifths vote requirement, cited cases interpreting both state and federal origination clauses in concluding that the phrase "bills for raising revenue" was sufficiently understood so as not to need further explanation in the ballot title. The Dale case thus implies that the standards for determining when a bill is a bill for raising revenue should be the same for purposes of both the origination clause and the three-fifths vote requirement. No court has ruled directly on the meaning of the phrase "bills for raising revenue" for three-fifths vote purposes.

For drafting purposes, then, a bill for raising revenue should always be treated as requiring origination in the House of Representatives and a three-fifths vote in favor in each legislative chamber for passage.

One of the principal Oregon cases interpreting the origination clause is Northern Counties Trust Co. v. Sears, 30 Or. 388, 401-403 (1895). That case concludes that a bill is a bill for raising revenue if the bill's primary and direct purpose is to raise revenue for general governmental use. By contrast, a bill that merely incidentally raises revenue in furtherance of another government objective is not a bill for raising revenue. Courts interpreting the phrase "bills for raising revenue" have narrowly applied the term to those bills levying taxes for general governmental purposes "in the strict sense of the words." Id. at 402.

The Oregon Supreme Court has provided more guidance on the issue in two more recent cases. In Bobo v. Kulongoski, 338 Or. 111 (2005), the court determined that the question of whether a bill is a bill for raising revenue "entails two issues. The first is whether the bill

collects or brings money into the treasury. If it does not, that is the end of the inquiry. If a bill does bring money into the treasury, the remaining question is whether the bill possesses the essential features of a bill levying a tax." The court also noted that there is nothing to indicate that the phrase "bill for raising revenue" has different meanings for the purposes of Article IV, sections 18 and 25.

The court further clarified what it means for a bill to possess "the essential features of a bill levying a tax" in City of Seattle v. Dep't of Revenue, 357 Or. 718 (2015). Applying a strict interpretation of the phrase, the court held that the origination clause applies only to bills that actually levy a tax. A bill repealing a tax exemption, at issue in City of Seattle, is not a bill for raising revenue. The Oregon Tax Court further examined the analysis governing bills for raising revenue in Boquist v. Department of Revenue, 23 Or. Tax 263 (2013).

A drafter is frequently requested to draft a bill that increases fees or creates new fees. A bill establishing or increasing fees is not a bill for raising revenue. State v. Wright, 14 Or. 365 (1887) (overruled on other grounds, Warren v. Crosby, 24 Or 558 (1893)). The distinction between a fee and a tax is that a fee is a charge for which the feepayer receives a benefit in exchange for payment. By contrast, a tax exists when the taxpayer receives no benefit, other than the benefits of good government in general, in exchange for paying the charge.

Bills that impose assessments for local improvements or other special assessments are also not treated as bills for raising revenue, for the same reasons that fee bills are not treated as bills for raising revenue. See United States v. Munoz-Flores, 495 U.S. 385 (1990).

Often, a practical way to distinguish between charges that are fees or special assessments and charges that are taxes is to look at the breadth of the population paying the charge and the extent to which revenues raised by the charge exceed the cost of the benefit being provided. The greater the number of people subject to the charge or the more the revenues exceed the cost, the more likely it is that the charge is a tax. A bill imposing a charge that greatly exceeds the cost of the service being provided was found to be a bill for raising revenue in 15 Op. Att'y Gen. 113 (1931) (bill requiring local government to impose a privilege tax on gross earnings of utilities) and in 25 Op. Att'y Gen. 100 (1951) bill imposing fees on race licenses and percentage charge on gross receipts from mutual wagering).

A bill that extends the sunset of a temporary tax is a bill for raising revenue if the bill that originally created the temporary tax would have been considered a bill for raising revenue.

A bill that merely authorizes local government to impose a tax if the local government decides to do so is not a bill for raising revenue; the bill would not directly raise any revenue absent subsequent local government action.

A drafter may be asked to prepare a Senate amendment to a non-revenue raising House bill that would make the bill a bill for raising revenue. Whether the Oregon origination clause permits a Senate revenue raising amendment to a non-revenue raising bill is a question that has not been answered by Oregon courts. Among other jurisdictions with origination clause provisions, there is a split of authority; the courts of a majority of states do not look beyond

the bill number in determining the origination of the revenue raising provision, but a minority of other jurisdictions do consider the source of the revenue raising provision. Accordingly, the drafter should, at a minimum, advise the amendment requester of the potential origination clause problem. A House bill that is a bill for raising revenue at the time it passes out of the House may be amended in any manner on the Senate side. City of Seattle, at least at in the tax court opinion, appears to confirm that a Senate bill may be amended on the House side so as to be a bill for raising revenue. City of Seattle v. Dep't of Revenue, 21 Or. Tax 269 (2013).

If a Senator requests a bill for raising revenue, the drafter should inform the Senator that the draft is a bill for raising revenue and that the Oregon Constitution requires bills for raising revenue to be introduced in the House. The Senator may still request preparation of the draft. A brief written letter explaining origination and three-fifths vote requirements should accompany any draft bill for raising revenue prepared for a Senator.

Article IX, section 1a, Oregon Constitution, prohibits the use of an emergency clause on "any act regulating taxation or exemption." An "act regulating taxation or exemption" is *not* the same as a bill for raising revenue. See section 2c of chapter 12 of this manual for further discussion.

The rules of the Legislative Assembly require the title of a bill for raising revenue to include "and providing for revenue raising that requires approval by a three-fifths majority."

2. VALIDATING BILLS.

a. Constitutionality of Validating Bills.

Validating bills (also called curative acts) are used to cure or validate irregularities in actions, proceedings or transactions consummated in good faith under authority of an existing law. A validating bill will be upheld if it is in accord with justice, equity and sound public policy and does not materially interfere with or overthrow vested rights, impose new burdens or infringe upon the judicial department. The Legislative Assembly may pass a retroactive law to validate any Act that it could have authorized in the first instance subject to the restriction that the proposal cannot impair the obligation of contracts or adversely affect a vested right. People's Utility Dist. v. Wasco County, 210 Or. 1 (1957).

A challenge to the validity of a validating Act is usually made under the due process clause of the Fourteenth Amendment to the United States Constitution. See Jackson County v. Jackson Ed. Serv. Dist., 90 Or. App. 299 (1988); Hughes v. Aetna Cas. & Sur. Co., 234 Or. 426 (1963).

Examples. A list of validating Acts applicable to estates in property, conveyancing and recording, is found in ORS 93.810. ORS 273.900 to 273.920 validate numerous transactions relating to state lands. The following are additional examples of validating Acts:

SECTION _____. The use before the effective date of this (year) Act of a resolution rather than an ordinance to submit a municipal measure to electors at a special election under ORS 221.210 is validated. An otherwise valid municipal measure that was adopted at a special

election under ORS 221.210 that was ordered before the effective date of this (year) Act by means of a resolution rather than an ordinance is validated.

OR

SECTION _____. The approval of any subdivision or partition plat, during the period beginning January 1, 1980, and ending on the effective date of this (year) Act, that would have satisfied the requirements of ORS 92.090, as amended by section _____ of this (year) Act, is validated.

OR

SECTION _____. The apportionments and distributions of liquor revenues for the calendar quarter ending June 30, 2000, and of highway revenues for the period of six months ending June 30, 2000, to the City of Manzanita and the City of Gold Beach, the amounts of which were based on a special census of each city taken after June 30, 1997, under ORS 190.510 to 190.610, are validated. An apportionment or distribution described in this section may not be invalidated or set aside because the State Board of Higher Education lacked authority to conduct a special census after June 30, 1997.

OR

SECTION _____. Any special election of a domestic water supply district that was called and held under ORS 264.340 or 264.350 before the effective date of this (year) Act, at which a majority of the votes cast by district electors authorized the district to take any action under ORS 264.340 or 264.350, is validated and constitutes valid authorization to the district to take any action authorized by the majority vote.

OR

SECTION _____. All actions before the effective date of this (year) Act under ORS 440.315 to 440.410, that would have been valid but for the requirement that electors of a hospital district reside in the district for a period of not less than 90 days before an election, are validated.

OR

SECTION _____. Any proceeding or election under ORS 450.005 to 450.245 for the creation of a sanitary district or for the election of sanitary district officers that was held before January 1, 1981, is validated, notwithstanding any defect or irregularity in the proceeding or election. A sanitary district created or attempted to be created by an election described in this section is declared to be created. Officers of a sanitary district elected, or attempted to be elected, by an election described in this section, or by an election affected by a proceeding described in this section, are declared to be elected.

OR

SECTION _____. The use prior to the effective date of this (year) Act of any moneys from the Capitol Properties Account for the purposes specified in ORS 276.064 (2)(b) is validated.

OR

SECTION _____. Notwithstanding any provision of law, payments of compensation to an officer or employee of the State of Oregon made before the effective date of this (year) Act in good faith by a state officer or agency, at the rate and in the amount shown in the official budget of the state officer or agency for the 1979-1981 biennium, and provided by legislative appropriation based on that budget, are validated as made in conformance with the intent of the Legislative Assembly.

OR

SECTION _____. If the notice of the referendum provided for in sections 3 and 4 of this (year) Act is given before the effective date of this (year) Act, or the referendum is held before the effective date of this (year) Act, then the notice or referendum is valid for the purposes of sections ___ to ___ of this (year) Act.

b. Effect of Repeal of Validating Act.

The repeal of a validating Act does not affect any validation accomplished before the effective date of the repeal. ORS 174.070.

3. INTERSTATE COMPACTS.

An interstate compact is a voluntary agreement between two or more states that is designed to meet common problems of the states concerned. Compacts may require congressional consent. Article I, section 10, of the United States Constitution. Congressional consent is required if the compact tends to increase the political power of the participating states above that of other states or relative to the United States, or if the compact otherwise affects a federal interest. See Health Net, Inc. v. Dept. of Revenue, 22 OTR 128 (2015); PTI, Inc. v. Philip Morris, Inc., 100 F. Supp. 2d 1179 (C.D. Calif., 2000); Intake Water Co. v. Yellowstone River Compact Comm'n, 590 F. Supp. 293 (D. Mont, 1983). Congressional consent is usually granted before a state adopts a compact. See Virginia v. West Virginia, 78 U.S. 39, 59-60 (1870), on how congressional consent may be given.

An interstate compact adopted by a state is considered federal law, not state law, and therefore is subject to federal standards of statutory interpretation. New York v. Hill, 528 U.S. 110 (2000).

ORS chapters 417 and 507 contain examples of interstate compacts. Interstate compacts are rarely presented in our form and style. To the extent possible, try to put interstate compacts in Oregon form and style.

4. UNIFORM AND MODEL ACTS.

Uniform Acts are prepared by the National Conference of Commissioners on Uniform State Laws (also called the Uniform Law Commission) and generally are intended to be followed exactly. Model or "suggested" Acts are prepared by the Drafting Committee of the Council of State Governments and by other persons and organizations and are intended as guides for legislation for which uniformity is not necessary. Recently promulgated Uniform Acts and the suggested Acts of the Council of State Governments for each year are published in an annual booklet of the Council of State Governments titled *Shared State Legislation* (formerly known as *Suggested State Legislation*).

Model Acts can be required to conform to Oregon form and style. Uniform Acts, however, are probably best left alone in order to ensure the sought-after uniformity. Do not make substantive changes to Uniform Acts unless the changes are clearly requested by the draft or amendment requester. Minimize style changes to Uniform Acts.

5. CONTINGENT MEASURES REFERRED TO VOTERS.

A drafter may be requested to prepare a measure to be referred to electors that is also made contingent on the occurrence of something else. The drafter should consider the following constitutional provisions when making a measure referred to electors contingent on some other event:

- Article I, section 21, of the Oregon Constitution, provides that no law shall "be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution[.]" See Marr v. Fisher, 182 Or. 383, 388-392 (1947) (discussed in chapter 12 under "Operative Dates"); Foeller v. Housing Authority of Portland, 198 Or. 205 (1953). Note that Article I, section 21, does not prohibit making a law operative contingent upon a future event. Hazell v. Brown, 352 Or. 455 (2012).

- Article III, section 1, of the Oregon Constitution, establishes the separation of powers among three branches of government and prohibits one branch from exercising the functions of another. See Rooney v. Kulongoski, 322 Or. 15 (1995).

- Article IV, section 1, of the Oregon Constitution, limits the power of the Legislative Assembly to enact laws to inhibit the exercise of the referendum power reserved to the people. See State ex rel. McPherson v. Snell, 168 Or. 153 (1942); Bernstein Bros., Inc. v. Department of Revenue, 294 Or. 614 (1983).

- Article XVII, section 1, of the Oregon Constitution, requires a separate vote by electors for each constitutional amendment submitted to electors. See Armatta v. Kitzhaber, 327 Or. 250 (1998) (discussed in chapter 17 of this manual). Article XVII, section 1, also prohibits requiring local government or other entity ratification of a measure before referral to electors. Hart v. Paulus, 296 Or. 352 (1984).

- Article IV, section 1 (4)(d), of the Oregon Constitution, provides that an initiated or referred measure becomes effective 30 days after the date on which it is enacted or approved by a majority of the votes cast.

6. INITIATIVES.

Initiatives enable the people of the State of Oregon to create new laws, amend or repeal existing laws or amend the Oregon Constitution through ballot measures voted on at the general election.

The office of Legislative Counsel is required to assist in the drafting of initiatives when the requirements described in ORS 173.140 are fulfilled. Initiative measures generally follow the forms used for legislative measures with these exceptions:

- Initiative measures *do not* include a measure summary or a referendum clause.

- The heading for an initiative measure reads "An Act" except that an initiative proposing a constitutional amendment is headed "Proposed Constitutional Amendment."

a. Statutory Initiatives.

The form for initiative measures that create new statutory law or amend or repeal existing statutory law generally follows the form used for bills. Use "this (year of next general election) Act" in internal references; the year of the general election is used because that is the year in which electors will enact the measure.

The formal parts of initiative measures that create new statutory law or amend or repeal existing statutory law are:

(1) **Heading.** The heading reads "An Act".

(2) **Title.** The title is similar to the title of a bill and gives a general indication of the subject to which the measure relates. The title should be expressed as a single subject. See chapter 5 of this manual for single subject requirements. Existing statutes that are amended or repealed by the measure also should be designated in the title. Special title clauses declaring emergencies, prescribing effective dates, referring the measure to electors or stating supermajority voting requirements do not apply to initiatives and therefore are not included in initiative measure titles.

(3) **Enacting Clause.** The enacting clause reads "Be It Enacted by the People of the State of Oregon:".

(4) **Body.** The body is where the text of new law is set forth, amended sections are set forth in amended form or existing statutes are repealed.

EXAMPLE:

AN ACT

Relating to public utilities.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) As used in this section and section 2 of this (year) Act, "measured service" means charging for local exchange telephone service based upon number of calls, length of calls, distance, time of day or any combination of these factors.

(2) The Public Utility Commission may not require any telephone customer or class of customers to pay for local exchange telephone service, or any portion of local exchange telephone service, on a mandatory measured service basis.

SECTION 2. Nothing in section 1 of this (year) Act prohibits the Public Utility Commission from requiring telephone customers to pay on a mandatory measured service basis for:

(a) Land, marine or air mobile service.

(b) Local exchange telephone service resold at a profit.

SECTION 3. The Public Utility Commission may not change boundaries of local exchange service areas nor take any other action if the change or action has the effect of circumventing section 1 of this (year) Act.

b. Initiatives That Amend the Oregon Constitution.

Initiative measures that amend the Oregon Constitution generally follow the form for joint resolutions that amend the Constitution; however, these initiative measures *do not* include a referendum clause. The formal parts of initiative measures that amend the Oregon Constitution are:

(1) **Heading.** The heading reads "Proposed Constitutional Amendment."

(2) **Enacting Clause.** The enacting clause reads "Be It Enacted by the People of the State of Oregon:".

(3) **Body.** The body consists of *one* amending clause.

EXAMPLE:

PROPOSED CONSTITUTIONAL AMENDMENT

Be It Enacted by the People of the State of Oregon:

PARAGRAPH 1. Section 2, Article II of the Constitution of the State of Oregon, is amended to read:

Sec. 2. (1) Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution if such citizen:

(a) Is 18 years of age or older;

(b) Has resided in this state during the six months immediately preceding the election, except that provision may be made by law to permit a person who has resided in this state less than 30 days immediately preceding the election, but who is otherwise qualified under this subsection, to vote in the election for candidates for nomination or election for President or Vice President of the United States or elector of President and Vice President of the United States; and

(c) Is registered [*prior to the*] **not less than 20 calendar days immediately preceding any** election in the manner provided by law.

(2) [*Except as otherwise provided in section 6, Article VIII of this Constitution with respect to the qualifications of voters in all school district elections, provision*] **Provision** may be made by law to require that persons who vote upon questions of levying special taxes or issuing public bonds shall be taxpayers.

CHAPTER SIXTEEN

MEASURES OTHER THAN BILLS

1. JOINT RESOLUTIONS
2. CONCURRENT RESOLUTIONS
3. JOINT MEMORIALS
4. RESOLUTIONS
5. MEMORIALS

In addition to bills, the Legislative Assembly as a whole may take action through the following kinds of measures:

- **Joint Resolution**.
- **Concurrent Resolution**.
- **Joint Memorial**.

Any of these three types of measures may be introduced in either house.

A single house of the Legislative Assembly may take action through the following kinds of measures:

- **Resolution**.
- **Memorial**.
- **Commemoration** (used only by the Senate during the legislative interim to express congratulations, commendation or sympathy — see Appendix F of this manual).

The power to "legislate" by resolution or memorial is confined within narrow limits. A resolution or memorial is not a law and is not submitted to the Governor for approval or disapproval. If adopted, resolutions and memorials are filed with the Secretary of State. Of the resolutions and memorials that are adopted only those considered to be of public significance and general interest are published in *Oregon Laws*.

1. JOINT RESOLUTIONS.

The Legislative Assembly uses joint resolutions to:

- Propose a constitutional amendment or revision (see chapter 17 of this manual).
- Create an interim committee under ORS 171.610 or a legislative task force.
- Give directions to a state agency or officer.
- Authorize some kind of temporary action.

While ORS 171.640 makes it unnecessary to use any measure to create interim committees, ORS 171.610 seems to indicate that if a measure is used, a joint resolution is the

preferred type of measure. See chapter 19 of this manual for interim committee boilerplate and an in-depth discussion of interim committees and legislative task forces.

A joint resolution cannot be used to legislate on matters involving property or other rights.[1] As to such matters, a resolution has only the effect of an expression of opinion and no more. A bill, unlike a joint resolution, is subject to the Governor's veto under Article V, section 15b, of the Oregon Constitution, and is subject to the referendum under Article IV, section 1, of the Oregon Constitution.[2] Therefore, the drafting attorney must make an initial decision whether to use a joint resolution or a bill for the request.

An appropriation cannot be made by resolution; however, expenditures may be authorized in a resolution from money that is already appropriated. For example, the limit on expenses for an interim committee may be set in the resolution that creates it, but the moneys to be used must be appropriated by an Act. Therefore, use a bill to create an interim committee when it is necessary to appropriate money to or for the interim committee.

The parts of a joint resolution are the heading, preamble (optional), resolving clause and body.

Heading. The heading identifies the type of measure. It does not include the name of the house of origin.

Preamble. A preamble ("whereas" clauses) may be used to express reasons for the proposed action, but may be omitted because it is not essential to the use or validity of the joint resolution. If used, the preamble follows the heading and precedes the resolving clause. Preambles often provide the drafting attorney with an opportunity to exercise an eloquence not otherwise found in bills. When writing a preamble:

- Do not use a comma after the word "Whereas" in each clause.
- End each paragraph except the last with a semicolon and the word "and".
- End the last paragraph with a semicolon and the phrase "now, therefore,". (This phrase connects the preamble to the resolving clause.)
- Keep text lightface.

Resolving Clause. While the preamble may be omitted, the resolving clause and body are indispensable parts of a joint resolution. The resolving clause is always flush with the left-hand margin. The resolving clause for a joint resolution is:

Be It Resolved by the Legislative Assembly of the State of Oregon:

Body. The measure text.

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[1] Rowley v. Medford, 132 Or. 405 (1930).
[2] 37 Op. Att'y Gen. 147, 154 (1974).

The following is an example of a joint resolution to create a single-purpose interim committee, including the heading, preamble, resolving clause and body (see chapter 19 of this manual for interim committee boilerplate and further discussion):

JOINT RESOLUTION

Whereas the State of Oregon has abundant ocean resources; and

Whereas new ocean resource technologies are in development; and

Whereas responsible stewardship of ocean resources benefits all Oregonians; now, therefore,

Be It Resolved by the Legislative Assembly of the State of Oregon:

(1) The Interim Committee on Ocean Resources is established, consisting of six members appointed as follows:

(a) The President of the Senate shall appoint three members from among members of the Senate.

(b) The Speaker of the House of Representatives shall appoint three members from among members of the House of Representatives.

(2) The interim committee shall study Oregon's ocean resources and identify appropriate new technologies for ocean resource stewardship.

(3) The interim committee may study and make recommendations for maximizing Oregon's ocean research and development assets.

(4) A majority of the members of the interim committee constitutes a quorum for the transaction of business.

(5) Official action by the interim committee requires the approval of a majority of the members of the interim committee.

(6) The President of the Senate and the Speaker of the House of Representatives, in consultation with the interim committee chairpersons, shall develop a work plan consisting of a list of subjects for study by the interim committee and the duration of the study. The work plan developed for the interim committee shall be filed with the Legislative Policy and Research Director.

(7) Interim committee work plans may be modified only by the appointing authorities after consultation with the interim committee chairperson. The interim committee, by official action, may request such a modification.

(8) The interim committee shall report to the Legislative Assembly in the manner provided in ORS 192.245 on or before December 31, 2018.

(9) The Legislative Policy and Research Director may employ persons necessary for the performance of the functions of the interim committee. The Legislative Policy and Research Director shall fix the duties and amounts of compensation of these employees. The interim committee shall use the services of continuing legislative staff, without employing additional persons, to the greatest extent practicable.

(10) All agencies of state government, as defined in ORS 174.111, are directed to assist the interim committee in the performance of its duties and, to the extent permitted by laws relating to confidentiality, to furnish such information and advice as the members of the interim committee consider necessary to perform their duties.

(11) Subject to the approval of the Emergency Board, the interim committee may accept contributions of funds and assistance from the United States Government or its agencies, or from any other source, public or private, and agree to conditions thereon not inconsistent with the purposes of the interim committee. All such funds are to aid in financing the functions of the interim committee and shall be deposited in the General Fund of the State Treasury to the credit of separate accounts for the interim committee and shall be disbursed for the purpose for which contributed in the same manner as funds appropriated for the interim committee.

(12) All legislation recommended by official action of the interim committee must indicate that it is introduced at the request of the interim committee and shall be prepared in time for presession filing pursuant to ORS 171.130.

2. CONCURRENT RESOLUTIONS.

A concurrent resolution is used when both houses of the Legislative Assembly join to:

- Address matters affecting the internal operations and procedures of the Legislative Assembly, such as joint sessions, appointments of joint committees, recesses and adjournments.
- Express legislative congratulations, commendation or sympathy.
- Express an opinion or sentiment on a matter of public interest.
- Express legislative approval of action taken by someone else.
- Designate a state emblem.
- Make a certain day a single day of state recognition. (Use a bill for a statutory holiday, as in ORS 187.010 and 187.020, or a day of annual recognition.)

The parts of a concurrent resolution are the heading, preamble (optional), resolving clause and body.

Heading. The heading identifies the type of measure. It does not include the name of the house of origin.

Preamble. The preamble for a concurrent resolution follows the same form as a preamble for a joint resolution and may be omitted.

Resolving Clause. The resolving clause is always flush with the left-hand margin. The resolving clause for a concurrent resolution is:

Be It Resolved by the Legislative Assembly of the State of Oregon:

Body. The text, which is lightface and which may take the form of numbered paragraphs or may take the following formal form:

- Begin the first paragraph with the word "That".
- Begin the second paragraph and subsequent paragraphs with the words "Resolved, That".
- End each paragraph except the last with a semicolon and the words "and be it further".
- End the last paragraph with a period.

When a concurrent resolution expresses legislative congratulations, commendation or sympathy, do not use numbered paragraphs because of the resulting impersonal appearance.

The following is an example of a concurrent resolution providing for the appointment of a joint committee and the convening of a joint session:

CONCURRENT RESOLUTION

Whereas February 12 is the 170th anniversary of the birth of Abraham Lincoln, the great emancipator; and

Whereas it is fitting that a suitable observance be made by the Senate and by the House of Representatives in honor of this day; now, therefore,

Be It Resolved by the Legislative Assembly of the State of Oregon:

(1) A committee of four shall be appointed to arrange an appropriate program commemorating this anniversary. The President of the Senate shall appoint two members from among members of the Senate, and the Speaker of the House of Representatives shall appoint two members from among the members of the House of Representatives.

(2) For this purpose, the Senate and the House of Representatives shall convene in joint session at 2:05 p.m. on Tuesday, February 12, 1979.

3. JOINT MEMORIALS.

A joint memorial is used when both houses of the Legislative Assembly join to address or petition Congress, the President of the United States or the officials or agencies of another governmental body. Do *not* use a joint memorial to commemorate the dead.

The parts of a joint memorial are the heading, address clause, introductory clause, preamble (optional), resolving clause and body.

Heading. The heading identifies the type of measure. It does not include the name of the house of origin.

Address Clause. The address clause follows the heading and precedes the introductory clause. Note that the first line of the address clause is flush with the left-hand margin and the second line is indented: <spm address>

To the President of the United States and the Senate and the House of Representatives of the United States of America, in Congress assembled:

Here is a special address clause used to memorialize the Senate of the United States of America when it goes into executive session:

To the Senate of the United States of America, in executive session assembled:

Here are other examples of address clauses:

- To the President of the United States:
- To the President of the United States, the Senate Majority Leader and the Speaker of the House of Representatives:
- To the President of the United States, the Senate and the House of Representatives of the United States of America, in Congress assembled, and the Secretary of the Department of Commerce:
- To the members of the Oregon Congressional Delegation:
- To the Director of the United States Fish and Wildlife Service:
- To the Governors of Alaska, Idaho, Montana and Washington and to the Premiers of Alberta and British Columbia:

Introductory Clause. The introductory clause follows the address clause and precedes the preamble, if used. The introductory clause for a joint memorial reads: <spm intro-jmem>

We, your memorialists, the Eightieth Legislative Assembly of the State of Oregon, in legislative session assembled, respectfully represent as follows:

Preamble. The preamble for a joint memorial follows the same form as a preamble for a joint resolution.

Resolving Clause. The resolving clause is always flush with the left-hand margin. The resolving clause for a joint memorial is:

Be It Resolved by the Legislative Assembly of the State of Oregon:

Body. The text, which is lightface and which may take the form of numbered paragraphs or may take the following formal form:

- Begin the first paragraph with the word "That".
- Begin the second paragraph and subsequent paragraphs with the words "Resolved, That".
- End each paragraph except the last with a semicolon and the words "and be it further".
- End the last paragraph with a period.

Provision for Sending Copies. It is customary to include at the end of the body of a joint memorial a provision for sending "a copy of this memorial" to members of the Oregon Congressional Delegation. (Note that the type of memorial is not specified.) Copies also may be sent to other specific officers and agencies of the federal government or other states or provinces, depending upon the subject of the joint memorial.

Never state in this provision that copies be sent to "each member of Congress" unless specifically directed to do so by the person requesting the joint memorial. Inclusion of such a provision will require the preparation of hundreds of copies of the joint memorial and transmittal of these copies to *each* member of Congress.

If copies of the joint memorial are to be sent to Congressional leadership, direct them to the "Senate Majority Leader and the Speaker of the House of Representatives" and *not* to the "Vice President of the United States and the Speaker of the House of Representatives." Although the Vice President serves as the presiding officer of the United States Senate, the Senate Majority Leader, like the Speaker of the House of Representatives, has been elected by the majority of the members of the leader's political party in that house to be responsible for the design and achievement of a legislative program.

The provision for sending copies may take the form of a numbered paragraph at the end of the joint memorial and should read substantially as follows:

(2) A copy of this memorial shall be sent to the President of the United States, to the members of the Federal Energy Regulatory Commission and to each member of the Oregon Congressional Delegation.

The provision for sending copies of a joint memorial may also take the following form:

That we, the members of the Seventy-seventh Legislative Assembly, respectfully request . . .; and be it further

Resolved, That a copy of this memorial shall be sent to the President of the United States, to the members of the Federal Energy Regulatory Commission and to each member of the Oregon Congressional Delegation.

The following is an example of a joint memorial:

JOINT MEMORIAL

To the Senate and House of Representatives of the United States of America, in Congress assembled:

We, your memorialists, the Seventieth Legislative Assembly of the State of Oregon, in legislative session assembled, respectfully represent as follows:

Whereas the historic Celilo Village has twice been moved or altered by projects of the United States Government; and

Whereas Celilo Village is one of the most visible Indian communities in the nation with thousands of visitors per day; and

Whereas the once prosperous center of fishing and trade has been lost to neglect, deterioration and poverty; and

Whereas the Confederated Tribes of the Umatilla Indian Reservation have committed to assist the "River People" and have prepared a detailed inventory of existing buildings and a preliminary plan for replacement and refurbishing; and

Whereas the land, infrastructure and five of the remaining houses from 1947 are held in trust by the Bureau of Indian Affairs for use by the Umatilla, Warm Springs, Yakima and other Columbia River Indians; now, therefore,

Be It Resolved by the Legislative Assembly of the State of Oregon:

(1) The Congress of the United States is urged to appropriate the necessary funds to restore and redevelop Celilo Village.

(2) A copy of this resolution shall be sent to each member of the Oregon Congressional Delegation.

4. RESOLUTIONS.

A resolution, also known as a "simple resolution," is adopted by a single house of the Legislative Assembly to:

- Take action affecting its own concerns or procedures, such as appointing a committee of its members.
- Express an opinion or sentiment on a matter of public interest.

The parts of a resolution are the heading, preamble (optional), resolving clause and body.

Heading. The heading identifies the type of measure *and includes* the name of the house of origin, e.g., "House Resolution" or "Senate Resolution."

Preamble. The preamble for a resolution follows the same form as a preamble for a joint resolution.

Resolving Clause. The resolving clause for a resolution identifies the single house taking the action or expressing the opinion or sentiment.

The resolving clause for a **House Resolution** is:

Be It Resolved by the House of Representatives of the State of Oregon:

The resolving clause for a **Senate Resolution** is:

Be It Resolved by the Senate of the State of Oregon:

Body. The text, which is lightface and which may take the form of numbered paragraphs or may take the following formal form:

- Begin the first paragraph with the word "That".
- Begin the second paragraph and subsequent paragraphs with the words "Resolved, That".
- End each paragraph except the last with a semicolon and the words "and be it further".
- End the last paragraph with a period.

The following is an example of a resolution adopted by a single house:

SENATE RESOLUTION

Whereas history has been marred by racial discrimination, exclusion, bigotry and great injustice toward people of color, including Native Americans, African Americans, Latinos, Chinese Americans, Japanese Americans and Pacific Islanders; and

Whereas such mistreatment based on race has been allowed and enforced through our laws and legal system; and

Whereas an example of a law was an Act passed by the Oregon Territorial Assembly in 1849 (and later repealed) that expressly excluded African Americans from the Territory; and

Whereas the legislative session that convened in January 1999 is the 150th anniversary of this exclusionary Act; and

Whereas one lingering effect of this history causes harm and pain to people of color and limits the quality and dignity of all of our lives; and

Whereas we believe that an honest acknowledgment of our racial history and open dialogue can lead to racial healing and reconciliation and free us to move constructively into a better future for all if we take personal responsibility for change by examining and changing our personal attitudes that perpetuate structural, economic and racial separation; now, therefore,

Be It Resolved by the Senate of the State of Oregon:

That we, the members of the Senate of the Seventieth Legislative Assembly, recognize Oregon's discriminatory history, acknowledge people of all races and ethnic backgrounds who have worked for positive change and celebrate the progress made and encourage participation in honest interracial dialogue essential to positive social change; and be it further

Resolved, That we, the members of the Senate of the Seventieth Legislative Assembly, resolve to increase public awareness of racial discrimination and work toward the full participation of racial minorities in all aspects of Oregon life, and that this Day of Acknowledgment provide focus for planning constructive dialogues and actions as we work toward a future of racial equality.

5. MEMORIALS.

A memorial, also known as a "simple memorial," is a measure by which a single house of the Legislative Assembly takes action of a character for which the Legislative Assembly as a whole would use a joint memorial.

The parts of a memorial are the heading, address clause, introductory clause, preamble (optional), resolving clause and body.

Heading. The heading identifies the type of measure *and includes* the name of the house of origin, e.g., "House Memorial" or "Senate Memorial."

Address clause. The address clause used for a memorial follows the form as that used for a joint memorial.

Introductory Clause. The introductory clause follows the address clause and precedes the preamble, if used. The introductory clause for a memorial identifies which house is addressing or petitioning the officials or agencies of another governmental body.

The introductory clause for a **House Memorial** reads: <spm intro-hmem>

We, your memorialists, the House of Representatives of the State of Oregon, in legislative session assembled, respectfully represent as follows:

The introductory clause for a **Senate Memorial** reads: <spm intro-smem>

We, your memorialists, the Senate of the State of Oregon, in legislative session assembled, respectfully represent as follows:

Preamble. If used, the preamble for a memorial follows the same form as a preamble for a joint resolution.

Resolving Clause. The resolving clause for a memorial also identifies which house is addressing or petitioning another governmental body. The resolving clause is always flush with the left-hand margin.

The resolving clause for a **House Memorial** is:

Be It Resolved by the House of Representatives of the State of Oregon:

The resolving clause for a **Senate Memorial** is:

Be It Resolved by the Senate of the State of Oregon:

When the Senate desires to express its views during an executive appointment session, the resolving clause is:

Be It Resolved by the Senate in Session Assembled under Section 4, Article III of the Oregon Constitution:

Body. The text is lightface and may take the form of numbered paragraphs or may take the following formal form:

- Begin the first paragraph with the word "That".
- Begin the second paragraph and subsequent paragraphs with the words "Resolved, That".
- End each paragraph except the last with a semicolon and the words "and be it further".
- End the last paragraph with a period.

Provision for Sending Copies. As for a joint memorial, it is customary to include at the end of the body of a memorial a provision for sending "a copy of this memorial" to members of the Oregon Congressional Delegation or, depending on the subject of the memorial, to other specific officers and agencies of the federal government or other states or provinces. The caveats about sending a copy of the memorial to "each member of Congress" or to Congressional leadership also apply.

The following is an example of a memorial adopted by a single house:

HOUSE MEMORIAL

To the President of the United States and the Senate and House of Representatives of the United States of America, in Congress assembled:

We, your memorialists, the House of Representatives of the State of Oregon, in legislative session assembled, respectfully represent as follows:

Whereas children are a precious gift and responsibility, and preserving the spiritual, physical and mental well-being of children is our sacred duty as citizens; and

Whereas no segment of our society is more critical to the future of human survival and society than our children, and it is the obligation of all public policymakers not only to support but also to defend the health and rights of parents, families and children; and

Whereas information endangering children is being made public and, in some instances, may be given unwarranted or unintended credibility through release under professional titles or through professional organizations; and

Whereas elected officials have a duty to inform and to counteract actions they consider damaging to children, parents, families and society; and

Whereas Oregon has made sexual molestation of a child a crime, and parents who sexually molest their children should be declared to be unfit; and

Whereas virtually all studies in this area, including those published by the American Psychological Association, condemn child sexual abuse as criminal and harmful to children; and

Whereas the American Psychological Association has recently published, but did not endorse, a study that suggests that sexual relationships between adults and "willing" children are less harmful than believed and might even be positive for "willing" children; now, therefore,

Be It Resolved by the House of Representatives of the State of Oregon:

(1) The House of Representatives of the Seventieth Legislative Assembly of the State of Oregon condemns and denounces all suggestions in the recently published study by the American Psychological Association that indicate that sexual relationships between adults and "willing" children are less harmful than believed and might even be positive for "willing" children.

(2) The House of Representatives of the Seventieth Legislative Assembly of the State of Oregon urges the President and the Congress of the United States of America to likewise reject and condemn, in the strongest honorable written and vocal terms possible, any suggestions that sexual relationships between children and adults are anything but abusive, destructive, exploitive, reprehensible and punishable by law.

(3) The House of Representatives of the Seventieth Legislative Assembly of the State of Oregon encourages competent investigations to continue to research the effects of child sexual abuse using the best methodology so that the public and public policymakers may act upon accurate information.

(4) A copy of this memorial shall be sent to:

(a) The Honorable Bill Clinton, President of the United States;

(b) The Honorable Al Gore, Jr., Vice President of the United States and President of the United States Senate;

(c) The Honorable Trent Lott, Majority Leader of the United States Senate;

(d) The Honorable J. Dennis Hastert, Speaker of the United States House of Representatives;

(e) The Honorable David Satcher, M.D., Ph.D., Surgeon General of the United States; and

(f) The members of the Oregon Congressional Delegation, including Senators Ron Wyden and Gordon Smith and Representatives David Wu, Greg Walden, Earl Blumenauer, Peter DeFazio and Darlene Hooley.

CHAPTER SEVENTEEN

CONSTITUTIONAL AMENDMENTS AND REVISIONS

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1. BACKGROUND.

Adequate background research is required in preparing a constitutional amendment or revision, just as in drafting a bill. Since any change in the Oregon Constitution must be approved by the people, correcting an error made in drafting a constitutional amendment or revision is much more difficult than correcting an error made in drafting a bill.

In drafting a constitutional amendment or revision, the drafting attorney must check the annotations to the Constitution. Reference to the report and files of the Oregon legislative interim committees on constitutional revision may be useful to pick up background information relating to the proposed amendment or revision and to find any notes concerning obsolete related parts of the Constitution. Comparative constitutional provisions of other states may be helpful in preparing a constitutional amendment. For the source of original sections of the Oregon Constitution, *A History of the Oregon Constitution* by Carey is often useful. Claudia Burton has also authored three law review articles on the legislative history of the Oregon Constitution.[1] For background on amendments to the Constitution, the voters' pamphlet for the election at which the amendment was adopted may provide the arguments pro and con.

There are significant differences between *amendment* and *revision* of which the drafting attorney must be aware. The terms are not interchangeable.

2. CONSTITUTIONAL AMENDMENT.

The people may amend the Constitution through use of the initiative procedure.[2] The amendments proposed by the people by petition do not require the referendum clause.

The method for legislatively adopting amendments to the Oregon Constitution is prescribed in Article XVII, section 1, Oregon Constitution. That section provides that:

- An amendment may be proposed in either house of the Legislative Assembly.

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[1] Claudia Burton, "A Legislative History of the Oregon Constitution of 1857 - Parts I, II and III," 37 Willamette L. Rev. 469 (2001), 39 Willamette L. Rev. 245 (2003), 40 Willamette L. Rev. 225 (2004).
[2] See Article IV, section 1, Oregon Constitution.

- The amendment must be agreed to by a *majority* of all the members elected to each of the two houses.

- The amendment must be referred to the people for their approval or rejection at the next *regular general election*, except when the Legislative Assembly orders a special election for that purpose.

- The amendment must be approved by a majority of the votes cast on the amendment.

- If the majority of votes cast on the amendment is in favor of the amendment, the Governor by proclamation declares the amendment adopted, and the amendment takes effect 30 days after the day on which it is approved by a majority of the votes cast.[3]

- When "two or more amendments shall be submitted" at the same election, they shall be so submitted that each amendment shall be voted upon separately.

Drafting attorneys should pay special attention to the separate-vote requirement. This requirement applies to constitutional amendments proposed by initiative petition and to constitutional amendments referred by the Legislative Assembly.[4] If a court determines that a measure was not adopted in compliance with the separate-vote requirement of Article XVII, section 1, the measure is void in its entirety.

The separate-vote requirement does not prohibit an amendment that affects more than one article or section. "At most it prohibits the submission of two amendments on two different subjects in such a manner as to make it impossible for the voters to express their will as to each."[5] The test for determining whether a measure contains more than one constitutional amendment that must be voted on separately is described in Armatta v. Kitzhaber,[6] Lehman v. Bradbury[7] and Swett v. Bradbury.[8]

In Armatta, the court said:

> We conclude that the proper inquiry is to determine whether, if adopted, the proposal would make two or more changes to the constitution that are substantive and that are not closely related. If the proposal would effect two

[3] Article IV, section 1 (4)(d), Oregon Constitution.
[4] Armatta v. Kitzhaber, 327 Or. 250 (1998).
[5] Baum v. Newbry, 200 Or. 576 (1954).
[6] 327 Or. 250 (1998).
[7] 333 Or. 231 (2002).
[8] 333 Or. 597 (2002).

> or more changes that are substantive and not closely related, the proposal violates the separate-vote requirement.[9]

In Lehman, the court said that to determine whether changes are closely related the court will examine (1) whether the constitutional provisions affected by the measure are related, and (2) whether the changes made to those constitutional provisions are closely related. The court said:

> First, we examine the relationship among the constitutional provisions that the measure affects . . . . If the affected provisions of the existing constitution themselves are not related, then it is likely that changes to those provisions will offend the separate-vote requirement. . . . [T]he fact that a proposed amendment asks the people, in one vote, substantively to change multiple provisions of the Oregon Constitution that are not themselves related is one indication that the proposed amendment might violate the separate-vote requirement.
>
> Next, we must consider the constitutional changes themselves. That is, . . . we must determine whether the changes made to those . . . constitutional provisions are closely related. If they are closely related, the measure under consideration survives scrutiny under Article XVII, section 1. If they are not, it does not.[10]

In Swett v. Bradbury, the court said that "it is equally valid analytically to start the inquiry by focusing on the changes themselves."[11]

Several other cases have also addressed this issue.[12]

a. Form of Constitutional Amendments.

A constitutional amendment is proposed by a joint resolution.

The following are examples of the parts of a joint resolution proposing a constitutional amendment:

Preamble:

Although a preamble ("whereas" clauses) is rarely used in a joint resolution proposing a constitutional amendment, one can be included if the requester wishes. House Joint Resolution 7 (1967) is an example.

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[9] Armatta at 277.
[10] Lehman at 246.
[11] Swett at 607.
[12] See also State v. Rogers, 352 Or. 510 (2012), Carey v. Lincoln Loan Co., 342 Or. 530 (2007); Meyer v. Bradbury, 341 Or. 288 (2006); Lincoln Interagency Narcotics Team v. Kitzhaber, 341 Or. 496 (2006); League of Oregon Cities v. State of Oregon, 334 Or. 645 (2002).

Resolving Clause:

Be It Resolved by the Legislative Assembly of the State of Oregon:

Amending Clause:

In a joint resolution proposing a constitutional amendment, only *one* amending clause is used. The amending clause immediately follows the resolving clause.

b. Amendment of Existing Section.

Probably the most common type of constitutional amendment is an amendment of an existing section of the Constitution. Brackets and boldfaced type are used to mark the changes to be made by the amendment, the same as in a bill. The following example illustrates the form used for amending a section or sections of the Constitution:

> **PARAGRAPH 1.** Sections 3 and 7, Article IV of the Constitution of the State of Oregon, are amended to read:
> **Sec. 3.** The Senators and Representatives shall be chosen. . . .
> **Sec. 7.** A senatorial district, when. . . .

c. Adding New Section.

The Oregon Constitution also may be amended by adding a new section or sections. In a joint resolution proposing such an amendment, the following is suggested: <spm addc>

> **PARAGRAPH 1.** The Constitution of the State of Oregon is amended by creating new sections 2 and 3 to be added to and made a part of Article III, such sections to read:
> **SECTION 2. The Legislative Assembly shall. . . .**
> **SECTION 3. The Legislative Assembly may. . . .**

The numbers assigned to the new sections in the proposed amendment should be the numbers that they will have when placed in the Constitution. This is an exception to the general rule that a drafting attorney does not assign permanent identifying numbers to new enactments. Note, too, that the section designation is not underlined, as it would be in a bill.

d. Repeal.

In a joint resolution proposing the repeal of a section of the Oregon Constitution, the following form should be used:

> **PARAGRAPH 1. Sections 37 and 38, Article I of the Constitution of the State of Oregon, are repealed.**

e. Repeal and Adoption in Lieu.

In a joint resolution proposing the repeal of a section of the Oregon Constitution and the adoption in lieu thereof of a new section, the following should immediately follow the resolving clause:

PARAGRAPH 1. The Constitution of the State of Oregon is amended by repealing section 6, Article IV, and by adopting the following new section 6 in lieu thereof, such section to read:

Sec. 6. (1) The number of Senators shall be. . . .

No separate statement is required to repeal the former section 6.

f. Repeal of Existing Section and Amendment of Existing Section in Same Proposed Amendment.

In a joint resolution proposing the repeal of a section or sections of the Oregon Constitution and also proposing the amendment of existing sections, the following should immediately follow the resolving clause:

PARAGRAPH 1. The Constitution of the State of Oregon is amended by repealing section 18, Article VII (Original), and by amending section 5, Article VII (Amended), such section to read:

Sec. 5. In civil cases. . . .

g. Repeal of Existing Section and Creation of New Sections in Same Proposed Amendment.

In a joint resolution proposing the repeal of a section or sections of the Oregon Constitution and also proposing the enactment of new sections, the following should immediately follow the resolving clause:

PARAGRAPH 1. The Constitution of the State of Oregon is amended by repealing sections 2, 3, 4, 5, 6, 7 and 8, Article IV, and section 17, Article V, and by creating new sections 2 and 3 to be added to and made a part of Article IV, such sections to read:

SECTION 2. The Senate shall be. . . and the House of Representatives shall be. . . .

SECTION 3. (1) The Senators and Representatives shall be. . . .

h. Amendment of Existing Sections and Creation of New Sections in Same Proposed Amendment.

The form for an amendment of an existing section and the creation of a new section in the same proposed amendment depends on the circumstances. Usually, in a joint resolution proposing the amendment of an existing section and the creation of a new section, the following should immediately follow the resolving clause:

PARAGRAPH 1. The Constitution of the State of Oregon is amended by creating a new section 5 to be added to and made a part of Article III, and by amending section 2, Article IV, such sections to read:

SECTION 5. The Legislative Assembly. . . .

In some cases when it is necessary to create new sections, the amendment may be easier to understand if existing sections are repealed (rather than amended) and reenacted in the form of new sections.

An example of an amendment changing the title of an Article of the Constitution may be found in House Joint Resolution 5 (1959).

i. Adding a New Article.

Subject to the separate-vote requirement discussed above, a joint resolution may propose a new Article to the Oregon Constitution. To propose a new Article, use the following form after the resolving clause:

> **PARAGRAPH 1.** The Constitution of the State of Oregon is amended by creating a new Article to be known as Article XI-K, such Article to read:
>
> **ARTICLE XI-K**
>
> **SECTION 1. (Insert text)**
> **SECTION 2. (Insert text)**
> **SECTION 3. (Insert text)**

j. Referendum Clause.

Constitutional amendments proposed by the Legislative Assembly must be referred to the people for their approval or rejection. The referred amendment is to be voted on at the next regular general election, unless the Legislative Assembly orders a special election. Therefore, in a joint resolution proposing a constitutional amendment, a referendum clause must be included.

The following (to follow the text of the proposed amendment) is prescribed for submission by the Legislative Assembly of a proposed constitutional amendment at a *regular general election*: <spm general>

> **PARAGRAPH 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next regular general election held throughout this state.**

At the primary election: <spm primary>

> **PARAGRAPH 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at a special election held throughout this state on the same date as the next primary election.**

At a special election:

A drafting attorney may be asked to refer a constitutional amendment to the people at an election date that is different from the primary election or regular general election. If so, the resolution may require a bill to provide for a special election. For a discussion of special

election bills, see "Referral at Special Election" under "Referendum" in chapter 12 of this manual.

If requested to submit an amendment at a special election, or at the primary election or regular general election if the bill calling the special election does not pass, the drafting attorney should insert the following language in the referral paragraph: <spm special-option>

> **PARAGRAPH 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at a special election held throughout this state on the date specified in section __, chapter ___, Oregon Laws (year) (Enrolled _____ Bill ___). If a special election is not held throughout this state on the date specified in section __, chapter ___, Oregon Laws (year) (Enrolled _____ Bill ___), the amendment proposed by this resolution shall be submitted to the people for their approval or rejection at** [insert either "**a special election held throughout this state on the same date as the next primary election**" *or* "**the next regular general election held throughout this state**"]**.**

If requested to submit an amendment at a special election only, the drafting attorney should insert the following language in the referral clause (note that the amendment will not be referred if the special election bill does not pass): <spm special>

> **PARAGRAPH 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at a special election held throughout this state as provided in chapter ___, Oregon Laws (year) (Enrolled _____ Bill ___).**

Note that any referral to a special election will require a separate special election bill as described above.

An initiative petition does not require any referendum clause. The election date (regular general election) is fixed by the Oregon Constitution, unless a different election date is ordered by the Legislative Assembly in a separate bill.[13] For an example of a bill ordering a different election date on a referendum petition, see chapter 1050, Oregon Laws 1999.

k. Ballot Title.

If directed to prepare a ballot title, the drafting attorney should consult ORS 250.035 and 250.075. The ballot title may be included in the bill providing for the special election or may be drafted as a separate bill. Political circumstances may dictate the approach. The bill may alter or suspend the ballot title provisions of ORS 250.035, including provisions allowing judicial review of the ballot title. See discussion of ballot titles under "Referendum" and "Setting Special Elections" in chapter 12 of this manual.

L. Rescission of a Proposed Amendment.

In the 2002 second special session, the Legislative Assembly adopted Senate Joint Resolution 76, which rescinded Senate Joint Resolution 50 adopted in the 2002 first special session. See also House Joint Resolution 8 (1963 special session) and House Joint Resolution 2 (1967 special session). The authority of the Legislative Assembly to rescind a proposed

[13] Article IV, section 1 (4)(c), Oregon Constitution.

amendment to the Oregon Constitution and to refer a different proposed amendment to the voters was upheld by the Marion County Circuit Court.[14]

Note that the 2002 rescission occurred prior to printing of ballots or of the voters' pamphlet. An attempt to rescind a proposed amendment after ballots have been printed might or might not be upheld by a court.

3. CONSTITUTIONAL REVISION.

Article XVII, section 1, Oregon Constitution, provides that a convention to amend or propose amendments to the Constitution or to propose a new Constitution can be called only if the law providing for such convention first is approved by the people at a regular general election. An example of a bill calling a constitutional convention is House Bill 351 (1959).

The method for adopting a constitutional revision is prescribed in Article XVII, section 2, of the Oregon Constitution. Subsection (1) of that section provides that:

- A revision of all or part of the Constitution may be proposed in either house of the Legislative Assembly.
- The revision must be agreed to by *two-thirds* of all the members of each house.
- The revision must be referred to the people for their approval or rejection at the next regular statewide primary election, except when the Legislative Assembly orders a special election for that purpose.
- The revision must be approved by a majority of the votes cast on the revision.
- If the majority of votes cast on the revision is in favor of the revision, the Governor by proclamation declares the revision adopted, and the revision is in effect as the Constitution or as a part thereof from the date of the proclamation.
- The scope of a revision is not as limited as that of an amendment. A revision "may deal with more than one subject and shall be voted upon as one question."

Subsections (2) and (3) of Article XVII, section 2, Oregon Constitution, provide for a method of submitting an amendment in the form of alternative provisions so as to achieve consistency with a revision. Senate Joint Resolution 19 (1963) and House Joint Resolution 20 (1963) are examples.

The people may not initiate a constitutional revision.[15]

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[14] State ex rel. Simmons v. Bradbury, No. 02C11917 (March 12, 2002) (a copy of this ruling and associated pleadings is attached to the hard copy of Legislative Counsel opinion 2002-34, located in the opinion binders). See also Legislative Counsel opinions 73-27 and 2002-34.

[15] Holmes v. Appling, 237 Or. 546 (1964).

a. Joint Resolution.

A constitutional revision, like a constitutional amendment, is proposed by a joint resolution. However, revision proposals differ in several respects. The resolving clause of a joint resolution proposing a constitutional revision reflects this difference, as follows:

Be It Resolved by the Legislative Assembly of the State of Oregon, two-thirds of all the members of each house concurring:

b. Revision of Sections.

Since a proposed constitutional revision may deal with more than one subject and is voted on as one question, a resolution may propose the revision of any number of existing sections of the Constitution. These sections should be arranged in the same order in which they appear in the Constitution, unless some other arrangement is clearer or more logical. Bracketing and boldfacing the changes are the same in a revision as in a bill.

As in the case of a proposed constitutional amendment, one revising clause for several existing sections of the Constitution revised in the resolution may be used. However, it is preferable to use a separate revising clause for each existing section revised. For example:

PARAGRAPH 1. Section 3, Article IV of the Constitution of the State of Oregon, is revised to read:

Sec. 3. (Insert text)

PARAGRAPH 2. Section 7, Article IV of the Constitution of the State of Oregon, is revised to read:

Sec. 7. (Insert text)

c. Adding New Sections.

The Constitution may be revised by adding a new Article, section or sections. In a joint resolution proposing such a constitutional revision, all of the new sections may be grouped under a single revising clause. For example:

PARAGRAPH 1. The Constitution of the State of Oregon is revised by creating new sections 5, 6, 7 and 8 to be added to and made a part of Article III, (or, "to be added to and made a part thereof and to be designated Article XIX,") such sections to read:

The numbers assigned to the new sections in the proposed revision should be the numbers that they will have when placed in the Constitution. To avoid confusion, a separate numbered paragraph and revising clause in the resolution should be used for each Article of the Constitution that is affected by the proposed revision.

d. Repeal of Sections and Other Revisions.

Existing sections of the Constitution may be repealed in the same manner as in a joint resolution proposing a constitutional amendment. For example:

PARAGRAPH 1. Sections 37 and 38, Article I of the Constitution of the State of Oregon, are repealed.

Normally, all sections of the Constitution to be repealed by the proposed revision would be placed under one revising clause, except in those instances of repeal of an existing section and adoption of a new section in lieu thereof.

Revising clauses that approximate amending clauses used in proposed constitutional amendments should be used for instances of repeal and adoption in lieu, repeal of existing sections and amendment of existing sections in the same proposed amendment, repeal of existing sections and creation of new sections in the same proposed amendment and amendment of existing sections and creation of new sections in the same proposed amendment. However, it may be preferable to use a separate numbered paragraph and revising clause for each category of revision proposed in the resolution. House Joint Resolution 30 (1961) is an example.

e. Renumbering Existing Sections of Constitution.

Some existing sections of the Constitution are not located in the most appropriate place, and transferring an existing section from one place to another in the Constitution in order to carry out the scheme of the proposed revision may be desired. This *may* be done by repealing a section to be relocated and adopting a new section in lieu thereof, adding the new section to the proper Article and giving it the proper section number. However, the revision may be more intelligible if the existing section is redesignated in the following manner:

PARAGRAPH 3. Section 8, Article XV of the Constitution of the State of Oregon, is redesignated section 32, Article IV.

f. Referendum Clause.

Constitutional revisions proposed by the Legislative Assembly must be referred to the people for their approval or rejection. The referred revision is to be voted upon at the next **primary** election, unless the Legislative Assembly orders a special election. A referendum clause must be included in the joint resolution proposing a constitutional revision.

The following form (to follow the text of the proposed revision) is prescribed for submission of a proposed constitutional revision at a statewide primary election:

PARAGRAPH 4. The revision proposed by this resolution shall be submitted to the people for their approval or rejection at the next primary election.

If a special election to vote on the proposed constitutional revision is desired, the referendum clause must be adjusted, as in the case of a proposed constitutional amendment under the same circumstances. For example, the following form is prescribed for submission of a proposed constitutional revision at a regular general election:

PARAGRAPH 4. The revision proposed by the resolution shall be submitted to the people for their approval or rejection at a special election held on the same date as the next general election.

If requested to refer a constitutional revision to the people at an election date that is different from the primary or regular general election, adjust the special election referral language described in section 2j of this chapter. Be sure to change the word "amendment" to "revision" and remember that any referral to a special election will require a separate special election bill. For a discussion of special election bills, see "Referral at Special Election" under "Referendum" in chapter 12 of this manual.

4. ENABLING LEGISLATION; SELF-EXECUTING AMENDMENTS OR REVISIONS.

A requester who wants an amendment or revision of the Constitution often also wants enabling legislation to be operative if the constitutional amendment or revision is approved by the people. An Act may be made to take effect upon the adoption by the people of a constitutional amendment authorizing the Act.[16]

Enabling legislation prepared at the same time as a constitutional amendment or revision must include a provision in the enabling Act to the effect that if the constitutional amendment or revision is not approved by the people at the election at which it is to be submitted, the enabling Act is not effective. If the enabling legislation is to be adopted by initiative, the provision should indicate that the enabling legislation does not become "operative" unless the accompanying constitutional amendment or revision is approved by the people (because Article IV, section 1 (4)(d), Oregon Constitution, says that an initiative law becomes effective 30 days after the election at which it is approved). For example:

SECTION ___. This (year) Act does not become effective (operative) unless the Oregon Constitution is revised by vote of the people at the primary election in (year) to provide that . . . . This (year) Act becomes effective (operative) on the effective date of that revision.

OR

SECTION ___. This (year) Act does not become effective (operative) unless the Oregon Constitution is amended by vote of the people at the regular general election in (year) to repeal section 18, Article II of the Oregon Constitution. This (year) Act becomes effective (operative) on the effective date of that amendment.

OR

SECTION___. This (year) Act does not become effective (operative) unless the amendment to the Oregon Constitution proposed by House Joint Resolution 79 ((year)) is approved by the people at the regular general election held in November (year). This (year) Act becomes effective (operative) on the effective date of that amendment.

[16] State v. Rathie, 101 Or. 339 (1921), overruled on other grounds by State v. Brewton, 238 Or. 590 (1964).

An additional example may be found in section 6, chapter 625, Oregon Laws 1963. If this type of provision is included in the enabling Act, it is unnecessary to repeal the enabling Act if the proposed constitutional amendment or revision is rejected by the voters. Section 6, chapter 625, Oregon Laws 1963, reads as follows:

> **Sec. 6.** This Act shall not become effective unless the Constitution of the State of Oregon is amended by vote of the people at the regular general election held in 1964, so as to repeal sections 37 and 38, Article I thereof. If that amendment is so approved by vote of the people, this Act shall become effective on the effective date of the amendment.

It may be desirable that the constitutional amendment or revision specifically recognize as enabling legislation an Act passed before its adoption.[17] The following may serve as a guide for drafting such a constitutional provision:

> **(3) Any Act passed prior to the effective date of this constitutional amendment that purports to execute this section is considered to have been passed pursuant to this section and is ratified, adopted and confirmed as if passed after the adoption of this section.**

Instead of relying on enabling legislation to implement a constitutional amendment or revision, it may be necessary to draft an amendment or revision that will be self-executing. Such an amendment or revision probably will contain matters ordinarily covered by statute. If this is the case, it should be made plain that at least some of these matters are controlled by provisions of the amendment or revision only so long as later enacted statutes do not otherwise provide. Here are some examples of self-executing constitutional amendments:

> **SECTION ___. The State of Oregon acting through its appropriate administrative agency shall proceed with all reasonable speed to define, establish and quiet its title to all ocean beach lands and easements and other means of public access thereto owned or claimed by it.**

> **SECTION ___. Fee title to ocean beach lands now owned or hereafter acquired by the State of Oregon shall not be sold or conveyed, and all the lands shall be forever preserved and maintained for public use. No interest less than fee title and no rights or privileges in the lands now owned or hereafter acquired by the state shall be conveyed or granted by deed, lease, license, permit or otherwise, except as provided by law.**

5. OREGON RATIFICATION OF PROPOSED AMENDMENT TO FEDERAL CONSTITUTION.

HJR 2 (1967), HJR 13 (1973) and SJR 4 (1973) are joint resolutions ratifying proposed amendments to the United States Constitution. HJR 62 (1977) proposed the reaffirmation of the ratification of a proposed amendment to the United States Constitution. HJM 15 (1985) is a joint memorial requesting Congress to propose an amendment to the United States Constitution that requires a balanced federal budget and the withdrawal of previous memorials on the same subject.

The drafting attorney should be aware that Article V of the U.S. Constitution specifies the procedures for proposing and ratifying amendments to the U.S. Constitution. If two-thirds of

[17] Boyd v. Olcott, 102 Or. 327 (1921).

both houses of Congress agree and propose an amendment, Congress may direct how states may ratify the amendment, either by three-quarters of the state legislatures or by convention in three-quarters of the states.

If Congress directs ratification by state legislatures or by conventions, the ratification is not subject to a popular vote because the ratification is not an Act, a constitutional amendment or a constitutional revision under Article IV, section 1, or Article XVII, of the Oregon Constitution. Further, Article V of the U.S. Constitution specifically directs that the ratification be done by either state legislatures or by convention.

In the past, the Legislative Assembly has ratified and attempted to rescind ratification by use of a joint resolution.

Finally, the Legislative Assembly could pass an Act that submits an advisory question to the people regarding the merits of ratifying a proposed amendment to the United States Constitution. The "referral" of the advisory question would not qualify as a referral of an Act under Article IV, section 1, of the Oregon Constitution, would not constitute a vote on ratification and would not have the force of law.

CHAPTER EIGHTEEN

AMENDMENTS TO BILLS AND OTHER MEASURES

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1. DRAFTING AMENDMENTS TO A PRINTED OR ENGROSSED BILL.

The drafting of amendments to bills and other legislative measures is an important activity requiring at least the same degree of care used in drafting a bill. Many of the defects in our laws came about through failure to exercise care in writing amendments to an otherwise properly drafted bill. In drafting an amendment to a bill, *the entire bill must be checked* to make sure that the amendment is consistent with the remainder of the bill, including its title. The amendment must be consistent with existing law, even law not contained in the bill. If an inconsistency is discovered, the drafting attorney must make the necessary adjustments. If an amendment to a bill is directed to an ORS section in the bill, *STAIRS* should be rechecked to determine whether the amendment affects more than that section. Adding a new section to a bill by amendment requires the same care as adding it to the original draft.

The drafting attorney must always be sure that an amendment is directed to the most recent printed version of the bill.

The drafting attorney must draft amendments that are addressed to a *particular printed bill* in order to give proper consideration to issues regarding the bill title for purposes of Article IV, section 20, of the Oregon Constitution. That is, the relating clause of the bill title must be broad enough to describe the subject matter of the proposed amendment, unless the relating clause is to be changed to accommodate the new material to comply with the constitutional requirement. The practice of the Senate and House Desks changes from time to time as to whether amendments that include a change to the relating clause will be accepted at the desk. Reluctance to accept amendments with relating clause changes prevents material unrelated to the thrust of the original printed measure from being loaded on by amendment, i.e., "logrolling."

"Generic" amendments, i.e., amendments not addressed to a particular printed measure but drafted in anticipation of an as yet unidentified "vehicle," *do not meet* the preceding requirement and should not be drafted. See chapter 6 of *Form and Style Manual for Legislative Measures*.

After a bill has been printed, any action taken thereon is taken with respect to the printed bill in its latest version, and amendments are directed to the printed bill. If the bill has been ordered printed engrossed, amendments are directed to the printed engrossed bill since it is the latest version.

In writing amendments to a bill, the objective is to make clear the change to be made in the printed bill. A drafting attorney may find it helpful to first mark changes in pencil on a paper copy of the bill to be amended, then draft amendment language that describes the marked changes. Contrary to office typographical practice, punctuation marks, including commas and periods, are placed inside the quotation marks *only if they are a part of the matter quoted.*

New sections inserted in a bill by way of amendment may require renumbering of other sections in the bill. In the case of a very long bill, extensive additional amendments to renumber the sections may be avoided by giving new sections added to the bill by amendment numbers like "**Section 70a.**" and "**Section 70b.**"

Deletion of a section of a bill by way of amendment may require renumbering of other sections in the bill. In the case of a very long bill, extensive additional amendments to renumber the sections may be avoided by inserting a note in place of the deleted section:

> **NOTE:** Sections 4 through 12 were deleted by amendment. Subsequent sections were not renumbered.

When sections of a bill are added, deleted or renumbered in any way, the rest of the bill must be checked to ensure that internal references conform to the new numbering. If the bill being amended is an especially long one, a cross-reference list or card file may help in keeping track of internal references or a computer search may be done.

When an amendment to a bill deletes all the changes the bill originally made in an ORS section, the entire section of the bill is deleted; the ORS section will then remain the same as it appears in the latest edition of *Oregon Revised Statutes*. The ORS section number should also be deleted from the title.

Replacing the entire content of an existing statute should not be styled as an amendment of the statute. The proper course is to write a new section and repeal the existing statute.

2. FORM AND STYLE.

A drafting attorney should consult chapter 6 of *Form and Style Manual for Legislative Measures* to determine the correct way to write an amendment.

3. AMENDMENTS TO A PRINTED BILL THAT HAS NOT BEEN PRINTED ENGROSSED.

Since 1991 the Senate and House Desks have printed all amended measures engrossed. If this rule should change, they might return to the previous practice of sometimes voting on a printed bill with separate printed amendments. In that case, a drafting attorney may need to amend either the printed amendments or the printed bill or both, depending on the amendments requested.

If you are requested to delete all of the text of a bill that has been previously amended but *not printed engrossed*, first delete all previous amendments. For example:

> Delete the printed House amendments dated February 20.
> On page 1 of the printed bill, delete lines 4 through 28.
> Delete pages 2 through 5 and insert:
> "**SECTION 1.** The director shall . . .".

⇒ **Amending printed amendments.** When any new amendments will affect lines of the printed bill that have been amended in prior printed amendments, the new amendments must be directed to the printed amendments. In other words, amendments cannot be directed to a line of a printed bill if that line has previously been amended.

If the new amendments do not affect any previously amended lines, the practice is to amend the last version of the printed bill and proceed as for any other amendments.

Changes in prior printed amendments to the bill when no printed engrossed bill intervenes use the following form:

> In line 6 of the printed House amendments dated April 6, delete "of" and insert "or".
> **OR**
> On page 1 of the printed House amendments dated April 4, delete lines 5 through 7.

When both the previous amendments and the printed bill must be amended, it is necessary to amend the previous amendments *first* and then amend the bill.

> In line 10 of the printed House amendments dated February 20, delete "a" and insert "the".
> On page 2 of the printed bill, line 13, restore the bracketed material.

Sometimes when amending a bill, all previous amendments are to be deleted. Only one amendment statement is necessary to delete all previous amendments. For example:

> Delete the printed House amendments dated April 15.
> **OR**
> Delete the printed House amendments dated February 10 and February 20.

If previous amendments are to be amended very extensively, it may be simplest to delete those amendments and to incorporate into the new amendments those portions of the previous amendments that would have been unchanged. For example:

> Delete the printed House amendments dated March 15.
> On page 2 of the printed bill, line 4, after "the" insert "sanitation district and".

If, in amending an amendment, an effective date, emergency clause or other special provision is being added to a bill, the title of the bill must be amended to reflect that provision. For example:

> After line 3 of the printed House amendments dated April 22, insert:
> "**SECTION 2.** This (year) Act takes effect March 1, 2004.".
> In line 2 of the printed bill, after "459.850" insert "; and prescribing an effective date".

4. AMENDMENTS TO RESOLUTIONS AND MEMORIALS.

Amendments to resolutions and memorials follow the same form as amendments to bills. The first line of the amendment must accurately identify the correct version of the resolution or memorial that is being amended:

> On page 2 of the printed concurrent resolution, line 23, after "city" insert "or".
>
> On page 2 of the printed A-engrossed joint memorial, line 2, . . .".

5. MINORITY REPORT AMENDMENTS.

If a measure advances out of a committee on a split vote, one or more members of the minority of the committee may service notice of a minority report. Adrafting attorney may be asked to prepare minority report amendments. While the request is commonly made for a "minority report," the document the LC attorney is drafting is typically a proposed amendment, termed a "proposed minority report amendment." It differs from a standard or "majority" proposed amendment only in formatting. Instead of requesting a proposed amendment, the committee minority may simply want the current version of the measure, instead of the majority amendments; this is known as a "do pass" minority report.

In any case, if the requester complies with the timing requirements, two versions of the bill will be engrossed, and the proponent of the minority report version will make a motion on the chamber floor to substitute their version of the measure for that of the majority. The minority version will be accompanied by a minority report with the names of the proponent members. This document (the actual minority report) is not the responsibility of the LC attorney.

Minority report procedures are rule-driven and proposed MR amendments typically require rapid turnaround times in Legislative Counsel. It essential to review the chamber rules for the chamber in question, and to communicate with Publication Services and LC front desk staff, with the member who has served notice, with the LPRO committee analyst for the committee where notice was served and potentially with the "desks," i.e., the offices of the Chief Clerk or the Secretary of the Senate.

Keys to minority reports:

- Generally time is of the essence and LC should deliver MR amendments quickly.

- Rules about timing and procedure vary, both between chambers and long vs. short sessions.
- Other rules, such as the type of committee where a MR may be considered, may apply.
- The LC attorney prepares a proposed amendment, if anything, and only the formatting is different from typical proposed amendments.
- LC attorney communication with the member, Pubs/Front Desk staff, LPRO staff and maybe the desk is essential.
- Current House rules require that a proposed MR amendment be a proposed amendment that was previously available to the committee.
- The LC attorney need not referee whether the member served notice appropriately or otherwise complied with the rules. If in doubt, discuss with the Legislative Counsel or the desk.
- Make sure to select "Minority report" in the docket for the blue slip.

Formatting:

Format the proposed minority report amendment by using the F12 key to enter the command "prop mr". The filename for the amendment will be the measure number padded to four digits, e.g., HB1234 or SJM0004. The filetype for a minority report amendment includes "MR" in front of the amendment number. That is true regardless of the engrossing level of the bill. For example, instead of a filetype of 1, a minority report amendment will have the filetype MR1. Instead of a filetype of A2, a minority report amendment will have a filetype of AMR2. See the DW370 manual material on Document Naming Standards & Storage for a further discussion of minority report naming standards.

6. CONFERENCE COMMITTEE REPORTS.

Conference Committee reports often assume a slightly different form because of the need to reconcile prior and differing House and Senate amendments in order to produce the same text for both houses regardless of the particular text of the prior versions. These changes are shown in the report but may not affect the text of the amendments.

Four examples of the most common conference committee situations are as follows:

(1) Concur and repass: <spm ccspeaker> + <spm hconcura>; *or* <spm ccpres> + <spm sconcura>

Speaker _____:

Your Conference Committee to whom was referred A-engrossed House Bill 2925, having had the same under consideration, respectfully reports it back with the recommendation that the House concur in the Senate amendments dated June 3 and that the bill be repassed.

(2) Concur and amend: <spm ccspeaker> + <spm hconcurb>; *or* <spm ccpres> + <spm sconcurb>

Speaker _____:
Your Conference Committee to whom was referred B-engrossed House Bill 2906, having had the same under consideration, respectfully reports it back with the recommendation that the House concur in the Senate amendments dated June 15 and that the bill be amended as follows and repassed.

(3) Recede and repass: <spm ccspeaker> + <spm hrecedec>; *or* <spm ccpres> + <spm srecedec>

Speaker _____:
Your Conference Committee to whom was referred B-engrossed House Bill 3023, having had the same under consideration, respectfully reports it back with the recommendation that the Senate recede from the Senate amendments dated June 15 and that the A-engrossed bill be repassed.

(4) Recede and amend: <spm ccspeaker> + <spm hreceded>; *or* <spm ccpres> + <spm sreceded>

Speaker _____:
Your Conference Committee to whom was referred B-engrossed House Bill 2309, having had the same under consideration, respectfully reports it back with the recommendation that the Senate recede from the Senate amendments dated May 30 and that the A-engrossed bill be amended as follows and repassed.

Publication Services keeps a notebook with examples for more unusual situations.

7. CONFLICT AMENDMENTS.

A bill may amend an ORS section that is amended by another bill during the same session. If the two amendments are inconsistent, a conflict amendment, prepared by the conflicts team, may be necessary to resolve the issues and to make plain the legislative intent. The intent may be shown by further amending or repealing the amendment from the earlier bill.

Unless the amendments are inconsistent, two or more amendments may be blended during compilation. The reason is found in Article IV, section 22, of the Oregon Constitution, as amended in 1976,[1] which provides in part:

> However, if, at any session of the Legislative Assembly, there are enacted two or more acts amending the same section, each of the acts shall be given effect to the extent that the amendments

[1] Before the 1976 amendments to Article IV, section 22, when two or more Acts were enacted amending the same section of the statutes at the same session of the Legislative Assembly, the Attorney General believed the Act last filed in the office of the Secretary of State controlled. 26 Op. Att'y Gen. 161 (1953). Others were of the view that the Act last signed by the Governor controlled. Skinner v. Davis, 156 Or. 174 (1937) (the amendment of a statute operates as obliteration of the former version and on the assumption that signature by the Governor is the last action required to give effect to a legislative enactment).

do not conflict in purpose. If the amendments conflict in purpose, the act last signed by the Governor shall control.

Therefore, if two bills that amend the same section become law, Legislative Counsel may compile both bills if no conflict is found. If a conflict is found, the last-signed bill controls. It is preferable to amend the section each time to clarify the legislative purpose and to avoid any controversy as to whether amendments conflict in purpose.

There are two types of conflicts that will merit attention during drafting: textual conflicts and conflicts in purpose.

In textual conflicts, two bills amend the same ORS section in a textually inconsistent fashion.[2] This is the clearest type of conflict and will be detected by the conflicts team in Publication Services. When a bill is in the second house and has emerged from committee to be filed at the desk, committee staff "check off" on the bill by requesting that the conflicts team review the ORS sections amended and repealed in that bill compared with other bills amending or repealing the same sections. If a textual conflict is discovered, the conflicts team notifies the committee and the drafting attorney so that a conflict amendment can be prepared.[3]

A conflict in purpose is less readily discernible. Its detection depends heavily on the attentiveness of the drafting attorney, Publication Services or the committee's members and staff. In this situation, two or more bills include provisions that would result in laws that are mutually inconsistent if both were enacted. This may occur when the bills amend the same section but not the same language or when the creation of a new section conflicts with the provisions of a previously passed bill.

Unlike other types of amendments, conflict amendments are drafted by the editors on the conflicts team in Publication Services. The conflicts team uses software to scan all measures as they come out of committee, and rely on LPRO staff to notify them as the committees vote on bills and move them. However, the attorney may need to answer legal or policy questions from the conflicts team to ensure the correct choice between conflicting provisions. It is advisable for each attorney to be aware of their assigned bills that address similar subjects and that potentially amend the same ORS sections. As the conflicts software is targeted at existing law, it cannot alert editors or attorneys to conflicting provisions of new, boldfaced law.

If a drafting attorney is aware of a potential conflicts problem or would like to have two similar bills tracked, the drafting attorney should preemptively consult the Publication Services' conflicts team. They can track bills and alert the drafting attorney if the second bill is reported out of committee. During each session, the Legislative Counsel's staff publishes all amendments and repeals of ORS sections into a "Table of ORS Sections Amended, Repealed or 'Added To'" (commonly "A&R Tables") in the Weekly

[2] E.g., the first bill amends a section to indicate that a person *shall* perform a certain act; the second bill amends the same language in the same section to indicate that a person *may* perform the act.
[3] See chapter 18 of this manual discussing conflict amendments.

Cumulative Index to Legislative Measures. For example, conflicts may appear in this table as follows:

ORS §	Amend Repeal	Section#	Bill#
8.020	A	§1	SB 104
	A	§1	HB 2394
8.030	R	§8	HB 2138
	A	§2	HB 2486

From left to right the columns show: the number of the ORS section affected; an "A" or "R" indicating amendment or repeal of the section; the section that does the amend or repeal; and the bill which amends or repeals the section. In this example, ORS 8.020 is amended by section 1 of Senate Bill 104 and by section 1 of House Bill 2394; ORS 8.030 is repealed by section 8 of House Bill 2138 and amended by section 2 of House Bill 2486.

An "if" amendment can be used when two bills amend the same section and neither has been enacted or when one of the bills has been enacted but has not yet been assigned a chapter number for Oregon Laws. An "if" amendment is put in *only one bill*, usually the later or least advanced bill. For example: <spm cona>

SECTION 48. ORS 342.601 is amended to read:
342.601. (1) (Insert text)

SECTION 48a. If House Bill 2533 becomes law, section 48 of this (year) Act (amending ORS 342.601) is repealed and ORS 342.601, as amended by section 8, chapter _____, Oregon Laws 2001 (Enrolled House Bill 2533), is amended to read:
342.601. (1) (Insert text)

Any bracketed material is deleted, and any inserted material is included (not in bold) from the first bill (in the example, House Bill 2533). Only material that is deleted or inserted by the later bill (in the example the bill in which "**SECTION 48.**" appears) will be bracketed or appear in boldfaced type.

An "as amended by" amendment can be used when two bills amend the same section and one bill has been assigned a session law chapter number. For example: <spm conamend>

SECTION 2. ORS 1.360, as amended by section 3, chapter 125, Oregon Laws 1993 (Enrolled Senate Bill 5555), is amended to read:

Any bracketed material is deleted, and any inserted material is included (not in bold) from the first bill (in this example, Senate Bill 5555). Only material that is deleted or inserted by the later bill (in the example, the bill in which "**SECTION 2.**" appears) will be bracketed or appear in boldfaced type.

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8. AMENDMENTS TO PROPOSED AMENDMENTS.

Legislative committees may request amendments addressing proposed amendments (LC draft amendments). Avoid and discourage this practice at all costs. It is extremely rare; it happens only when the proposed amendments are particularly voluminous. There is a great risk of undetected errors that is introduced by this approach. Proposed amendments are referred to as "typed amendments."

Amendments to typed amendments must identify the typed amendments with the date they were prepared (March 4) and their assigned Legislative Counsel docket number (HB 2509-1), for example:

On page 1 of the typed amendments to House Bill 2509 dated March 4 (HB 2509-1), after line 17, insert:

"(c) Specify circumstances under which the Department of Transportation may cease to issue distinctive indicia of registration for any particular group.".

In line 18, delete "(c)" and insert "(d)".

CHAPTER NINETEEN

INTERIM COMMITTEES, TASK FORCES AND WORK GROUPS

A drafting attorney may be asked to create a temporary body that will study an issue and make recommendations for legislation or other recommendations. Three common options for this temporary body are an interim committee, a task force or a work group.[1] This chapter reviews these three temporary bodies.

1. OVERVIEW.

If a requester wants a group of legislators or stakeholders to study an issue and then to make recommendations based on that study, the requester may request the creation of a temporary body in the form of an interim committee, a task force or a work group. The primary differences between the bodies are based on function, duration, formation and membership of the body. The characteristics of each body are described below.

a. Interim Committee.

An interim committee is the most formal of the temporary bodies. Generally, the function of an interim committee is to study a variety of problems or a broad range of topics. The topics of consideration for interim committees typically parallel the topics of consideration for session committees.

The duration of an interim committee is one legislative interim. A legislative interim is the date of adjournment of an odd-year regular session until the next odd-year regular session convenes, with a suspension during even-year regular sessions.[2]

Now that the Legislative Assembly meets annually and organizes interim meeting days as Legislative Days, interim committees have become more similar to session committees. Interim committees are usually established by the Speaker of the House of

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[1] The drafting attorney must be certain that the requester wants a temporary body and not an entity that is more permanent, such as a board or commission. Chapter 8 of this manual discusses creation of a board or commission. A drafting attorney also should avoid using any creative terminology to describe the temporary body (e.g., "Blue Ribbon Panel" or "Five Star Commission").

[2] ORS 171.615.

Representatives or the President of the Senate under ORS 171.640. Less common, but legally acceptable, is to establish an interim committee by joint resolution[3] or by a bill. A joint resolution or bill is more likely when the topics to be studied by the interim committee are particularly controversial or when there is another reason to establish the interim committee in a written document approved by a majority of the members of each chamber of the Legislative Assembly.

If a drafting attorney is asked to establish an interim committee, a joint resolution may be preferred instead of a bill. A joint resolution offers greater flexibility because a joint resolution does not establish law and is not subject to the constitutional requirements related to origination, reading, subject matter, content, effective date, Governor approval or referral. Nonetheless, a joint resolution is not always appropriate and a bill may be required instead. The most likely situation when a bill would be required is when an appropriation is necessary to or for the committee. A joint resolution cannot appropriate money, so a bill would be required to make the appropriation. See section 5 of this chapter.

An interim committee should have legislator members only.[4] Members are selected by the President of the Senate or the Speaker of the House of Representatives.[5] An interim committee formed under the authority of ORS 171.640 is typically comparable to a session committee and often has the same members (e.g., the Interim Senate Education Committee members may be the same members as the Senate Education Committee). If the interim committee is formed under a joint resolution or bill, bipartisanship can be achieved by directing that membership include a specified number of members from the minority party. Interim committees consist of three or more members[6] and have no maximum number of members, but best practice is to have no more than 11 members.

ORS 171.605 to 171.635 authorizes the Legislative Assembly to create an interim committee by joint resolution to make studies, report information to the Legislative Assembly, make recommendations and propose legislative measures. Additionally, ORS 171.130 authorizes an interim committee to presession file proposed legislative measures. Many other powers available to session committees also apply to interim committees[7] and a joint resolution can modify the powers of an interim committee.[8] If a joint committee is being created by a joint resolution or a bill, the powers of the joint committee may be a topic of disagreement. A drafting attorney should be familiar with the statutorily provided powers of interim committees and ensure that the requester does not want any of those powers modified.

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[3] ORS 171.610.

[4] ORS 171.635 and 171.640 do provide for the appointment of members of the public to an interim committee, but current practice is to appoint only legislator members to an interim committee. A task force is the preferred temporary body for including nonlegislators.

[5] *See* ORS 171.640.

[6] ORS 171.640.

[7] *E.g.*, ORS 171.505 (administering oaths to witnesses) and 171.510 (compelling attendance of witnesses and production of papers).

[8] ORS 171.605.

b. Task Force.

A task force is less formal than an interim committee but more formal than a work group. Generally, the function of a task force is to study one problem or one topic[9] (e.g., studded tires).

The duration of a task force is usually only one legislative interim, but a task force can have a longer duration. If the duration of a task force is very long, it may not be a temporary body and should be treated as a permanent body instead. Legislation establishing a task force should include a sunset date that specifies when the task force ends.

Task forces are usually established by a bill, though they also can be established by a joint resolution or by the presiding officers under the authority of ORS 171.640.[10] Because a task force is tasked with studying a specific problem or topic, the Legislative Assembly typically negotiates and memorializes the scope of a task force in a joint resolution or bill instead of relying on the statutory authority of ORS 171.640. If all members of a task force are legislators, a joint resolution may be the most appropriate method for establishing the task force. Use a bill to create a task force if the task force: (1) has nonlegislators appointed by persons other than the Speaker and President; (2) requires an appropriation to or for the task force; (3) requires someone outside of the legislative branch (such as the Governor or executive agency staff) to do something (such as appoint members or provide staff support); or (4) lasts more than one interim.

The membership of a task force depends on the type of task force. A task force can be composed of only legislators (a "legislative task force"), a combination of legislators and nonlegislators (a "mixed task force") or only nonlegislators (a "nonlegislative task force"). For a task force with legislators, bipartisanship can be achieved by directing the appointing authority to appoint a specified number of members from the minority party or by giving appointing authority to both the majority and minority parties. The members of a legislative task force are usually appointed by the President of the Senate and the Speaker of the House of Representatives. The members of a mixed task force are usually appointed by the Speaker and the President (who appoint the legislators) and the Governor, head of an executive agency or the Chief Justice of the Supreme Court (who appoint the nonlegislators). The members of a nonlegislative task force are usually appointed by the Governor, the head of an agency or the Chief Justice. *Ensure that the appointing authority is from the branch of government that the member represents to avoid separation of powers problems* (e.g., the Governor or agency head should make appointments of any agency representatives while the Chief Justice of the Supreme Court should make appointments of any judges or other representatives of the judicial branch).

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[9] A legislative task force is a temporary body usually created instead of an interim committee to study a single issue. See ORS 171.640 for a statement that certain bodies created by the presiding officers are interim committees even if called task forces.

[10] If the task force is established under the authority of ORS 171.640, the presiding officers should draft a memo that states that the body is a task force notwithstanding ORS 171.640 (ORS 171.640 states that a task force may become an interim committee if there are three or more members).

When possible, limit the number of members on a task force to 11 and encourage the requester to put an odd number of members on the task force to avoid split decisions. Sometimes, a requester will want membership of the task force to represent specific stakeholders. If possible, describe the desired qualifications of the member (e.g., a representative of school district boards) instead of a specific organization (e.g., a representative from the Oregon School Board Association).

The duties of a task force are often outlined in the joint resolution or bill establishing the task force. A task legislative force needs specific authority in the measure creating it to presession file. This is a policy decision that must be discussed with the requester. As a general rule, a task force composed of only legislators will have the authority to presession file in the same manner provided for interim committees. If the drafting attorney creates a task force that is essentially an executive or judicial branch entity and the requester wants to allow presession filing, the drafting attorney should consult ORS 171.130.

c. Work Group.

A work group is the least formal of the temporary bodies. A work group can be convened during a session to work on a specific bill or during an interim to work on a specific topic.

Work groups are typically informally created under the direction of the chair of a committee but can be more formally created as the result of a memorandum from the chair of a committee.[11] *A work group may not be established by a bill or joint resolution.* Legislators sometimes prefer a work group because of its informal nature and the fact that a work group does not have the same public meeting and public record requirements as an interim committee or task force. Establishing a work group by a bill or joint resolution destroys that informal quality and subjects the work group to many of the procedural formalities imposed on interim committees and task forces.

A work group can be composed of legislators only, a mix of legislators and nonlegislators, or nonlegislators only, but *in no event may a work group consist of a quorum from a legislative committee*.

A work group does not have any authority to take any action on legislation and cannot presession file any legislation.

2. FINDINGS; PREAMBLE.

A requester may want a preamble in a joint resolution establishing an interim committee or a task force. (For a general discussion of the format of a joint resolution, see chapter 16 of this manual.) A preamble may be used to state reasons for creation of an

[11] If the work group is created by a memo from the presiding officers, the work group may become subjected to rules and other formalities that apply to formal legislative bodies.

interim committee or a task force, but it is not essential to the validity of the joint resolution. If the requester wants to include a preamble, the drafting attorney should explain its limited effectiveness and should ask the requester to supply the text. As an alternative, a drafting attorney may be able to incorporate the subject matter of the requested preamble into the provisions creating functions or duties.

If a bill establishes the interim committee or task force, the requester may want legislative findings included in the bill. Ask the requester to supply the text, and explain to the requester the limited effectiveness of findings. As an alternative, the drafting attorney might suggest a preamble instead of findings or may be able to incorporate the subject matter into the provision creating the functions or duties. If the requester insists on a findings section, make it the first section of the bill.

3. MEMBERS.

When gathering information about a proposal for an interim committee or a task force, the drafting attorney needs to find out the number of members, their qualifications, the process for filling vacancies, and related information.

a. Separation of Powers; Legislators as Nonvoting, Advisory Members.

Article III, section 1, of the Oregon Constitution (separation of powers provision), prohibits a person charged with official duties in one branch of the government from exercising those duties and the duties of another branch.[12] A separation of powers problem ("dual exercise" problem) can arise when members of the legislature serve on a task force that has executive branch duties or is established within an agency. The drafting attorney should give careful consideration to potential separation of powers issues. *If a separation of powers problem exists, make the legislative members nonvoting and advisory members.* (See boilerplate for examples.)

b. Compensation of Members (Salary, Per Diem and Expenses); Volunteers.

Under ORS 171.072, legislator members of an interim committee or task force are entitled to receive compensation in the form of a per diem, mileage, costs and other expenses in return for their services. Compensation will be provided unless otherwise stated. If compensation is not desired, the interim committee or task force cannot be established by a joint resolution. ORS 171.072 (4) states that a member of the Legislative Assembly "shall" be compensated for service on an interim committee or a task force. Because a resolution is not a law, a resolution cannot "notwithstand" provisions of statutes unless the particular statute authorizes it. Therefore, legislator members of an interim committee or a task force created by a joint resolution will always be entitled to compensation.[13] Nonlegislator members of a task force do not receive compensation in return for their services on the task force.

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[12] 43 Op. Att'y Gen. 205 (1983).

[13] *See* 37 Op. Att'y Gen. 147 (1974) (stating that a joint resolution cannot authorize payment to legislator members of an interim committee an amount greater than the amounts authorized by ORS 171.072).

If a task force is created by a bill, the drafting attorney may provide that all members of the task force serve as volunteers. (See boilerplate for examples.)

c. Term of Office (for task forces that last longer than one interim).

Include a term of office provision when the task force functions for more than one interim. In addition, the drafting attorney may want to specify the terms of members first appointed to the task force. (See section 4a of chapter 8 of this manual for examples.)

d. Miscellaneous Provisions.

The drafting attorney should consider including provisions that govern the routine functions of the interim committee or the task force, such as filling a vacancy, selecting a chairperson and vice chairperson, establishing the times and places of meetings and the number of times that the interim committee or the task force will meet, and fixing the number of members that constitute a quorum or that are required to approve official action. Examples of provisions for these routine functions are found in the boilerplate at the end of this chapter.

4. DUTIES.

a. Generally.

The drafting attorney may provide for specific functions and powers that an interim committee or a task force will exercise. Alternatively, the drafting attorney can include a provision that allows the appointing authorities to develop a work plan for the interim committee or task force.

The drafting attorney should use care when creating the powers and describing the functions of a nonlegislative task force because it is in this area that separation of powers issues frequently arise.[14]

b. Staff Support.

Unless the drafting attorney is creating an interim committee by joint resolution, the drafting attorney must provide for staff support for an interim committee or a task force. The drafting attorney may provide that an interim committee or a legislative task force use the services of existing legislative staff[15] to the extent practicable. A mixed task force or a nonlegislative task force may be authorized to use the services of the legislative, executive or judicial branch, as appropriate.

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[14] *See* 43 Op. Att'y Gen. 205 (1983) (discussing governmental functions and the distinctions between executive and legislative branch functions).

[15] Usually the Legislative Policy Research Office, the Legislative Fiscal Office or the Legislative Revenue Office.

An interim committee or a task force may require the assistance of state agencies to complete assigned tasks.[16] *The drafting attorney should consider potential separation of powers and delegation of legislative authority issues when giving an executive or judicial branch agency or private persons authority to assist the interim committee or task force.*

c. Reports and Recommendations.

An interim committee or a legislative task force may be required to submit a report to the Legislative Assembly.

A mixed task force or a nonlegislative task force may be required to submit a report to the Legislative Assembly or to an appropriate interim committee. A mixed task force or a nonlegislative task force also may be given authority to make recommendations for legislation. If the task force provides legislative recommendations to an appropriate interim committee, it is unnecessary to also give the task force authority to introduce legislation. That is the function of the appropriate interim committee.[17]

The drafting attorney should consider providing specific due dates for reports. The report due date needs to be before the sunset date. (See section 6 of this chapter for a brief discussion of sunset clauses.) If a mixed task force or a nonlegislative task force is going to submit a report to an appropriate interim committee, require the task force to submit the report to the interim committee on or before *December 15* so that the interim committee has time to take whatever action it decides to take.

Examples of provisions that address these issues are found in the boilerplate at the end of this chapter.

5. FUNDING.

A joint resolution is not a law, therefore, appropriations to pay expenses of an interim committee or a task force may not be made by a joint resolution.[18] If the drafting attorney must appropriate funds to an interim committee or a task force, then create the interim committee or the task force in a bill.

An appropriation is enacted each session for the payment of expenses of the Legislative Assembly. A joint resolution creating an interim committee or legislative task force may authorize the interim committee or legislative task force to expend a certain amount of the money already appropriated for legislative expenses. If additional appropriations are required, then a bill is required.

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[16] This is true only for an interim committee or a task force created by a bill because a state agency cannot be ordered to act by a joint resolution.

[17] ORS 171.130.

[18] *See* Article IX, section 4, of the Oregon Constitution, which prohibits drawing money from the state treasury "but in pursuance of appropriations made by law." *See also* section 1h of chapter 9 of this manual.

In a Letter of Advice[19] dated April 9, 1991, the Attorney General opined that certain legislative interim committees or studies cannot be funded from lottery funds. Specific authorization probably is necessary for a task force to accept and use moneys offered by other public or private sources.[20]

6. SUNSET CLAUSE.

In any bill creating an interim committee or a task force, the drafting attorney should include a sunset clause.[21] A sunset clause is not necessary for an interim committee or a task force that is created by a joint resolution.

The sunset date for an interim committee or for a task force that lasts only one interim should be December 31, [year following session year], in most cases. The sunset date for a task force that will last longer than one interim should be a normal sunset date (January 2 of any year or June 30 of an even-numbered year).

7. BOILERPLATE.

a. Boilerplate for an Interim Committee Created by a Joint Resolution. Use and modify as needed: <boiler INCTJR>

Be It Resolved by the Legislative Assembly of the State of Oregon:

(1) The Interim Committee on [Subject] is established.

(2) The committee consists of [number] members appointed as follows:

(a) The President of the Senate shall appoint [number] members from among members of the Senate.

(b) The Speaker of the House of Representatives shall appoint [number] members from among members of the House of Representatives.

(3) The interim committee shall [describe functions; see ORS 171.610].

(4) The interim committee may [describe authority or power; there is no need to duplicate language from ORS 171.505, 171.510 and 171.620].

(5) A majority of members of the interim committee constitutes a quorum for the transaction of business.

(6) Official action by the interim committee requires the approval of a majority of the members of the interim committee.

(7) The interim committee shall report to the Legislative Assembly in the manner provided in ORS 192.245 at any time within 30 days after its final meeting or at the time the President and Speaker designate.

(8) The Legislative Policy and Research Director may employ persons necessary for the performance of the functions of the interim committee. The Legislative Policy and Research Director shall fix the duties and amounts of compensation of the employees. The interim committee shall use the services of continuing legislative staff, without employing additional persons, to the greatest extent practicable.

[19] Opinion Request OP-6373 (April 9, 1991).
[20] 29 Op. Att'y Gen. 284 (1959).
[21] *See* ORS 171.615.

Optional provisions for a joint resolution that creates an interim committee:

As an alternative to subsections (3) and (4) of the basic boilerplate, a drafting attorney may use: <spm ic-workplan>

> (3) The President of the Senate and the Speaker of the House of Representatives, in consultation with the interim committee chairperson, shall develop a work plan consisting of a list of subjects for study by the interim committee. The interim committee, by official action, may request modification of the work plan. Only the President and Speaker, after consultation with the chairperson, may modify the work plan.

If the interim committee needs to begin working quickly, the drafting attorney may use either: <spm icjr-laterof>

> (x) All appointments to the interim committee made under subsection (2) of this resolution must be completed by the later of ___ days after adjournment sine die of the [year] session of the [number of the current] Legislative Assembly or [date].
>
> **OR**
>
> (x) The interim committee shall have its first meeting on or before the later of ___ days after adjournment sine die of the [year] session of the [number of the current] Legislative Assembly or [date].

b. Basic Boilerplate for an Interim Committee Created by a Bill. Use and modify as needed: <boiler INCTBILL>

> **SECTION 1. (1) The Interim Committee on [Subject] is established.**
>
> **(2) The committee consists of [number] members appointed as follows:**
>
> **(a) The President of the Senate shall appoint [number] members from among members of the Senate.**
>
> **(b) The Speaker of the House of Representatives shall appoint [number] members from among members of the House of Representatives.**
>
> **(3) The interim committee shall [describe function; see ORS 171.610].**
>
> **(4) The interim committee may [describe authority or power; there is no need to duplicate language from ORS 171.505 and 171.510].**
>
> **(5) A majority of the members of the interim committee constitutes a quorum for the transaction of business.**
>
> **(6) Official action by the interim committee requires the approval of a majority of the members of the interim committee.**
>
> **(7) The interim committee shall elect one of its members to serve as chairperson.**
>
> **(8) If there is a vacancy for any cause, the appointing authority shall make an appointment to become immediately effective.**
>
> **(9) The interim committee shall meet at times and places specified by the call of the chairperson or of a majority of the members of the interim committee.**
>
> **(10) The interim committee may adopt rules necessary for the operation of the interim committee.**
>
> **(11) The interim committee shall report to the Legislative Assembly in the manner provided in ORS 192.245 at any time within 30 days after its final meeting or at the time the President and Speaker designate.**
>
> **(12) The Legislative Policy and Research Director may employ persons necessary for the performance of the functions of the interim committee. The Legislative Policy and Research Director shall fix the duties and amounts of compensation of the employees. The interim committee shall use the services of**

continuing legislative staff, without employing additional persons, to the greatest extent practicable.

(13) All agencies of state government, as defined in ORS 174.111, are directed to assist the interim committee in the performance of the duties of the interim committee and, to the extent permitted by laws relating to confidentiality, to furnish information and advice the members of the interim committee consider necessary to perform their duties.

SECTION 2. Section 1 of this [year] Act is repealed on December 31, [year following session year].

SECTION 3. This [year] Act takes effect on the 91st day after the date on which the [year] regular session of the [number of the current] Legislative Assembly adjourns sine die.

Optional provisions for a bill that creates an interim committee:

As an alternative to section 1 (3) and (4) of the basic boilerplate, a drafting attorney may use: <spm ic-workplan>

(3) The President of the Senate and the Speaker of the House of Representatives, in consultation with the interim committee chairperson, shall develop a work plan consisting of a list of subjects for study by the interim committee. The interim committee, by official action, may request modification of the work plan. Only the President and Speaker, after consultation with the chairperson, may modify the work plan.

As an alternative to section 1 (7) of the basic boilerplate, a drafting attorney may use: <spm icbill-chair>

(7) The President of the Senate and the Speaker of the House of Representatives shall select one member of the interim committee to serve as chairperson and another to serve as vice chairperson, with the duties and powers necessary for the performance of the functions of the offices as the President and the Speaker determine.

If the interim committee needs to begin working quickly, the drafting attorney may use either: <spm icbill-laterof>

(x) All appointments to the interim committee made under subsection (2) of this section must be completed by the later of ___ days after adjournment sine die of the [year] session of the [number of the current] Legislative Assembly or [date].

OR

(x) The interim committee shall have its first meeting on or before the later of ___ days after adjournment sine die of the [year] session of the [number of the current] Legislative Assembly or [date].

In addition to the basic boilerplate, a drafting attorney may also include: <spm icbill-moneys>

(x) The Legislative Policy and Research Director may accept, on behalf of the interim committee, contributions of moneys and assistance from the United States Government or its agencies or from any other source, public or private, and agree to conditions placed on the moneys not inconsistent with the duties of the interim committee.

(y) All moneys received by the Legislative Policy and Research Director under subsection (x) of this section shall be deposited into the _____ Account established by ORS XXX.XXX to be used for the purposes of carrying out the duties of the interim committee [this assumes the moneys in the already existing account are already continuously appropriated to the Legislative Policy and Research Director or the Legislative Assembly. If not, use the next option to add a continuous appropriation].

OR

(x) The Legislative Policy and Research Director may accept, on behalf of the interim committee, contributions of moneys and assistance from the United States Government or its agencies or from any other source, public or private, and agree to conditions placed on the moneys not inconsistent with the duties of the interim committee. All moneys received by the Legislative Policy and Research Director under this subsection shall be deposited into the _____ Fund established under section X of this (year) Act to be used for the purposes of carrying out the duties of the interim committee.

SECTION X. The _____ Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned by the _____ Fund shall be credited to the fund. All moneys in the _____ Fund are continuously appropriated to the Legislative Policy and Research Director for the purposes of carrying out the duties of the interim committee established under section ____ of this (year) Act.

SECTION Y. (1) Section X of this (year) Act is repealed on January 2, (year).

(2) Any moneys remaining in the _____ Fund on January 2, (year), that are unexpended, unobligated and not subject to any conditions shall revert to the General Fund.

c. Basic Boilerplate for a Legislative Task Force. Use and modify as needed: <boiler LEGTASK>

SECTION 1. (1) The Task Force on [Subject] is established.

(2) The task force consists of [number] members appointed as follows:

(a) The President of the Senate shall appoint [number] members from among members of the Senate.

(b) The Speaker of the House of Representatives shall appoint [number] members from among members of the House of Representatives.

(3) The task force shall [describe function].

(4) The task force may [describe authority or powers].

(5) A majority of the members of the task force constitutes a quorum for the transaction of business.

(6) Official action by the task force requires the approval of a majority of the members of the task force.

(7) The task force shall elect one of its members to serve as chairperson.

(8) If there is a vacancy for any cause, the appointing authority shall make an appointment to become immediately effective.

(9) The task force shall meet at times and places specified by the call of the chairperson or of a majority of the members of the task force.

(10) The task force may adopt rules necessary for the operation of the task force.

(11) The task force may presession file legislation in the manner provided in ORS 171.130 for interim committees. All legislation recommended by official action of the task force must indicate that it is introduced at the request of the task force.

(12) The task force shall report to the Legislative Assembly in the manner provided in ORS 192.245 at any time within 30 days after its final meeting or at time the President and Speaker designate.

(13) The Legislative Policy and Research Director may employ persons necessary for the performance of the functions of the task force. The Legislative Policy and Research Director shall fix the duties and amounts of compensation of the employees. The task force shall use the services of continuing legislative staff, without employing additional persons, to the greatest extent practicable.

(14) All agencies of state government, as defined in ORS 174.111, are directed to assist the task force in the performance of the duties of the task force and, to the extent permitted by laws relating to confidentiality, to furnish information and advice the members of the task force consider necessary to perform their duties.

SECTION 2. Section 1 of this [year] Act is repealed on December 31, [year following session year].

SECTION 3. This [year] Act takes effect on the 91st day after the date on which the [year] regular session of the [number of current] Legislative Assembly adjourns sine die.

Optional provisions for a bill that creates a legislative task force:

As an alternative to section 1 (3) and (4) of the basic boilerplate, a drafting attorney may use: <spm tfleg-workplan>

(3) The President of the Senate and the Speaker of the House of Representatives, in consultation with the task force chairperson, shall develop a work plan consisting of a list of subjects for study by the task force. The task force, by official action, may request modification of the work plan. Only the President and Speaker, after consultation with the chairperson, may modify the work plan.

As an alternative to section 1 (7) of the basic boilerplate, a drafting attorney may use: <spm tfleg-chair>

(7) The President of the Senate and the Speaker of the House of Representatives shall select one member of the task force to serve as chairperson and another to serve as vice chairperson, with the duties and powers necessary for the performance of the functions of the offices as the President and the Speaker determine.

In addition to the basic boilerplate, the drafting attorney also may include: <spm tf-authority>

(x) The chairperson or vice chairperson of the task force has the authority given to the chairperson or vice chairperson of a legislative committee by ORS 171.505 and 171.510.

If the task force needs to begin working quickly, the drafting attorney may use either: <spm tf-laterof>

(x) All appointments to the task force made under subsection (2) of this section must be completed by the later of ___ days after adjournment sine die of the [year] session of the [number of the current] Legislative Assembly or [date].

OR

(x) The task force shall have its first meeting on or before the later of ___ days after adjournment sine die of the [year] session of the [number of the current] Legislative Assembly or [date].

In addition to the basic boilerplate, the drafting attorney may insert: <spm tfleg-moneys>

(x) The Legislative Policy and Research Director may accept, on behalf of the task force, contributions of moneys and assistance from the United States Government or its agencies or from any other source, public or private, and agree to conditions placed on the moneys not inconsistent with the duties of the task force.

(y) All moneys received by the Legislative Policy and Research Director under subsection (x) of this section shall be deposited into the _____ Account established by ORS XXX.XXX to be used for the purposes of carrying out the duties of the task force [this assumes the moneys in the already existing account are already continuously appropriated to the Legislative Policy and Research Director or the Legislative Assembly. If not, use the next option to add a continuous appropriation].

OR

(x) The Legislative Policy and Research Director may accept, on behalf of the task force, contributions of moneys and assistance from the United States Government or its agencies or from any other source, public or private, and agree to conditions placed on the moneys not inconsistent with the duties of the task force. All moneys received by the Legislative Policy and Research Director under this subsection shall be deposited into the _____ Fund established under section X of this (year) Act to be used for the purposes of carrying out the duties of the task force.

SECTION X. The _____ Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned by the _____ Fund shall be credited to the fund. All moneys in the _____ Fund are continuously appropriated to the Legislative Policy and Research Director for the purposes of carrying out the duties of the task force established under section _____ of this (year) Act.

SECTION Y. (1) Section X of this (year) Act is repealed on January 2, (year).

(2) Any moneys remaining in the _____ Fund on January 2, (year), that are unexpended, unobligated and not subject to any conditions shall revert to the General Fund.

d. Basic Boilerplate for a Mixed Task Force. Use and modify as needed: <boiler MIXTASK>

SECTION 1. (1) The Task Force on [Subject] is established.

(2) The task force consists of [number] members appointed as follows:

(a) The President of the Senate shall appoint:

(A) [Number] members from among members of the Senate.

(B) [Number] members who are [set out qualifications of nonlegislators].

(b) The Speaker of the House of Representatives shall appoint:

(A) [Number] members from among members of the House of Representatives.

(B) [Number] members who are [set out qualifications of nonlegislators].

(c) The [Governor, Director of (agency), Chief Justice of Oregon Supreme Court] shall appoint [number] representatives from ____.

(3) The task force shall [describe function].

(4) The task force may [describe authority or powers].

(5) A majority of the [voting] members of the task force constitutes a quorum for the transaction of business.

(6) Official action by the task force requires the approval of a majority of the [voting] members of the task force.

(7) The task force shall elect one of its members to serve as chairperson.

(8) If there is a vacancy for any cause, the appointing authority shall make an appointment to become immediately effective.

(9) The task force shall meet at times and places specified by the call of the chairperson or of a majority of the [voting] members of the task force.

(10) The task force may adopt rules necessary for the operation of the task force.

(11) The task force shall submit a report in the manner provided in ORS 192.245, and may include recommendations for legislation, to the joint legislative committee established under ORS [section] or an interim committee of the Legislative Assembly related to [subject of task force] no later than September 15, [year].

(12) The [agency] shall provide staff support to the task force.

(13) Members of the Legislative Assembly appointed to the task force are nonvoting members of the task force and may act in an advisory capacity only.

(14) Members of the task force who are not members of the Legislative Assembly are not entitled to compensation or reimbursement for expenses and serve as volunteers on the task force.

(15) All agencies of state government, as defined in ORS 174.111, are directed to assist the task force in the performance of the duties of the task force and, to the extent permitted by laws relating to confidentiality, to furnish information and advice the members of the task force consider necessary to perform their duties.

SECTION 2. Section 1 of this [year] Act is repealed on December 31, [year following session year].

SECTION 3. This [year] Act takes effect on the 91st day after the date on which the [year] regular session of the [number of current] Legislative Assembly adjourns sine die.

Optional provisions for a bill that creates a mixed task force:

As an alternative to section 1 (3) and (4) of the basic boilerplate, a drafting attorney may use: <spm tf-workplan>

(3) The appointing authorities, in consultation with the task force chairperson, shall develop a work plan consisting of a list of subjects for study by the task force. The task force, by official action, may request a modification of the work plan. Only the appointing authorities, after consultation with the chairperson, may modify the work plan.

As an alternative to section 1 (7) of the basic boilerplate, a drafting attorney may use: <spm tf-chair>

(7) The [Governor, President, Speaker, Director of (agency), Chief Justice] shall select one member of the task force to serve as chairperson and another to serve as vice chairperson, for the terms and with the duties and powers necessary for the

performance of the functions of the offices as the [Governor, President, Speaker, Director of (agency), Chief Justice] determines.

As an alternative to section 1 (11) of the basic boilerplate, a drafting attorney may use either: <spm tf-report>

(11) The task force shall report its findings and recommendations on [subject] to the [number] Legislative Assembly in the manner provided by ORS 192.245 no later than September 15, [year].

OR

(11) The task force shall report its findings and recommendations to the [number] Legislative Assembly in the manner provided by ORS 192.245 and to the [Governor, Director of (agency), Chief Justice] no later than September 15, [year].

As an alternative to section 1 (14) of the basic boilerplate, a drafting attorney may use: <spm tfmix-expense>

(14) Notwithstanding ORS 171.072, members of the task force who are members of the Legislative Assembly are not entitled to mileage expenses or a per diem and serve as volunteers on the task force. Other members of the task force are not entitled to compensation or reimbursement for expenses and serve as volunteers on the task force.

In addition to the basic boilerplate, the drafting attorney may insert: <spm tf-authority>

(x) The chairperson or vice chairperson of the task force has the authority given to the chairperson or vice chairperson of a legislative committee by ORS 171.505 and 171.510.

If the task force needs to begin working quickly, the drafting attorney may use either: <spm tf-laterof>

(x) All appointments to the task force made under subsection (2) of this section must be completed by the later of ___ days after adjournment sine die of the [year] session of the [number of the current] Legislative Assembly or [date].

OR

(x) The task force shall have its first meeting on or before the later of ___ days after adjournment sine die of the [year] session of the [number of the current] Legislative Assembly or [date].

In addition to the basic boilerplate, the drafting attorney may insert either of the following options if a state agency does not receive a General Fund appropriation to pay for the costs of the task force: <spm tf-moneys>

(x) The [agency that staffs the task force] may accept contributions of moneys and assistance from the United States Government or its agencies or from any other source, public or private, and agree to conditions placed on the moneys not inconsistent with the duties of the task force.

(y) All moneys received by the [agency that staffs the task force] under subsection (x) of this section shall be deposited into the _____ Account established

by ORS XXX.XXX to be used for the purposes of carrying out the duties of the task force [this assumes the moneys in the already existing account are already continuously appropriated to the agency. If not, use the next option to add a continuous appropriation].

OR

(x) The [agency that staffs the task force] may accept, on behalf of the task force, contributions of moneys and assistance from the United States Government or its agencies or from any other source, public or private, and agree to conditions placed on the moneys not inconsistent with the duties of the task force. All moneys received by the [agency that staffs the task force] under this subsection shall be deposited into the _____ Fund established under section X of this (year) Act to be used for the purposes of carrying out the duties of the task force.

SECTION X. The _____ Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned by the _____ Fund shall be credited to the fund. All moneys in the _____ Fund are continuously appropriated to the [agency that staffs the task force] for the purposes of carrying out the duties of the task force established under section _____ of this (year) Act.

SECTION Y. (1) Section X of this (year) Act is repealed on January 2, (year).
(2) Any moneys remaining in the _____ Fund on January 2, (year), that are unexpended, unobligated and not subject to any conditions shall revert to the General Fund.

In addition to the basic boilerplate, the drafting attorney may also insert: <spm tf-approp>

SECTION X. There is appropriated to the [agency that staffs the task force], for the biennium beginning July 1, [year], out of the General Fund, the amount of $_____ for the purpose of carrying out the duties of the [name] Task Force.

As an alternative to section 2 of the basic boilerplate, the drafting attorney may use: <spm tf-repeal>

SECTION 2. Section 1 of this [year] Act is repealed on [a regular sunset date].

e. Basic Boilerplate for a Nonlegislative Task Force. Use and modify as needed: <boiler NONTASK>

SECTION 1. (1) The Task Force on [Subject] is established.
(2) The task force consists of [number] members appointed as follows:
(a) The President of the Senate shall appoint [number] members who are [set out qualifications].
(b) The Speaker of the House of Representatives shall appoint [number] members who are [set out qualifications].
(c) The [Governor, Director of (agency), Chief Justice of Oregon Supreme Court] shall appoint [number] representatives from ____.
(3) The task force shall [describe function].
(4) The task force may [describe authority or powers].
(5) A majority of the [voting] members of the task force constitutes a quorum for the transaction of business.
(6) Official action by the task force requires the approval of a majority of the [voting] members of the task force.

(7) The task force shall elect one of its members to serve as chairperson.

(8) If there is a vacancy for any cause, the appointing authority shall make an appointment to become immediately effective.

(9) The task force shall meet at times and places specified by the call of the chairperson or of a majority of the [voting] members of the task force.

(10) The task force may adopt rules necessary for the operation of the task force.

(11) The task force shall submit a report in the manner provided in ORS 192.245, and may include recommendations for legislation, to the joint legislative committee established under ORS [section] or an interim committee of the Legislative Assembly related to [subject of task force] no later than September 15, [year].

(12) The [agency] shall provide staff support to the task force.

(13) Members of the task force are not entitled to compensation or reimbursement for expenses and serve as volunteers on the task force.

(14) All agencies of state government, as defined in ORS 174.111, are directed to assist the task force in the performance of the duties of the task force and, to the extent permitted by laws relating to confidentiality, to furnish information and advice the members of the task force consider necessary to perform their duties.

SECTION 2. Section 1 of this [year] Act is repealed on December 31, [year following session year].

SECTION 3. This [year] Act takes effect on the 91st day after the date on which the [year] regular session of the [number of the current] Legislative Assembly adjourns sine die.

Optional provisions for a bill that creates a nonlegislative task force:

As an alternative to section 1 (3) and (4) of the basic boilerplate, the drafting attorney may use: <spm tf-workplan>

(3) The appointing authorities, in consultation with the task force chairperson, shall develop a work plan consisting of a list of subjects for study by the task force. The task force, by official action, may request a modification of the work plan. Only the appointing authorities, after consultation with the chairperson, may modify the work plan.

As an alternative to section 1 (7) of the basic boilerplate, the drafting attorney may use: <spm tf-chair>

(7) The [Governor, President, Speaker, Director of (agency), Chief Justice] shall select one member of the task force to serve as chairperson and another to serve as vice chairperson, for the terms and with the duties and powers necessary for the performance of the functions of such offices as the [Governor, President, Speaker, Director of (agency), Chief Justice] determines.

As an alternative to section 1 (11) of the basic boilerplate, the drafting attorney may use either: <spm tf-report>

(11) The task force shall report its findings and recommendations on [subject] to the [number] Legislative Assembly in the manner provided by ORS 192.245 no later than September 15, [year].

OR

(11) The task force shall report its findings and recommendations to the [number] Legislative Assembly in the manner provided by ORS 192.245 and to the [Governor, Director of (agency), Chief Justice] no later than September 15, [year].

In addition to the basic boilerplate, the drafting attorney may insert: <spm tf-authority>

(x) The chairperson or vice chairperson of the task force has the authority given to the chairperson or vice chairperson of a legislative committee by ORS 171.505 and 171.510.

If the task force needs to begin working quickly, the drafting attorney may use either: <spm tf-laterof>

(x) All appointments to the task force made under subsection (2) of this section must be completed by the later of ___ days after adjournment sine die of the [year] session of the [number of the current] Legislative Assembly or [date].

OR

(x) The task force shall have its first meeting on or before the later of ___ days after adjournment sine die of the [year] session of the [number of the current] Legislative Assembly or [date].

In addition to the basic boilerplate, the drafting attorney may insert either of the following options if the state agency does not receive a General Fund appropriation to pay for the costs of the task force: <spm tf-moneys>

(x) The [agency that staffs the task force] may accept contributions of moneys and assistance from the United States Government or its agencies or from any other source, public or private, and agree to conditions placed on the moneys not inconsistent with the duties of the task force.

(y) All moneys received by the [agency that staffs the task force] under subsection (x) of this section shall be deposited into the _____ Account established by ORS XXX.XXX to be used for the purposes of carrying out the duties of the task force [this assumes the moneys in the already existing account are already continuously appropriated to the agency. If not, use the next option to add a continuous appropriation].

OR

(x) The [agency that staffs the task force] may accept, on behalf of the task force, contributions of moneys and assistance from the United States Government or its agencies or from any other source, public or private, and agree to conditions placed on the moneys not inconsistent with the duties of the task force. All moneys received by the [agency that staffs the task force] under this subsection shall be deposited into the _____ Fund established under section X of this (year) Act to be used for the purposes of carrying out the duties of the task force.

SECTION X. The _____ Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned by the _____ Fund shall be credited to the fund. All moneys in the _____ Fund are continuously appropriated to the [agency that staffs the task force] for the purposes of carrying out the duties of the task force established under section _____ of this (year) Act.

SECTION Y. **(1) Section X of this (year) Act is repealed on January 2, (year).**

(2) Any moneys remaining in the _____ Fund on January 2, (year), that are unexpended, unobligated and not subject to any conditions shall revert to the General Fund.

In addition to the basic boilerplate, the drafting attorney may also insert: <spm tf-approp>

SECTION X. **There is appropriated to the [agency that staffs the task force], for the biennium beginning July 1, [year], out of the General Fund, the amount of $_____ for the purpose of carrying out the duties of the [name] Task Force.**

As an alternative to section 2 of the basic boilerplate, the drafting attorney may use: <spm tf-repeal>

SECTION 2. **Section 1 of this [year] Act is repealed on [a regular sunset date].**

8. DRAFTING ATTORNEY CHECKLIST FOR INFORMATION FOR INTERIM COMMITTEE OR TASK FORCE.

(1) NECESSARY INFORMATION

(a) **Name** of the interim committee or task force (*e.g.*, Interim Committee on Adolescents or Task Force to Study What's the Matter with Kids Today).

(b) **Purpose**.

(c) **Duties**.
- (A) Specifically listed; or
- (B) Work plan. If so, who develops the work plan (appointing authorities)?

(d) **Duration** (sunset date).

(e) **Members**.
- (A) Legislators, nonlegislators.
- (B) Number.
- (C) Appointing authorities.
- (D) Qualification, areas of expertise.
- (E) Compensation (for all or some members) or voluntary service (remember that if a joint resolution is used, legislator members automatically receive compensation under ORS 171.072 because a joint resolution cannot "notwithstand" a statute).
- (F) Terms of service (if service will last longer than an interim. Not necessary for interim committee or a legislative task force).
- (G) Vacancy (how filled, who appoints).
- (H) Eligibility for reappointment.

(I) Chairperson (if so, appointing authority).

(f) **Staff** (if so, agency staff or continuing legislative staff).

(g) **Legislative recommendations** (if so, remember that a task force needs specific authorization to presession file; this is a policy decision for the requester).

(h) **Report** (if so, when due? to whom submitted? be more specific than "report shall be submitted to the [number] Legislative Assembly").

(i) **Subject to ORS 171.605 to 171.635** (appropriate only for an interim committee or a legislative task force created by a bill.) An interim committee or a legislative task force is a committee of legislators appointed to function in the interim. The Joint Interim Judiciary Committee is a legislative interim committee, as is the interim Senate Revenue Committee. The Task Force on Doing Good, with a few legislators and a few members appointed by the Governor, is not an interim committee or a legislative task force.

(2) ADDITIONAL INFORMATION

(a) **Appropriations**. If yes, use a bill. Specify how much money or just leave figure blank. Is money to be appropriated to an agency for use by the task force or is money appropriated directly to the task force? If necessary, name or create an account in which to put the money.

(b) **Authority to accept contributions** of funds from federal government or other public or private sources. If yes, specify account and make continuous appropriation to the task force or to the agency staffing the task force.

9. RECOMMENDATIONS FROM LEGISLATIVE POLICY AND RESEARCH OFFICE

Staffing Agency	Assign LPRO to staff only legislative or mixed task forces with legislators to be appointed as members. Ideally with appointment of both majority and minority party and both chambers and the task force role to prepare legislative proposals or recommendations. Note: is problematic when an appointed, voting TF member is from the same agency as the staffing agency.
Chair and Vice-Chair	Use a version of this provision in F/S Manual: "The President of the Senate and the Speaker of the House of Representatives (or other appointing authority) shall select one member of the task force to serve as chairperson and another to serve as vice chairperson, with the duties and powers necessary for the performance of the functions of the offices as the President and the Speaker determine."

Voting/Non-voting Members	Be as clear as possible in legislation which members are voting, and which are not. Many members are unaware of separation of powers issues for a mixed task force that leads to members being appointed as non-voting. Be clear on what constitutes a quorum. Note: Supreme Ct Chief Justice is not appointing voting members.
Member Appointments	Use optional provision in F/S Manual: (x) All appointments to the task force made under subsection (2) of this section must be completed by the later of ___ days after adjournment sine die of the [year] session of the [number of the current] Legislative Assembly or [date]. (Note: 30 – 60 days would be helpful. Gov appointment process is minimum of 45 days, usually longer.)
First Meeting	Use optional provision in F/S Manual: (x) The task force shall have its first meeting on or before the later of ___ days after adjournment sine die of the [year] session of the [number of the current] Legislative Assembly or [date]
Member Compensation	Make clear if TF members are entitled to compensation or not under ORS 292.495.
Workplan	Address preparation of a work plan with optional provision in F/S Manual modified as follows: "(3) No later than 60 days after appointments are made, the Legislative Policy and Research Office shall work with the task force chair to prepare a work plan for the task force to review and adopt. The task force, by official action, may request and modify the work plan."
Report Due Date	Use December 15, not September 15.
Other Timeline Considerations	
Hiring Staff	Hiring limited duration TF staff can take 2 – 3 months.
Procurement	The state's procurement process requires 3-4 months. If a procurement results in a contract, it can take an additional two months for the vendor to orient themselves to a project, including executing data-sharing agreements. These two timelines, combined, often translate to a six-month process before research activities commence.
Research	If a TF requires policy research or analysis, whether provided by LPRO or an independent research entity, a measure should include research questions or a list of study considerations. This informs the scope of research necessary to support a TF and offers guidance in developing a workplan. As noted above, if an independent research entity is directed to provide research, an additional 3-4 months is required to work through the state's procurement process.
Data Accessibility	Research may require access to data sources not publicly available from state agencies and execution of appropriate data-sharing agreements and security protocols between state agencies and the research partner. When applicable the bill should directly authorize state agencies to share data with LPRO or a 3rd party provided state and federal safeguards are met.

CHAPTER TWENTY

BONDING

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1. CONSTITUTIONAL DEBT LIMITATION AND BONDING.

Under Article XI, section 7, of the Oregon Constitution, the State of Oregon is generally prohibited from lending its credit or "in any manner" creating debt or liabilities in an amount larger than $50,000.[1] This general prohibition, however, has been limited by constitutional amendments that permit debt for specific purposes and by a narrow judicial construction of the type of "debt" that is prohibited by section 7.

In 1989, the Oregon Supreme Court decided State ex rel. Kane v. Goldschmidt, which approved the use of certificates of participation, a form of revenue-based borrowing. The court stated:

> This court has looked at not less than two basic characteristics in deciding whether action violates Article XI, section 7: (1) the fund from which payments on the obligation are made; and (2) the degree to which the public body is liable for repayment of the loan.
>
> If the revenues generated from a particular project being financed are pledged for repayment, rather than revenues from general taxation, no "debt" or "indebtedness" is thereby created. Often referred to as the "special fund" cases, this line of decisions upholds the plan if the promise by the state is to make installment payments only from a "special [revenue] fund." Such a promise does not create a "debt" or "liabilities," within the meaning of Article XI, section 7, because general tax revenues have not been pledged.
>
> A second line of cases classifies debt based on the degree to which the public body is liable for the repayment of the obligation. *Rorick v. Dalles City* involved the issuance and sale of Columbia River bridge bonds by Dalles City. The authorizing statute contained a debt limitation provision similar to Article XI, section 7. Although principal on the bonds was payable only from the tolls and revenues of the bridge, the city was absolutely liable

[1] Exceptions specified within Article XI, section 7, allow (1) for uncapped debt incurred in case of war, invasion or insurrection, (2) for debt, not to exceed one percent of the true cash value of property taxed on an ad valorem basis, incurred to build and maintain permanent roads and (3) for costs associated with the lease of real property for a public purpose for a period of 20 years or less.

for the interest on future installments if the "special fund" was insufficient to meet the obligation.[2]

The court held that the "term 'debt' as used in Article XI, section 7, means an unconditional and legal obligation of the state to pay, when at the time the obligations initially are created there are insufficient unappropriated and not otherwise obligated funds in the state treasury to meet those obligations."[3]

Thus, the court in Kane essentially parsed public borrowing into two broad categories. *General obligation borrowing* (or "G.O. bonding") is a full faith and credit obligation for which general tax revenues are pledged as security. If existing funds are insufficient to pay the obligation, the lender can compel the government through legal process to levy additional taxes sufficient to pay the obligation.[4] General obligation debt is "debt" that is subject to the constitutional limitation, and the state may incur general obligation debt in excess of $50,000 only through bonding programs specifically authorized in the Constitution.

By contrast, *revenue-based borrowing* (or "revenue bonding") is an obligation for which only specific revenue, income or property is pledged as security.[5] If the pledged revenue, income or property is insufficient to pay the obligation, the lender has no legal recourse to compel the government to pay the obligation from any other source. Debt is not incurred in the constitutional sense when the state borrows money by pledging only a particular stream of revenue to repayment.

2. GENERAL TIPS FOR DRAFTING BOND BILLS.

a. General Procedural Requirements (ORS Chapter 286A).

ORS chapter 286A establishes procedural requirements for the issuance and administration of debt instruments by the State Treasurer on behalf of state agencies. (ORS chapter 287A, in combination with applicable provisions of city and county home rule charters and local ordinances, governs local government borrowing; however, drafting attorneys are not typically called upon to draft local ordinances or resolutions authorizing local government borrowing.)

The provisions of ORS chapter 286A reflect a modern trend to grant the State Treasurer broad procedural authority to issue and administer bonds. Older authorizing statutes tend to include more specific and sometimes outdated or conflicting procedural requirements. The modern trend likely reflects both the increasingly sophisticated marketplace for public borrowing and deference to the discretion of the State Treasurer.

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[2] State ex rel. Kane v. Goldschmidt, 308 Or. 573, 581-582 (1989) (citations omitted; brackets in original).
[3] Id. at 583.
[4] Id. at 581-582. Despite the generality of the concept of taxing power often associated with general obligation borrowing, many of Oregon's constitutional authorizations for general obligation borrowing except the ad valorem taxing power.
[5] Id.

ORS chapter 286A was created in 2007 in an attempt to create uniformity in bonding procedures, the result of work by the Oregon Law Commission. Though conforming amendments were made throughout ORS, not all statutory sections were amended to address textual conflicts.[6] As a result, several agencies, including the Department of Transportation, the State Department of Energy, the Oregon Business Development Department and the Housing and Community Services Department, have statutes authorizing ongoing bond programs that still describe procedural authority.

Because ORS chapter 286A gives the State Treasurer full procedural authority to issue and administer bonds otherwise authorized by law, a drafting attorney who encounters bond procedures in a different ORS chapter should eliminate provisions of law outside ORS chapter 286A that describe standard procedures for issuing and administering state bonds. These changes should be handled with precision. The drafting attorney should not eliminate provisions that authorize an ongoing bond program. Likewise, the drafting attorney should not eliminate provisions describing procedural limitations specific to the bond program unless the requester intends to change the limitations. But with the approval of the requester, the drafting attorney should aggressively seek to eliminate duplicative provisions that describe standard procedures within the range of authority provided by ORS chapter 286A.

Under ORS 286A.005, the State Treasurer issues all state bonds. This is statutory policy, not a constitutional requirement. However, if a drafting attorney finds contradictory language in statute that suggests an agency is "authorized to issue" bonds or that certain bonds are "issued by" the agency, the drafting attorney should aggressively seek to conform the language to the stated policy and practice in ORS chapter 286A. That is: "At the request/on behalf of a related agency, the State Treasurer is authorized to issue . . . ."

b. Ongoing Bond Program or One-Time Biennial Authorization.

A bill authorizing the issuance of bonds generally takes the form of either an ongoing bond program or a one-time biennial authorization. An ongoing bond program is usually codified and assigned an ORS number or numbers. A bill creating an ongoing bond program should establish a statutory cap on the amount of bonds that may be outstanding at any one time or should clearly charge the Governor and the Legislative Assembly with establishing the amount of bonds to be issued in a biennium pursuant to ORS 286A.035.[7]

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[6] An example is ORS 470.220 to 470.290 (last amended in 2009), which establish a program for the issuance of general obligation bonds under Article XI-J of the Oregon Constitution. ORS 470.225 accurately directs the State Treasurer to issue the general obligation bonds in accordance with ORS chapter 286A. ORS 470.270, however, contradicts ORS 470.225 by authorizing the Director of the State Department of Energy to issue refunding bonds after consultation with the State Treasurer. Though subsequent references to the director or the State Department of Energy within ORS 470.270 are probably correct, it is the State Treasurer, not the director, who should be authorized to issue the refunding bonds.

[7] For example, ORS 285B.530 to 285B.548 describe a revenue bond program with a statutory cap on the amount of bonds to be issued. ORS 470.220 to 470.290 describe a general obligation bond program for which the Legislative Assembly is expected to specify the amount of bonds to be issued in each biennium. The language is not nearly as clear as it should be. The series appears to be an open-ended authorization to bond

A one-time bond authorization will generally be compiled in ORS as a note section for the appropriate biennia.[8] The draft of a one-time authorization should specify both the amount of bonds to be issued and the biennium or biennia[9] for which the bonds can be issued.

c. Provisions Not Specifically Required by State Law.

Some common bonding practices not explicitly required by state law are driven by issues of federal law, particularly the Internal Revenue Code. For example, the cost of public borrowing is lower because government is a low-risk borrower and because the interest from municipal bonds used for capital construction is generally excluded from taxable income under the Internal Revenue Code. However, the interest from municipal bonds is recognized as income under certain circumstances, including arbitrage in which the state invests borrowed money for the purpose of making a profit. Drafting attorneys need not focus on the arbitrage issue, but the State Treasurer and bond counsel will alert the requester and drafting attorney if adjustments are needed to avoid an arbitrage concern.

d. Separate Funds in General Obligation or Revenue Bond Bills.

When drafting a general obligation or revenue bond bill other than a lottery-backed revenue bond, the State Treasurer prefers that the drafting attorney establish three funds in the bill. Though ORS 286A.025 grants the State Treasurer authority to establish funds and accounts related to the issuance and sale of bonds, a bill authorizing bonds usually includes (1) a project fund, (2) a bond fund and (3) a bond administration fund—all established in the State Treasury, separate and distinct from the General Fund. (Bond-related funds and accounts are not established in the General Fund because placing moneys in the General Fund affects the amount of revenue available for "kicker" calculations.) The net proceeds of a bond are placed in a project fund that is used primarily for the purpose for which the bonds are issued. Authority for the project fund should include a provision allowing for moneys remaining in the fund at the end of the project to be used for bond-related costs. The term "bond-related costs" should be defined in the bill in a form substantially like the examples included in this chapter. The bond fund is used to pay principal, interest and premium, if any. The bond administration fund is used to pay any bond-related costs. The overlap drafted into the purposes of each fund is deliberate and intended to avoid stranding moneys in one of these funds when the primary purpose is accomplished.

3. BIENNIAL BONDING PROCESS.

ORS 286A.035 establishes a process within which bond authorizations for a biennium are decided. In preparation for the Governor's recommended budget, state

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up to the limit stated in Article XI-J of the Oregon Constitution; however, the second sentence of ORS 470.290 seems to anticipate that the Legislative Assembly will authorize a maximum amount of bonded indebtedness under the series.

[8] See, e.g., sections 12 to 22, 30 and 31, chapter 748, Oregon Laws 2017 (compiled as notes following ORS 286A.585 in the 2017 edition).

[9] A bill can authorize bond issuance in one or more future biennia. Such an authorization does not unconstitutionally bind future legislatures because a subsequent Legislative Assembly can amend or repeal the forward-looking bond authorizations.

agencies request bonding authority in certain amounts. The State Treasurer also recommends to the Governor the prudent maximum amount for each bond program (including one-time authorizations). The Governor's recommended budget proposes an amount for each bond program. Finally, through the legislative process, an amount is authorized for each bond program and for each approved one-time authorization to issue bonds. In each session, the biennial bond bill is one of the last bills finalized and passed. The Governor's recommendations for bonding are reflected in the introduced version of the biennial bond bill. By the time this bill is enrolled, most, if not all, approved bonding for the biennium will be engrossed into the biennial bond bill. In both cases, the provisions of the biennial bond bill reflect the process described in ORS 286A.035. As examples, see chapter 903, Oregon Laws 2009 (Enrolled Senate Bill 5505), and chapter 570, Oregon Laws 2017 (Enrolled Senate Bill 5505).

Bonding bills prepared for members of the Legislative Assembly are not part of the Governor's budget and are not yet part of the process described in ORS 286A.035. Therefore, in a bond bill not currently included in the biennial bond bill, a drafting attorney should include the phrase: "In addition to and not in lieu of bonds authorized pursuant to ORS 286A.035 . . . ." During final budget deliberations, drafting attorneys usually are asked to prepare amendments that roll the language of individual bond authorizations into the biennial bond bill. When a bond authorization is rolled into the biennial bond bill, it becomes part of the ORS 286A.035 process; that is, it is no longer "in addition to."

4. CONSTITUTIONAL AUTHORIZATION FOR GENERAL OBLIGATION BORROWING.

When asked to draft a new authorization for general obligation borrowing, the drafting attorney should draft a joint resolution proposing an amendment to the Oregon Constitution. The drafting attorney will find previous authorizations for general obligation borrowing after Article XI in provisions currently denominated Articles XI-A to XI-Q. Drafting attorneys should focus on more recent constitutional authorizations as models for drafting.

Before drafting the joint resolution, the drafting attorney should determine whether the items to be financed already fit within one of the existing exceptions in Article XI, section 7, or within one of the authorizations set forth in Articles XI-A to XI-Q. There is no guarantee that a requester will not want a specific authorization for the requester's intended purpose, but many requesters will be pleased to learn that they can achieve their purpose without a constitutional amendment.

5. GENERAL OBLIGATION BORROWING BILL.

When asked to draft a bill authorizing issuance of a specific amount of general obligation indebtedness, the drafting attorney should draft a bill authorizing issuance and administration of general obligation bonds pursuant to existing constitutional authority under Articles XI-A to XI-Q. Though included in the constitutional authority, the drafting attorney should repeat in the bill the requirement that the State of Oregon pledge its full

faith and credit and taxing power. The State Treasurer and bond counsel will notice the absence of this language.

The example below authorizes an ongoing bond program to finance the seismic retrofit of certain public buildings. The example does not establish a statutory cap on the total amount of bonds to be issued, but section 3 of the example refers to the biennial bonding process in ORS 286A.035.

Based on chapter 814, Oregon Laws 2005 (Enrolled Senate Bill 4)—Seismic retrofit bond program:[10]

SECTION 1. Sections 2 to 8 of this 2___ Act are added to and made a part of ORS chapter _____.

SECTION 2. As used in sections 2 to 8 of this 2___ Act, unless the context requires otherwise:

(1) "Article XI-M bonds" means general obligation bonds issued, or other general obligation indebtedness incurred, under the authority of Article XI-M of the Oregon Constitution.

(2) "Bond administration fund" means the Article XI-M Bond Administration Fund established under section 5 of this 2___ Act.

(3) "Bond fund" means the Article XI-M Bond Fund established under section 4 of this 2___ Act.

(4) "Bond-related costs" means:

(a) The costs of paying the principal of, the interest on and the premium, if any, on Article XI-M bonds;

(b) The costs and expenses of issuing, administering and maintaining Article XI-M bonds including, but not limited to, redeeming Article XI-M bonds and paying amounts due in connection with credit enhancement devices or the administrative costs and expenses of the State Treasurer and the Oregon Department of Administrative Services, including costs of consultants or advisers retained by the State Treasurer or the department for the purpose of issuing, administering or maintaining Article XI-M bonds;

(c) Capitalized interest on Article XI-M bonds;

(d) Costs of funding reserves for Article XI-M bonds, including costs of surety bonds and similar instruments;

(e) Rebates or penalties due the United States Government in connection with Article XI-M bonds; and

(f) Other costs or expenses that the Director of the Oregon Department of Administrative Services determines are necessary or desirable in connection with issuing, administering or maintaining Article XI-M bonds.

(5) "Seismic fund" means the Education Seismic Fund established under section 6 of this 2___ Act.

(6) "State share of costs" means the total costs and related expenses of the seismic rehabilitation of public education buildings, minus contributions for seismic rehabilitation from the applicants as required by the Office of Emergency Management.

SECTION 3. (1) Article XI-M bonds are a general obligation of the State of Oregon and must contain a direct promise on behalf of the State of Oregon to pay the

[10] This example is a revised version of enrolled Senate Bill 4 (2005). The text of the bill has been modified to best serve as a drafting model.

principal of, the interest on and the premium, if any, on the Article XI-M bonds. The State of Oregon shall pledge its full faith and credit and taxing power to pay Article XI-M bonds, except that the ad valorem taxing power of the State of Oregon may not be pledged to pay Article XI-M bonds.

(2) The State Treasurer, with the concurrence of the Director of the Oregon Department of Administrative Services, may issue Article XI-M bonds:

(a) Subject to the limit on bond issuance established for the particular biennium in ORS 286A.035 and at the request of the Director of the Office of Emergency Management, for the purpose of financing all or a portion of the state share of costs to plan and implement seismic rehabilitation of public education buildings in the amount of the state share of costs, plus an amount determined by the State Treasurer to pay estimated bond-related costs.

(b) To refund Article XI-M bonds. The amount of Article XI-M bonds issued under this paragraph may not exceed the estimated costs of paying, redeeming or defeasing the refunded bonds, plus an amount determined by the State Treasurer to pay estimated bond-related costs.

(3) The State Treasurer shall transfer the net proceeds of Article XI-M bonds issued for the purpose described in subsection (2)(a) of this section to the Office of Emergency Management for deposit in the Education Seismic Fund established under section 6 of this 2___ Act.

SECTION 4. (1) The Article XI-M Bond Fund is established in the State Treasury, separate and distinct from the General Fund. Amounts in the bond fund may be invested as provided in ORS 293.701 to 293.857, and interest earned on the bond fund must be credited to the bond fund. Amounts credited to the bond fund are continuously appropriated to the Oregon Department of Administrative Services for the purpose of paying, when due, the principal of, the interest on and the premium, if any, on outstanding Article XI-M bonds. The department shall deposit in the bond fund:

(a) Capitalized or accrued interest on Article XI-M bonds;

(b) Amounts appropriated or otherwise provided by the Legislative Assembly for deposit in the bond fund; and

(c) Reserves established for the payment of Article XI-M bonds.

(2) The department may create separate accounts in the bond fund for reserves and debt service for each series of Article XI-M bonds.

SECTION 5. (1) The Article XI-M Bond Administration Fund is established in the State Treasury, separate and distinct from the General Fund. Amounts in the bond administration fund may be invested as provided in ORS 293.701 to 293.857, and interest earned on the bond administration fund must be credited to the bond administration fund. Amounts credited to the bond administration fund are continuously appropriated to the Oregon Department of Administrative Services for payment of bond-related costs. The department shall credit to the bond administration fund:

(a) Proceeds of Article XI-M bonds that were issued to pay bond-related costs;

(b) Amounts appropriated or otherwise provided by the Legislative Assembly for deposit in the bond administration fund; and

(c) Amounts transferred from the Education Seismic Fund by the Office of Emergency Management as provided in section 6 of this 2___ Act.

(2) The department may create separate accounts in the bond administration fund.

SECTION 6. (1) The Education Seismic Fund is established in the State Treasury, separate and distinct from the General Fund. Amounts in the seismic fund may be invested as provided in ORS 293.701 to 293.857, and interest earned on the

seismic fund must be credited to the seismic fund. Amounts credited to the seismic fund are continuously appropriated to the Office of Emergency Management for the purpose described in section 3 (2)(a) of this 2___ Act and for the purpose of paying bond-related costs. The office shall deposit in the seismic fund:

(a) The net proceeds of Article XI-M bonds transferred pursuant to section 3 (3) of this 2___ Act;

(b) Amounts appropriated or otherwise provided by the Legislative Assembly for deposit in the seismic fund;

(c) Gifts, grants or contributions received by the office for the purpose described in section 3 (2)(a) of this 2___ Act; and

(d) Moneys received as repayment of, as a return on or in exchange for the grant or loan of net proceeds of Article XI-M bonds.

(2) The office may create separate accounts in the seismic fund as appropriate for the management of moneys in the seismic fund.

(3) The office and any other state agency or other entity receiving or holding net proceeds of Article XI-M bonds shall, at the direction of the Oregon Department of Administrative Services, take action necessary to maintain the excludability of interest on Article XI-M bonds from gross income under the Internal Revenue Code.

(4) The office shall transfer to the Article XI-M Bond Administration Fund the unexpended and uncommitted amounts remaining in the seismic fund if:

(a) Unexpended funds that are not contractually committed to a particular purpose remain in the seismic fund on the last day of the biennium; and

(b) Article XI-M bonds will be outstanding in the next biennium.

(5) The office may adopt rules to carry out this section including, but not limited to, establishing:

(a) Required contributions from applicants;

(b) Fees;

(c) Standards, terms and conditions under which moneys in the seismic fund may be granted, loaned or otherwise made available; and

(d) Procedures for distributing and monitoring the use of moneys from the seismic fund.

SECTION 7. (1) In accordance with the applicable provisions of this chapter and ORS chapter 286A, Article XI-M bonds may:

(a) Be sold at a competitive or negotiated sale;

(b) Bear interest that is includable or excludable from gross income under the Internal Revenue Code; and

(c) Be sold on terms approved by the State Treasurer, including terms related to the time of sale, the issuance of Article XI-M bonds in series, the maturity of each series and the interest borne by each series of Article XI-M bonds.

(2) Subject to the approval of the State Treasurer, the Director of the Oregon Department of Administrative Services may:

(a) Acquire one or more credit enhancement devices for Article XI-M bonds; and

(b) Enter into related agreements.

SECTION 8. For each biennium in which Article XI-M bonds will be outstanding, the Oregon Department of Administrative Services shall include in the Governor's budget request to the Legislative Assembly an amount that, when added to the amount on deposit in the Article XI-M Bond Fund and the Article XI-M Bond Administration Fund, is sufficient to pay the bond-related costs that are scheduled to come due in the biennium.

6. REVENUE-BASED BORROWING BILL.

As described above, revenue-based borrowing is an obligation for which only specific revenue, income or property is pledged to secure payment. A draft authorizing issuance of revenue bonds must not include the full faith and credit pledge. Rather, the draft must direct the State of Oregon, acting through the State Treasurer, to pledge only the specific revenue, income or property from which a holder of the revenue bonds may collect the obligation. The pledged sources of repayment may include moneys in a new fund or account. The drafting attorney should establish the new fund or account separate and distinct from the General Fund, and the moneys in the new fund or account should be continuously appropriated for the express purpose of bond repayment.

The example below is based on introduced Senate Bill 7 (2007):[11]

SECTION 1. As used in sections 1 to 5 of this 2___ Act, "bond-related costs" means:

(1) The costs and expenses of issuing and administering bonds under sections 1 to 5 of this 2___ Act, including but not limited to:

(a) Paying or redeeming the bonds;

(b) Paying amounts due in connection with credit enhancement devices or reserve instruments;

(c) Paying the administrative costs and expenses of the State Treasurer and the Legislative Assembly, including the cost of consultants, attorneys and advisers retained by the State Treasurer or the Legislative Assembly for the bonds; and

(d) Any other costs or expenses that the State Treasurer or the Legislative Administration Committee determines are necessary or desirable in connection with issuing and administering the bonds;

(2) The cost of funding bond reserves;

(3) Capitalized interest for the bonds; and

(4) Rebates or penalties due to the United States in connection with the bonds.

SECTION 2. (1) For the biennium beginning July 1, 2___, at the request of the Legislative Administration Committee, the State Treasurer may issue revenue bonds in an amount not to exceed net proceeds of $50 million for the purpose of financing the remodel of the Senate and House wings of the Oregon Capitol, plus an additional amount to be estimated by the State Treasurer for payment of bond-related costs.

(2) Net proceeds of the bonds issued pursuant to this section must be deposited in the Wing Remodel Bond Fund, established under section 3 of this 2___ Act, in an amount sufficient to provide $50 million in net proceeds and interest earnings for disbursement to the Legislative Administration Committee to finance the remodel of the Senate and House wings of the Oregon Capitol.

(3) Bond-related costs must be paid from the gross proceeds of the revenue bonds issued under this section and from moneys deposited in the Oregon State Capitol Foundation Fund.

(4) The State Treasurer, with the approval of the Legislative Administration Committee, may irrevocably pledge and assign all or a portion of the moneys deposited in the Oregon State Capitol Foundation Fund to secure revenue bonds or credit enhancements. Revenue bonds issued under this section:

(a) Are payable from the moneys deposited in the Oregon State Capitol Foundation Fund.

[11] This example is a revised version of introduced Senate Bill 7 (2007). The text of the bill has been modified to best serve as a drafting model.

(b) Do not constitute a debt or general obligation of this state, the Legislative Assembly or a political subdivision of this state but are secured solely by the moneys deposited in the Oregon State Capitol Foundation Fund, by amounts in a debt service reserve account established with respect to revenue bonds issued under this section or by a credit enhancement obtained for the revenue bonds issued under this section.

(5) The State Treasurer and the Legislative Assembly have no obligation to pay bond-related costs except as provided in this section. A holder of revenue bonds or other similar obligations issued under this section does not have the right to compel the exercise of the taxing power of the state to pay bond-related costs.

(6) The holders of revenue bonds issued under this section, upon the issuance of the revenue bonds, have a perfected lien on the moneys deposited in the Oregon State Capitol Foundation Fund that are pledged and assigned to the payment of the revenue bonds. The lien and pledge are valid and binding from the date of issuance of the revenue bonds and are automatically perfected without physical delivery, filing or other act. The lien and pledge are superior to subsequent claims or liens on the moneys deposited in the Oregon State Capitol Foundation Fund.

(7) As long as any revenue bonds issued under this section are outstanding, the provisions of this section and the provisions of a security document related to the revenue bonds are deemed to be contracts between the state and holders of the revenue bonds. The state:

(a) May not create a lien, encumbrance or any other obligation that is superior to the liens authorized by subsection (6) of this section on the moneys in the Oregon State Capitol Foundation Fund that are pledged and assigned to the payment of the revenue bonds; and

(b) May not give force or effect to a statute or initiative or referendum measure approved by the electors of this state, if doing so would unconstitutionally impair existing covenants made with the holders of existing revenue bonds or would unconstitutionally impair other obligations or agreements regarding the security of revenue bonds to which the moneys deposited in the Oregon State Capitol Foundation Fund are pledged and assigned.

SECTION 3. (1) The Wing Remodel Bond Fund is established in the State Treasury, separate and distinct from the General Fund. The net proceeds from the sale of revenue bonds issued under section 2 of this 2___ Act must be credited to the Wing Remodel Bond Fund. Investment earnings received on moneys in the Wing Remodel Bond Fund must be credited to the fund.

(2) Moneys in the Wing Remodel Bond Fund are continuously appropriated to the Legislative Administration Committee for the purpose of paying for the remodel of the Senate and House wings of the Oregon State Capitol.

SECTION 4. (1) The Wing Remodel Bond Debt Service Fund is established in the State Treasury, separate and distinct from the General Fund. The Wing Remodel Bond Debt Service Fund consists of:

(a) An amount from the moneys deposited in the Oregon State Capitol Foundation Fund credited by the State Treasurer that is necessary in a fiscal year, as determined by the Legislative Administration Committee in consultation with the State Treasurer, to pay the bond-related costs scheduled to be paid in that fiscal year on the revenue bonds issued under section 2 of this 2___ Act;

(b) Any funds appropriated or allocated to the Wing Remodel Bond Debt Service Fund; and

(c) Investment earnings received on moneys in the Wing Remodel Bond Debt Service Fund.

(2) Moneys in the Wing Remodel Bond Debt Service Fund are continuously appropriated to the Legislative Administration Committee to pay, when due, the bond-related costs on outstanding revenue bonds, to fund revenue bond reserves and to pay amounts due in connection with credit enhancements.

(3) The Legislative Administration Committee, in consultation with the State Treasurer, shall use amounts in the Wing Remodel Bond Debt Service Fund to pay, when due, the bond-related costs on outstanding revenue bonds, to fund revenue bond reserves and to pay amounts due in connection with credit enhancements.

(4) If the moneys deposited in the Oregon State Capitol Foundation Fund are not sufficient to pay the bond-related costs due to be paid in a fiscal year, the Legislative Administration Committee, in consultation with the State Treasurer, shall make payments in that fiscal year according to the relative priority of revenue bonds secured by the moneys deposited in the Oregon State Capitol Foundation Fund.

SECTION 5. (1) The Wing Remodel Bond Administration Fund is established in the State Treasury, separate and distinct from the General Fund. The Wing Remodel Bond Administration Fund consists of:

(a) The amount of revenue bond proceeds remaining after depositing the net proceeds in the Wing Remodel Bond Fund;

(b) The proceeds of revenue bonds issued to pay bond-related costs;

(c) Any funds appropriated or allocated to the Wing Remodel Bond Administration Fund; and

(d) Investment earnings received on moneys in the Wing Remodel Bond Administration Fund.

(2) Moneys in the Wing Remodel Bond Administration Fund are continuously appropriated to the Legislative Assembly for paying bond-related costs during the term of revenue bonds issued under section 2 of this 2___ Act.

(3) The Legislative Assembly, in consultation with the State Treasurer, may use amounts in the Wing Remodel Bond Administration Fund to pay bond-related costs during the term of revenue bonds issued under section 2 of this 2___ Act. Amounts in the fund must be disbursed upon the written request of the Legislative Administrator on behalf of the Legislative Administration Committee.

SECTION 6. Notwithstanding any other law limiting expenditures, the amount of $1 is established for the biennium beginning July 1, 2___, as the maximum limit for the purpose of paying for the remodel of the Senate and House wings of the Oregon State Capitol by the Legislative Administration Committee from the Wing Remodel Bond Fund established in section 3 of this 2___ Act.[12]

SECTION 7. Notwithstanding any other law limiting expenditures, the amount of $1 is established for the biennium beginning July 1, 2___, as the maximum limit for payment of expenses by the Legislative Administration Committee from the Wing Remodel Bond Debt Service Fund established under section 4 of this 2___ Act, to pay, when due, the bond-related costs on outstanding revenue bonds, to fund revenue bond reserves and to pay amounts due in connection with credit enhancements.

SECTION 8. Notwithstanding any other law limiting expenditures, the amount of $1 is established for the biennium beginning July 1, 2___, as the maximum limit for payment of expenses by the Legislative Administration Committee from the Wing Remodel Bond Administration Fund established under section 5 of this 2___ Act, which expenses are bond-related costs associated with revenue bonds issued under section 2 of this 2___ Act.

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[12] Introduced bills authorizing issuance of bonds usually do not include expenditure limits for the new funds or accounts created (see chapter 9 of this manual for discussion of expenditure limits). If a bill receives favorable consideration in the ways and means process, expenditure limits will be added if necessary.

7. LOTTERY-BACKED REVENUE-BASED BORROWING BILL.

Lottery-backed revenue bonds are a subset of revenue bonds for which lottery income is pledged as security. A bill authorizing the issuance of lottery bonds should state that the issuance is "pursuant to ORS 286A.560 to 286A.585" in order to incorporate the procedural details of that series.

Article XV of the Oregon Constitution, the constitutional authorization for the State Lottery, requires that lottery income be used for specific purposes, including creating jobs, furthering economic development, financing public education and restoring and protecting parks, beaches, watersheds and habitats. For this reason, ORS 286A.566 (1) requires a bill authorizing issuance of lottery bonds to include findings that the project to be financed with lottery bonds meets the constitutional purposes. Typically, this means findings for why the expenditure of lottery income "furthers economic development and creates jobs."

Drafting attorneys may use the following example as a template for a lottery bond authorization:

SECTION 1. (1) For the biennium beginning July 1, 2023, at the request of the Oregon Department of Administrative Services, after the department consults with the [relevant agency], the State Treasurer is authorized to issue lottery bonds pursuant to ORS 286A.560 to 286A.585 in an amount that produces $__ million in net proceeds for the purposes described in subsection (2) of this section, plus an additional amount estimated by the State Treasurer to be necessary to pay bond-related costs.

(2) Net proceeds of lottery bonds issued under this section must be transferred to the [relevant agency] for deposit in the [program fund] for [purposes].

--OR--

(2) Net proceeds of lottery bonds issued under this section must be transferred to the [relevant agency] for deposit in the ODAS Economic Development Distributions Fund established under ORS 461.553 for distribution to [recipient] for [purposes].

(3) The Legislative Assembly finds that the use of lottery bond proceeds will create jobs, further economic development, finance public education or restore and protect parks, beaches, watersheds and native fish and wildlife, and is authorized based on the finding that [reasons, e.g. improving access to sports and recreation services will enhance the economic viability of the region, create jobs and improve the quality of life for the community].

For further examples of lottery bond authorizations, see A-engrossed House Bill 2396 (2009) (authorizing lottery bonds over several biennia for disbursement to Lane Transit District for a specific project) and sections 12 to 22, 30 and 31, chapter 748, Oregon Laws 2017 (authorizing lottery bonds for eventual distribution to local governments and private entities).

APPENDIX A

ESTABLISHING NEW AGENCY; TRANSFERRING FUNCTIONS BETWEEN AGENCIES; ABOLISHING AGENCY; "PRIVATIZING" AGENCY

Boilerplate is available for the creation of an agency, the transfer of agency functions or the abolishment of an agency. Using boilerplate is more efficient than pulling up multiple standard phrases.

1. ESTABLISHING NEW AGENCY.

a. Standard Boilerplate for Establishing an Agency.

Use this boilerplate language when creating an agency and modify as appropriate: <boiler newagncy>

ESTABLISHING NEW STATE AGENCY

SECTION 1. (1) The Department of _____ is established.
(2) The department shall _____.
(3) The department may _____.

DIRECTOR

SECTION 2. (1) The Department of _____ is under the supervision and control of a director, who is responsible for the performance of the duties, functions and powers of the department.

(2) The Governor shall appoint the Director of the Department of _____, who holds office at the pleasure of the Governor.

(3) The director shall be paid a salary as provided by law or, if not so provided, as prescribed by the Governor.

(4) Subject to the approval of the Governor, the director may organize and reorganize the administrative structure of the department as the director considers appropriate to properly conduct the work of the department.

(5) The director may divide the functions of the department into administrative divisions. Subject to the approval of the Governor, the director may appoint an individual to administer each division. The administrator of each division serves at the pleasure of the director and is not subject to the provisions of ORS chapter 240. Each individual appointed under this subsection must be well qualified by technical training and experience in the functions to be performed by the individual.

CONFIRMATION BY SENATE

SECTION 3. The appointment of the Director of the Department of _____ is subject to confirmation by the Senate in the manner prescribed in ORS 171.562 and 171.565.

EMPLOYEES

SECTION 4. (1) The Director of the Department of _____ shall, by written order filed with the Secretary of State, appoint a deputy director. The deputy director serves at the pleasure of the director, has authority to act for the director in the absence of the director and is subject to the control of the director at all times.

(2) Subject to any applicable provisions of ORS chapter 240, the director shall appoint all subordinate officers and employees of the Department of _____, prescribe their duties and fix their compensation.

GENERAL AUTHORITY TO ADOPT RULES

SECTION 5. In accordance with the provisions of ORS chapter 183, the Department of _____ may adopt rules for the administration of the laws that the Department of _____ is charged with administering.

CIVIL PENALTIES

SECTION 6. (1) In addition to any other liability or penalty provided by law, the Director of the Department of _____ may impose a civil penalty not to exceed $____ on a person for any of the following:

(a) Violation of section _____ of this (year) Act.

(b) Violation of any rule adopted by the director under section 5 of this (year) Act.

(2) Civil penalties under this section must be imposed in the manner provided by ORS 183.745.

(3) All civil penalties recovered under this section must be paid into the State Treasury and credited to the General Fund and are available for general governmental expenses.

CAUTIONARY NOTE: The decision to include any of the following requires consulting the drafting manual and the requester.

TERM OF OFFICE ALTERNATE TO SECTION 2 (2)

SA NOTE: See chapter 8 and Appendix B of the drafting manual. Four years, the constitutional maximum, is the default term of office for the director. If the requester wants a term of office of less than four years, you should substitute this provision for section 2 (2). <spm agency-term>

ESTABLISHING DIVISIONS

SA NOTE: If the request necessitates creating divisions in statute, as opposed to letting the director create them pursuant to section 2 of the boilerplate, you might want to use this provision. <spm agency-division>

TRAVEL AND SUBSISTENCE EXPENSES

SA NOTE: See chapter 8 of the drafting manual. If the request necessitates something other than the standard amounts provided by statute, you might want to use this provision. <spm agency-expenses>

FIDELITY BOND

SA NOTE: See chapter 8 and Appendix B of the drafting manual. If the request requires something other than the Oregon Department of Administrative

Services default fidelity bond for state officers, employees and agents , you might want to use this provision. <spm agency-bond>

SPECIAL REQUIREMENTS AND QUALIFICATIONS

SA NOTE: See chapter 8 of the drafting manual. <spm agency-require>

OATH OF OFFICE

SA NOTE: See chapter 8 of the drafting manual. <spm agency-oath>

AUTHORITY TO ADOPT SPECIFIC TYPES OF RULES

SA NOTE: See chapters 13 and 14 of the drafting manual. If the agency needs rulemaking authority that is more specific than the authority granted in section 5 of the boilerplate (for example, if the agency needs to be able to establish fees through rules), you might want to use some of the following provisions. <spm agency-lic-rules>

CRIMINAL PENALTIES

SA NOTE: See chapters 8 and 11 and Appendix H of the drafting manual. <spm agency-penalty>

APPLICATION OF ADMINISTRATIVE PROCEDURES ACT

SA NOTE: See chapter 8 of the drafting manual. The APA applies to agencies unless specifically exempted. If the request necessitates alternative procedures, you might want to use the following provision. <spm agency-apa> **Note that you also will need to amend statutes that provide full or partial exemption from the APA, as appropriate, to include the new agency.**

OATHS, DEPOSITIONS, SUBPOENAS

SA NOTE: See chapter 8 of the drafting manual. <spm agency-subpoena>

ADVISORY AND TECHNICAL COMMITTEES

SA NOTE: See chapters 8 and 19 of the drafting manual. <spm agency-comm>

UNIT AND SECTION CAPTIONS

SA NOTE: The unit captions in the boilerplate are for the convenience of the drafter. If you have used unit and section captions in your draft, you need to include this provision. If you have used only unit captions or only section captions in your draft, you need to use the appropriate provision. <spm captions> or <spm captions-sec> or <spm captions-unit>

b. Standard Phrases for Establishing New Agency.

The following standard phrases are available for use with new agency boilerplate, if appropriate for a particular draft:

<spm agency-term>

(2) The Governor shall appoint the Director of the Department of _____.

The director holds office for a term of _____ years, but may be removed at any time during the term at the pleasure of the Governor.

<spm agency-division>

SECTION __. (1) The _____ Division is established within the Department of _____.

(2) The division shall _____.

<spm agency-expenses>

SECTION __. In addition to being paid a salary, but subject to any applicable law regulating travel and other expenses of state officers and employees, the Director of the Department of _____ shall be reimbursed for actual and necessary travel and other expenses incurred by the director in the performance of official duties.

<spm agency-bond>

SECTION __. Before assuming the duties of the office, the Director of the Department of _____ shall give to the state a fidelity bond, with one or more corporate sureties authorized to do business in this state, in a penal sum prescribed by the Director of the Oregon Department of Administrative Services, but not less than $50,000.

<spm agency-require>

SECTION __. An individual is not eligible to hold the office of Director of the Department of _____, or to hold any office or employment in the Department of _____, if the individual has any connection with persons engaged in or conducting any _____ business of any kind, holds stock or bonds in any _____ business of any kind, or receives any commission or profit from or has any interest in the purchases or sales made by the department.

<spm agency-oath>

SECTION __. Before assuming the duties of the office, the Director of the Department of _____ shall subscribe to an oath that the director faithfully and impartially will discharge the duties of the office and that the director will support the Constitution of the United States and the Constitution of the State of Oregon. The director shall file a copy of the signed oath with the Secretary of State.

<spm agency-rules>

SECTION __. In accordance with applicable provisions of ORS chapter 183, the Department of _____ may adopt rules for the administration of sections _____ to _____ of this (year) Act.

<spm agency-lic-rules>

SECTION __. In accordance with applicable provisions of ORS chapter 183, the Department of _____ may adopt rules:

(1) Establishing standards for _____;

(2) Relating to the professional methods and procedures used by persons licensed by the Department of _____;

(3) Governing the examination of applicants for licenses issued by the department and the renewal, suspension and revocation of the licenses; and

(4) Establishing fees for _____.

<spm agency-penalty>

SECTION __. Violation of section _____ of this (year) Act, or of any rule adopted under section _____ of this (year) Act, is a Class C misdemeanor.

<spm agency-apa>

SECTION ___. Except as otherwise provided in section _____ of this (year) Act, ORS chapter 183 applies to the Department of _____.

<spm agency-subpoena>

SECTION ___. The Director of the Department of _____, the deputy director and authorized representatives of the director may administer oaths, take depositions and issue subpoenas to compel the attendance of witnesses and the production of documents or other written information necessary to carry out the provisions of sections _____ to _____ of this (year) Act. If any person fails to comply with a subpoena issued under this section or refuses to testify on matters on which the person lawfully may be interrogated, the director, deputy director or authorized representative may follow the procedure set out in ORS 183.440 to compel obedience.

<spm agency-comm>

SECTION ___. (1) To aid and advise the Director of the Department of _____ in the performance of the functions of the Department of _____, the director may establish any advisory or technical committees the director considers necessary. The committees may be continuing or temporary. The director shall determine the representation, membership, terms and organization of the committees and shall appoint the members of the committees. The director shall be an ex officio member of each committee.

(2) Members of the committees are not entitled to compensation but, in the discretion of the director, may be reimbursed from funds available to the department for actual and necessary travel and other expenses incurred by the members in the performance of official duties in the manner and amount provided in ORS 292.495.

2. TRANSFERRING FUNCTIONS BETWEEN AGENCIES.

These are samples of provisions that may be needed to transfer functions from one state agency to another. They should not be followed slavishly. Each line must be suitable in the particular situation covered by the bill being drafted.

Chapter 839, Oregon Laws 1979, is an example of a bill dividing the functions of a single agency and assigning part of them to another officer. Chapter 37, Oregon Laws 2012, is an example of a bill abolishing an agency (State Commission on Children and Families) and dividing its functions between two new agencies. Chapter 616, Oregon Laws 1967, is an example of a bill that transferred certain functions of one agency to a new agency but left the old agency in charge of the new agency. Chapter 885, Oregon Laws 1000, and Chapter 595, Oregon Laws 2009, are examples of bills that grouped several officers and agencies under a single new agency. Chapter 767, Oregon Laws 2015, is an example of a bill abolishing an agency and transferring its duties to other existing bodies.

a. Abolishing an Agency and Transferring its Functions to a New Agency.

When abolishing an agency and transferring its functions to a new agency, use the following boilerplate and standard phrases.

A. Boilerplate for Transferring Functions to a New Agency.

<boiler aboltran>

ABOLISH AND TRANSFER

SECTION 1. (1) The Old Agency is abolished. On the operative date of this section, the tenure of office of the members of the Old Agency Board and of the Director of the Old Agency ceases.

(2) All the duties, functions and powers of the Old Agency are imposed upon, transferred to and vested in the New Agency.

RECORDS, PROPERTY, EMPLOYEES

SECTION 2. (1) The Director of the Old Agency shall:

(a) Deliver to the New Agency all records and property within the jurisdiction of the director that relate to the duties, functions and powers transferred by section 1 of this (year) Act; and

(b) Transfer to the New Agency those employees engaged primarily in the exercise of the duties, functions and powers transferred by section 1 of this (year) Act.

(2) The Director of the New Agency shall take possession of the records and property, and shall take charge of the employees and employ them in the exercise of the duties, functions and powers transferred by section 1 of this (year) Act, without reduction of compensation but subject to change or termination of employment or compensation as provided by law.

(3) The Governor shall resolve any dispute between the Old Agency and the New Agency relating to transfers of records, property and employees under this section, and the Governor's decision is final.

UNEXPENDED REVENUES

SECTION 3. (1) The unexpended balances of amounts authorized to be expended by the Old Agency for the biennium beginning July 1, ____, from revenues dedicated, continuously appropriated, appropriated or otherwise made available for the purpose of administering and enforcing the duties, functions and powers transferred by section 1 of this (year) Act are transferred to and are available for expenditure by the New Agency for the biennium beginning July 1, ____, for the purpose of administering and enforcing the duties, functions and powers transferred by section 1 of this (year) Act.

(2) The expenditure classifications, if any, established by Acts authorizing or limiting expenditures by the Old Agency remain applicable to expenditures by the New Agency under this section.

SA NOTE: This provision assumes that the effective date of the transfer will be sometime after the Legislative Assembly has completed a budget for the biennium. Thus, it is transferring moneys that were appropriated to the old agency to the new agency. If, for example, the effective date of the abolition and transfer is January 1, 2008, the blanks above would be filled in with "2007." If the effective date of the abolition and transfer coincides with the beginning of a biennium, presumably there will be no need for this provision as the Legislative Assembly will have appropriated moneys only to the new agency.

ACTION, PROCEEDING, PROSECUTION

SECTION 4. The transfer of duties, functions and powers to the New Agency by section 1 of this (year) Act does not affect any action, proceeding or prosecution involving or with respect to such duties, functions and powers begun before and

pending at the time of the transfer, except that the New Agency is substituted for the Old Agency in the action, proceeding or prosecution.

LIABILITY, DUTY, OBLIGATION

SECTION 5. (1) Nothing in sections ____ to ____ of this (year) Act relieves a person of a liability, duty or obligation accruing under or with respect to the duties, functions and powers transferred by section 1 of this (year) Act. The New Agency may undertake the collection or enforcement of any such liability, duty or obligation.

(2) The rights and obligations of the Old Agency legally incurred under contracts, leases and business transactions executed, entered into or begun before the operative date of section 1 of this (year) Act are transferred to the New Agency. For the purpose of succession to these rights and obligations, the New Agency is a continuation of the Old Agency and not a new authority.

RULES

SECTION 6. Notwithstanding the transfer of duties, functions and powers by section 1 of this (year) Act, the rules of the Old Agency in effect on the operative date of section 1 of this (year) Act continue in effect until superseded or repealed by rules of the New Agency. References in rules of the Old Agency to the Old Agency or an officer or employee of the Old Agency are considered to be references to the New Agency or an officer or employee of the New Agency.

SECTION 7. Whenever, in any statutory law or resolution of the Legislative Assembly or in any rule, document, record or proceeding authorized by the Legislative Assembly, reference is made to the Old Agency or an officer or employee of the Old Agency, the reference is considered to be a reference to the New Agency or an officer or employee of the New Agency.

NEW DIRECTOR

SECTION 8. The Director of the New Agency may be appointed before the operative date of section 1 of this (year) Act and may take any action before that date that is necessary to enable the director to exercise, on and after the operative date of section 1 of this (year) Act, the duties, functions and powers of the director pursuant to section 1 of this (year) Act.

AGENCY NAME CHANGE

SECTION 9. For the purpose of harmonizing and clarifying statutory law, the Legislative Counsel may substitute for words designating the "Old Agency" or its officers, wherever they occur in statutory law, words designating the "New Agency" or its officers.

ACCOUNT NAME CHANGE

SECTION 10. For the purpose of harmonizing and clarifying statutory law, the Legislative Counsel may substitute for words designating the "Old Agency Account," wherever they occur in statutory law, words designating the "New Agency Account."

HOUSEKEEPING IN ORS

SA NOTE: The duties being transferred may require that certain ORS sections get added to a different chapter or series. If so, insert an adding provision for the new location. Also review all the relevant definition sections. If all that is needed

is to "unadd" the sections from the current chapter or series, see the Form and Style Manual appendix on series and adding.

OPERATIVE DATE

SECTION 11. Except as otherwise specifically provided in section 8 of this (year) Act, sections 1 to 10 of this (year) Act become operative on January 1, ____.

UNIT AND SECTION CAPTIONS

SA NOTE: The unit captions in the boilerplate are for the convenience of the drafter. If you have used unit and section captions in your draft, you need to include this provision. If you have used only unit captions or only section captions in your draft, you need to use the appropriate provision. <spm captions> or <spm captions-sec> or <spm captions-unit>

B. Standard Phrases for Transferring Functions to a New Agency.

<spm agency-op>

SECTION ___. The transfer of duties, functions, powers, records, property, employees and moneys by sections 1, 2 and 3 of this (year) Act does not become operative until the Director of the Receiving Agency has been appointed and has qualified. Until then, the Transferring Agency shall continue to perform the duties and functions, exercise the powers and have charge of the records, property, employees and moneys.

SECTION ___. Except as otherwise specifically provided in section __ of this (year) Act, sections __ to __ of this (year) Act become operative on January 1, _____.

<spm name-change2>

SECTION ___. For the purpose of harmonizing and clarifying statutory law, the Legislative Counsel may substitute for words designating the <<Transferring Agency>> or its officers, wherever they occur in ORS chapter ___, other words designating the <<Receiving Agency>> or its officers.

Note: The account name change and agency name change provisions do not substitute for making appropriate statutory amendments in a draft to reflect a change. The account name change and agency name change provisions are intended only as a safeguard against undetected new references that might be created in other legislation in the same session.

b. Abolishing an Agency and Transferring its Functions to an Existing Agency.

When abolishing an agency and transferring its functions to an existing agency, use the following boilerplate.

<boiler transfer>

TRANSFER

SECTION 1. The duties, functions and powers of the Transferring Agency relating to _____ are imposed upon, transferred to and vested in the Receiving Agency.

RECORDS, PROPERTY, EMPLOYEES

SECTION 2. (1) The Director of the Transferring Agency shall:

(a) Deliver to the Receiving Agency all records and property within the jurisdiction of the director that relate to the duties, functions and powers transferred by section 1 of this (year) Act; and

(b) Transfer to the Receiving Agency those employees engaged primarily in the exercise of the duties, functions and powers transferred by section 1 of this (year) Act.

(2) The Director of the Receiving Agency shall take possession of the records and property, and shall take charge of the employees and employ them in the exercise of the duties, functions and powers transferred by section 1 of this (year) Act, without reduction of compensation but subject to change or termination of employment or compensation as provided by law.

(3) The Governor shall resolve any dispute between the Transferring Agency and the Receiving Agency relating to transfers of records, property and employees under this section, and the Governor's decision is final.

UNEXPENDED REVENUES

SECTION 3. (1) The unexpended balances of amounts authorized to be expended by the Transferring Agency for the biennium beginning July 1, ____, from revenues dedicated, continuously appropriated, appropriated or otherwise made available for the purpose of administering and enforcing the duties, functions and powers transferred by section 1 of this (year) Act are transferred to and are available for expenditure by the Receiving Agency for the biennium beginning July 1, ____, for the purpose of administering and enforcing the duties, functions and powers transferred by section 1 of this (year) Act.

(2) The expenditure classifications, if any, established by Acts authorizing or limiting expenditures by the Transferring Agency remain applicable to expenditures by the Receiving Agency under this section.

ACTION, PROCEEDING, PROSECUTION

SECTION 4. The transfer of duties, functions and powers to the Receiving Agency by section 1 of this (year) Act does not affect any action, proceeding or prosecution involving or with respect to such duties, functions and powers begun before and pending at the time of the transfer, except that the Receiving Agency is substituted for the Transferring Agency in the action, proceeding or prosecution.

LIABILITY, DUTY, OBLIGATION

SECTION 5. (1) Nothing in sections ____ to ____ of this (year) Act relieves a person of a liability, duty or obligation accruing under or with respect to the duties, functions and powers transferred by section 1 of this (year) Act. The Receiving Agency may undertake the collection or enforcement of any such liability, duty or obligation.

(2) The rights and obligations of the Transferring Agency legally incurred under contracts, leases and business transactions executed, entered into or begun before the operative date of section 1 of this (year) Act and accruing under or with respect to the duties, functions and powers transferred by section 1 of this (year) Act are transferred to the Receiving Agency. For the purpose of succession to these rights and obligations, the Receiving Agency is a continuation of the Transferring Agency and not a new authority.

RULES

SECTION 6. Notwithstanding the transfer of duties, functions and powers by section 1 of this (year) Act, the rules of the Transferring Agency with respect to such duties, functions or powers that are in effect on the operative date of section 1 of this (year) Act continue in effect until superseded or repealed by rules of the Receiving Agency. References in such rules of the Transferring Agency to the Transferring Agency or an officer or employee of the Transferring Agency are considered to be references to the Receiving Agency or an officer or employee of the Receiving Agency.

SECTION 7. Whenever, in any uncodified law or resolution of the Legislative Assembly or in any rule, document, record or proceeding authorized by the Legislative Assembly, in the context of the duties, functions and powers transferred by section 1 of this (year) Act, reference is made to the Transferring Agency, or an officer or employee of the Transferring Agency, whose duties, functions or powers are transferred by section 1 of this (year) Act, the reference is considered to be a reference to the Receiving Agency or an officer or employee of the Receiving Agency who by this (year) Act is charged with carrying out such duties, functions and powers.

HOUSEKEEPING IN ORS

SA NOTE: The duties being transferred may require that certain ORS sections get added to a different chapter or series. If so, insert an adding provision for the new location. Also review all the relevant definition sections. If all that is needed is to "unadd" the sections from the current chapter or series, see the Form and Style Manual appendix on series and adding.

OPERATIVE DATE WHEN FUNCTIONS ARE BEING TRANSFERRED TO AN EXISTING AGENCY

SECTION . Sections 1 to 8 of this (year) Act become operative on January 1, ____.

POSSIBLE OPERATIVE DATE PROVISIONS WHEN FUNCTIONS ARE BEING TRANSFERRED TO A NEW AGENCY

SA NOTE: If transferring to a new agency, you should substitute this provision for the standard operating date provision. <spm agency-op> **See chapters 8 and 12 of the drafting manual.**

UNIT AND SECTION CAPTIONS

SA NOTE: The unit captions in the boilerplate are for the convenience of the drafter. If you have used unit and section captions in your draft, you need to include this provision. If you have used only unit captions or only section captions in your draft, you need to use the appropriate provision. <spm captions> or <spm captions-unit> or <spm captions-sec>

3. ABOLISHING AGENCY.

When an agency is abolished, there may be some transitional requirements. The following is a bill that abolished an agency and had transitional requirements:

SECTION 1. The Law Enforcement Council is abolished.

SECTION 2. **ORS 423.205, 423.210, 423.220, 423.230, 423.240 and 423.280 are repealed.**

SECTION 3. ORS 423.510 is amended to read:

423.510. (1) There is [*hereby*] established the Community Corrections Advisory Board consisting of 15 members appointed by the Governor. The board shall be composed of:

(a) Three persons representing community corrections agencies;

(b) Two persons representing state agencies;

(c) Two persons representing private agencies;

(d) Four lay citizens;

(e) A member of the judiciary;

(f) A law enforcement officer; [*and*]

(g) [*Two members of the Law Enforcement Council*.] **One district attorney; and**

(h) One member of a county governing body.

(2) Members of the board shall serve for a period of four years at the pleasure of the Governor provided they continue to hold the office, position or description required by subsection (1) of this section. The Governor may at any time remove any member for inefficiency, neglect of duty or malfeasance in office. Before the expiration of the term of the member, the Governor shall appoint a successor whose term begins on July 1 next following. A member is eligible for reappointment. If there is a vacancy for any cause, the Governor shall make an appointment to become immediately effective for the unexpired term.

(3) A member of the board shall receive no compensation for service as a member, but all members may receive actual and necessary travel and other expenses incurred in the performance of their official duties within limits as provided by law or rule under ORS 292.220 to 292.250.

SECTION 4. **(1) Notwithstanding the term of office specified by ORS 423.510, of the two Community Corrections Advisory Board members appointed pursuant to the amendments to ORS 423.510 by section 3 of this (year) Act to replace the two members formerly appointed from the Law Enforcement Council:**

(a) One shall serve for a term ending June 30, (year+1); and

(b) One shall serve for a term ending June 30, (year+3).

(2) Notwithstanding the abolition of the Law Enforcement Council and the adjustment of categories by the amendments to ORS 423.510 by section 3 of this (year) Act, the two members of the council appointed before the effective date of this (year) Act to serve upon the Community Corrections Advisory Board shall continue their service until January 1, (year+1), or until the appointment of their successors, whichever occurs first.

(3) Nothing in this (year) Act prevents the Governor from appointing either or both of the two board members appointed from the Law Enforcement Council to a new position on the board created by the amendments to ORS 423.510 by section ___ of this (year) Act, so long as the candidate for appointment meets the category requirement of ORS 423.510 (1).

4. "PRIVATIZING" AGENCY.

To privatize means to transfer the status of an entity (such as a business, industry or agency) from a publicly owned or controlled entity to an entity that is privately owned or controlled. Unfortunately, the word is often used imprecisely and may encompass a wide range of meanings. A request for a bill to privatize a state agency may, therefore, indicate any one of a number of intended objectives. Before beginning to prepare a "privatization" bill, the drafter must determine with some precision what the requester wants to accomplish.

If the requester wants to abolish a state agency and have its functions assumed by a private corporation, the drafter may use the provisions set out previously in this appendix for abolishing an agency. If the abolished agency collected, received or expended moneys, ORS 182.080 provides a procedure to be used in winding up the affairs of the abolished agency and also saves any rights or liabilities accruing prior to the abolition of the agency.

The requester may want a private corporation to assume the functions of a state agency and to manage the assets and property of the former agency under a contract with the State of Oregon. Chapter 200, Oregon Laws 2003, is an example of such an approach to "privatization."

When it becomes clear that a request for a bill to privatize a state agency is actually a request to transform the state agency into a public corporation, the drafter should try to determine why the requester wants the agency to become a public corporation rather than a private corporation. Some likely reasons are the retention of the Governor's power to appoint the governing body of the corporation, a desire to maintain the former agency's protection against tort liability under ORS 30.260 to 30.300 or preservation of various employment and retirement benefits for the corporation's employees. When fully informed concerning the requester's objectives, the drafter has a number of statutory examples that may be used as drafting guides. The State Accident Insurance Fund Corporation (ORS 656.751 to 656.776), the Oregon State Bar (ORS 9.005 to 9.755) and corporations for use and control of water (ORS chapter 554) are public corporations that may serve as models for proposed public corporations.

APPENDIX B

STATUTES AND CONSTITUTIONAL PROVISIONS OF GENERAL APPLICATION

This appendix consists of a list of statutes and constitutional provisions of general application. Most of these provisions are not mentioned elsewhere in this manual. This list is not intended as a substitute for adequate research, but as a convenient reference.

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1. STATUTES IN GENERAL.

General definitions.

Unless the context or a specially applicable definition requires otherwise:

"**Person with a disability**" is defined in ORS 174.107.

"**May not**" and "**shall not**" are equivalent expressions of absolute prohibition. ORS 174.100 (5).

"**Person**" includes individuals, corporations, associations, firms, partnerships, limited liability companies and joint stock companies. ORS 174.100 (6).

"**Violate**" includes failure to comply. ORS 174.100 (11).

Effective date of law.

Unless otherwise specified, an act of the Legislative Assembly becomes effective on January 1 of the year following passage. ORS 171.022.

Enforcement of law.

Under ORS 8.650 to 8.680, it is the duty of the district attorney to enforce the law and prosecute violators. This may render unnecessary specific statutes as to the duty of the district attorney to enforce particular laws and prosecute violators.[1]

[1] Note that the Department of Justice may take charge of investigations or prosecutions under certain circumstances. See ORS 180.060, 180.070, 180.080, 180.610.

Unless expressly provided otherwise, the repeal of a statute or part thereof that authorizes a state officer, board, commission, corporation, institution, department, agency or other state organization to collect, receive and expend moneys does not affect or impair any right, liability, or obligation accrued or act completed under the statute or a rule or order promulgated under the statute. ORS 182.080.

2. NOTICE; SERVICE; COMPUTATION OF TIME.

Legal notice, public notice.

ORS chapter 193 contains general provisions concerning the publication of legal notices. Unless the context or a specially applicable definition requires otherwise, "public notice" means any legal publication that requires an affidavit of publication described in ORS 193.070 or is required by law to be published. ORS 174.104.

Holidays.

State holidays are identified in ORS 187.010. ORS 187.010 (3) provides that any act authorized, required or permitted to be performed on a holiday may be performed on the next succeeding business day, and no liability or loss of rights of any kind shall result from the delay.

Computation of time.

Except as otherwise provided in ORCP 10, ORS 174.120 governs computation of the time within which an act is to be done. The time is computed by excluding the first day and including the last day unless the last day falls on a legal holiday or on Saturday. The first day excluded is the day on which the precipitating event occurs; the first day following the precipitating event is counted.[2]

If a time period is prescribed for personal service of a document or notice on a public officer or for filing a document or notice with a public office, and on the last day the office closes before the end of the normal work day, the time for service or filing runs until the close of office hours on the next day that the office is open for business. ORS 174.125; ORCP 10 A.

Determining date of filing or receipt of reports, claims, tax returns or remittances.

ORS 293.660 provides that, for certain reports, tax returns, remittances or claims to be filed with the state, the date shown by a post office or private express carrier cancellation mark on the envelope, or the actual date of mailing, is deemed the date of receipt. The statute also provides for cases in which mail is lost in transmission.

[2] Beardsley v. Hill, 219 Or. 440, 445 (1959).

Certified and registered mail.

ORS 174.160 and 174.170 provide that in most cases where a statute requires use of certified or registered mail, any mail form that provides a return receipt is acceptable. Personal service that meets the requirements of service of a summons is also acceptable.

Appeals to Court of Appeals in special statutory proceeding.

ORS 19.205 (5) provides that an appeal may be taken from the circuit court to the Court of Appeals in any special statutory proceeding under the same conditions, in the same manner and with like effect as from a judgment or order entered in an action, unless appeal is expressly prohibited by the law authorizing the special statutory proceeding.[3]

3. BONDS.

Bonds required in any action or matter.

ORS 22.020 provides that money, an irrevocable letter of credit (with certain exceptions), a certified check or federal or municipal obligations may be deposited in lieu of a security deposit or bond required or permitted by law. This should be considered in amending any statute providing for a bond.

Bonds by public corporation.

ORS 22.010 provides that the state, a county or a city is not required to furnish any bond in any action.

Omitted provisions in bonds required by statute.

A bond required by statute is to be construed as including as a condition any omitted statutory provisions. ORS 742.370.

4. FINANCE.

Taxes.

State income tax laws may define income by reference to federal tax law provisions as those federal laws may from time to time be amended. Article IV, section 32, Oregon Constitution.

State financial administration.

ORS chapters 291, 292, 293 and 295 relate to state financial administration, including budgets, expenditures and handling of state moneys, accounting, investing, depositories, etc.

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[3] See State v. Branstetter, 332 Or. 389 (2001) (discussing proceedings that qualify as "special statutory proceedings").

County and municipal finance.

ORS chapters 294 and 295 relate to county and municipal financial administration.

Public contracts and purchasing.

ORS chapters 279 to 279C have general provisions relating to public contracts and purchasing.

5. GOVERNMENT UNITS.

General definitions.

Unless the context or a specially applicable definition requires otherwise:

"**Any other state**" includes any state and the District of Columbia. ORS 174.100 (1).

"**City**" includes any incorporated village or town. ORS 174.100 (2).

"**County court**" includes a board of county commissioners. ORS 174.100 (3).

"**United States**" includes territories, outlying possessions and the District of Columbia. ORS 174.100 (10).

Definitions for "**public body**," "**state government**," "**executive department**," "**judicial department**," "**legislative department**," "**local government**," "**local service district**" and "**special government body**" are provided by ORS 174.108 to 174.118. These definitions do not apply unless specific reference is made to the appropriate statute and the intention that the definition be applicable is expressed. ORS 174.108.

Public records.

ORS chapter 192 covers retention, inspection and destruction of public records. ORS 192.105 requires notice to the State Archivist in connection with any statute authorizing destruction of public records. ORS 192.345 states an exception to public inspection rights; ORS 192.338 addresses public records that contain both exempt and nonexempt material.

Administrative Procedures Act.

ORS chapter 183 governs the administrative procedures of most state agencies.

Rules.

ORS 183.310 to 183.410 and 183.710 to 183.730 provide a general procedure for filing copies of rules with the Secretary of State and the Legislative Counsel and must be considered in connection with any provisions relating to agency rulemaking.

Civil penalties.

ORS 183.745 establishes a standardized procedure for imposition of civil penalties.

Attorneys for state agencies.

ORS 180.220 (2) and 180.230 provide that a state officer or agency may not employ or be represented by any attorney other than the Attorney General.

Costs in action or proceeding.

ORS 20.140 provides that the state or a county or city need not make advance payment of costs in any action in which it is a party.

Condemnation.

In connection with any statute dealing with condemnation, the general condemnation provisions in ORS chapter 35 should be considered.

Public lands.

ORS 271.300 to 271.360 relate to the general power of the state and its political subdivisions to transfer public real property.

Assignment or lease of office quarters for state agencies.

ORS 276.385 to 276.440 are general provisions relating to the assignment or lease of office quarters for state agencies.

Department of Corrections, Oregon Health Authority and Department of Human Services institutions.

ORS chapter 179 has a number of provisions applicable to institutions operated by the Department of Corrections, the Oregon Health Authority and the Department of Human Services.

Cooperation of governmental units and agencies.

ORS chapter 190 deals with cooperation of governmental units and agencies.

Qualifications of electors in election to form district.

A requirement that a person must own land in order to vote in an election to form a district may be unconstitutional under Article II, section 2, Oregon Constitution.[4]

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[4] J. Peterkort & Co. v. East Washington County Zoning District, 211 Or. 188 (1957).

Boards regulating professions.

ORS chapter 670 has a number of provisions applicable to boards regulating professions. Some boards regulating professions have semi-independent state agency status as described in ORS 182.454 to 182.472.

Meetings of state boards or commissions.

ORS 192.610 to 192.690 relate to public meetings.

Majority can exercise authority given jointly.

Any authority conferred by law upon three or more persons may be exercised by a majority of them unless expressly otherwise provided by law. ORS 174.130. This section does not make a quorum provision unnecessary.

Boards and commissions to pay counties for services.

State boards and commissions are required by ORS 182.040 to 182.060 to pay counties for services.

Reports to legislature.

ORS 192.230 to 192.250 set forth general provisions concerning reports to the Legislative Assembly. ORS 192.245 prescribes the form of written reports.

6. PUBLIC OFFICERS AND PUBLIC EMPLOYEES.

Elections.

ORS 246.021 provides that all election documents and fees must be received by the election officer not later than 5 p.m. of the last day permitted by law for such filing.

Eligibility, benefits and ethics.

ORS chapter 236 contains general provisions concerning eligibility for office, resignations, removals and vacancies, with reference to public officers. ORS chapter 243 contains general provisions concerning rights and benefits of public employees. ORS chapter 244 contains material on ethics and conflicts of interest.

Term of office.

Article XV, section 1, Oregon Constitution, provides that "all officers," except members of the Legislative Assembly, shall hold their offices until their successors are elected and qualified. This may render unnecessary a specific statutory provision to the same effect as to a particular office.

Article XV, section 2, Oregon Constitution, provides that the Legislative Assembly shall not create any "office" with a term longer than four years. A statute providing for a longer term may violate this section. (See the Annotations for this section.) Article VII (Amended), section 1, Oregon Constitution, establishes six-year terms for judges.

Vacancies in office.

Article V, section 16, and Article VI, section 9, Oregon Constitution, provide for the filling of vacancies in office. These sections should be considered in connection with any statute providing for filling a particular vacancy.

Forfeiture of office.

ORS 182.010 provides that failure to attend meetings may result in forfeiture of office.

Recall.

Article II, section 18, Oregon Constitution, and ORS 249.865 to 249.877 provide generally for the recall of a public officer and must be considered in connection with any statute providing for recall for a particular public officer.

Bonds of public officers.

Any state, county or municipal officer or officer of any school district, public board or public commission, etc., who is required to give a bond for the faithful performance of duties shall be allowed a reasonable sum paid a surety company for becoming surety on a bond. Such premium shall be paid out of the proper state, county, municipal, district, board or commission funds. ORS 742.354.

In any statute requiring a public official to furnish a fidelity bond or bond conditioned upon the faithful performance of the duties of the official, whenever the words "a surety" or "a corporate insurance company" or words of similar import are used in referring to execution of the bond, the bond may be executed by one or more sureties, or one or more corporate insurance companies, unless the particular statute specifically provides otherwise. ORS 174.140.

State employees.

ORS chapter 240 contains the State Personnel Relations Law, which should be kept in mind in connection with statutes relating to the appointment, removal and fixing of compensation of state employees.

ORS 182.030 prohibits employment of persons advocating violent overthrow of the government.

Salaries of state officers and employees.

ORS chapter 292 contains general provisions for the payment of salaries and expenses of state officers and employees.

Subsistence and mileage allowances for travel by state officers and employees.

ORS 292.210 to 292.288 prescribe the rate of compensation for use of privately owned vehicles and authorize the Oregon Department of Administrative Services to regulate and prescribe applicable limits.

Public Employees Retirement System.

ORS chapters 238 and 238A provide for a Public Employees Retirement System covering the state, its agencies and its political subdivisions. ORS chapter 237 relates to public employee retirement generally. Most state agencies are covered by the definition of "public employer" in ORS 238.005. Other state agencies, such as semi-independent agencies, may be statutorily included in PERS.

APPENDIX C

SPECIAL FORMS AND STYLES FOR USE DURING A SPECIAL SESSION

_____

Unusual circumstances during a special session require some slight additions to certain procedures described in this manual. Among these are adjustments that are necessary to meet problems arising if a new edition of *Oregon Revised Statutes* has not yet appeared following a regular session. Other changes are needed to distinguish enactments of a special session from those of a regular session. The drafting attorney must check the table of sections amended and repealed by the Acts of the regular session, as published online or in *Oregon Laws* for the regular session.

1. CITATION OF SPECIAL SESSION MEASURES.

"This (year) special session Act." To cite "this Act" in the body of a special session enactment, use:

- "… this (year) special session Act" for a first special session in any year.
- "… this (year) second special session Act" for a second special session in any year.

References to session. In a special session measure, use these examples as models and adjust as appropriate for number of special session and Legislative Assembly:

> **SECTION 7. This 2___ special session Act takes effect on the 91st day after the date on which the special session of the (Number) Legislative Assembly adjourns sine die.** [first special session]
>
> **OR**
>
> That the (year) special session of the Senate and the House of Representatives of the (Number) Legislative Assembly is adjourned sine die. [first special session]
>
> **OR**
>
> We, the (Number) Legislative Assembly of the State of Oregon, in (year) second special legislative session assembled, respectfully represent as follows:
>
> **OR**
>
> That the (Number) Legislative Assembly in (year) third special session, commenced _____, 2___, stand recessed until the call of the presiding officers or _____, 2___, whichever comes first.

Prior Special Session Measures. Use "Oregon Laws 20xx (special session)" to distinguish the first special session laws from the laws of a regular session in the same year.

To cite special session measures from an even year through 2010, use "Oregon Laws 20xx." The even-numbered year identifies the law as a special session enactment. The parenthetical "(special session)" is unnecessary, because regular sessions of the Legislative Assembly were not held in even years before 2012.

For second or subsequent special sessions in any year, specify which special session is meant in parentheses, as in "Oregon Laws 2002 (third special session)." For example:

- ". . . chapter 6, Oregon Laws 2017 (special session), . . ."
- ". . . section 2, chapter 105, Oregon Laws 2010, . . ."
- ". . . section 2a, chapter 1, Oregon Laws 2002 (fourth special session), . . ."
- ". . . House Joint Resolution 101 (2017 special session) . . . ."
- ". . . Senate Joint Memorial 3 (2010) . . . ."
- ". . . Senate Concurrent Resolution 16 (2002 second special session) . . . ."

Current Special Session Measures. If the current session is a first special session, add "(special session)" to citations to current measures:

- "section 10, chapter ___, Oregon Laws 2___ (special session) (Enrolled ____ Bill ___) (LC 3988),"

Delete the LC parenthetical once the bill number is assigned:

- "section 10, chapter ___, Oregon Laws 2___ (special session) (Enrolled Senate Bill 1101),"

When more than one special session is held in any year, the parenthetical must specify which special session is meant:

- "section 12, chapter ___, Oregon Laws 2___ (third special session) (Enrolled House Bill 4001),"
- "section 15, chapter ___, Oregon Laws 2___ (second special session) (Enrolled House Bill 4101),"

2. ADJUSTMENTS FOR SPECIAL SESSION PRIOR TO ORS PUBLICATION.

Certain adjustments are required when a special session precedes publication of ORS:

If the bill amends an ORS section, determine whether that ORS section was amended or repealed during the regular session by checking the table of sections amended and repealed by legislative action during the regular session. The table is published online and in the *Oregon Laws*. If the section was amended by an Act of the regular session, the amending clause in a special session bill reads:

> **SECTION 1.** ORS 92.100, as amended by section _____, chapter ___, Oregon Laws 2___, is amended to read:
> 92.100. (Insert adjusted text)

Adjust the text by deleting all material that appears in [*brackets and italic*] type and changing all **boldfaced** text to lightface. This can be accomplished by running the CLEAN CLIST in DW370. Use [*brackets and italic*] type and **boldfaced** type to indicate only the material to be deleted or inserted by the special session bill.

If the bill amends a new section enacted by an Act of the regular session, the amending clause uses the regular session *Oregon Laws* citation. Set forth all section text in lightface for amending. Use [*brackets and italic*] type and **boldfaced** type to indicate only the material to be deleted or inserted by the special session bill. The amending clause reads:

> **SECTION 1.** Section _____, chapter _____, Oregon Laws 2___, is amended to read:
> **Sec. __.** (Insert text)

If the bill repeals a section enacted or an ORS section amended by an Act of the regular session, the repealing clause reads, respectively:

> **SECTION 1. Section ___, chapter ___, Oregon Laws 2__, is repealed.**
>
> **OR**
>
> **SECTION 1. ORS 92.100, as amended by section ____, chapter ____, Oregon Laws 2___, is repealed.**

If the bill repeals a section enacted or an ORS section amended by a regular session Act and enacts a new section in lieu thereof, the enacting clause reads:

> **SECTION 1. Section ____, chapter ____, Oregon Laws 2___, is repealed and section 2 of this (year) special session Act is enacted in lieu thereof.**
>
> **SECTION 2. (Insert text)**
>
> **OR**

SECTION 1. **ORS 92.100, as amended by section ____, chapter ____, Oregon Laws 2___, is repealed and section 2 of this (year) special session Act is enacted in lieu thereof.**

SECTION 2. **(Insert text)**

3. ADJUSTMENTS FOR MULTIPLE SPECIAL SESSIONS IN ONE YEAR.

For second or subsequent special sessions in a year, additional adjustments are required because these special sessions will usually precede publication of *Oregon Laws* for the earlier special session(s).

Citing Earlier Special Session Laws. Bills drafted for second and subsequent special sessions often cite Acts or resolutions of an earlier special session. Cite session laws of an earlier special session as for current special session law and include the enrolled bill parenthetical for clarity. Use the standard form for citing resolutions, including, when necessary, the special session designation in the date parenthetical.

For example, when chapter 1, Oregon Laws 2002 (second special session), repealed two sections of chapter 11, Oregon Laws 2002, the relating clause looked like this:

A BILL FOR AN ACT

Relating to stores operated by Oregon Liquor Control Commission; creating new provisions; amending ORS 471.750; repealing sections 1 and 2, chapter 11, Oregon Laws 2002 (Enrolled House Bill 4013); and declaring an emergency.

Note the parentheticals used in chapter 11, Oregon Laws 2002 (second special session), including the insertion of "first" in the first parenthetical for ex post facto clarity:

SECTION 1. **If Enrolled House Bill 4013 (2002 first special session) becomes law, sections 1 (amending ORS 471.750) and 2, chapter 11, Oregon Laws 2002 (Enrolled House Bill 4013), are repealed.**

If the bill amends an ORS, ORCP or session law section, check the amend and repeal tables for the earlier sessions. If the section was amended by an earlier special session Act, the amending clause addresses the section as it appears in the earlier special session Act. Here are some examples:

SECTION 1. ORS 327.095, as amended by section 1, chapter 4, Oregon Laws 2002 (Enrolled House Bill 4011), is amended to read:
327.095. (1) (Insert text)

SECTION 1. ORS 273.384, as amended by section 1, chapter 4, Oregon Laws 2002 (second special session) (Enrolled House Bill 4035), is amended to read:
273.384. (Insert text)

SECTION 1. Section 28, chapter 954, Oregon Laws 2001, as amended by section 2, chapter 4, Oregon Laws 2002 (second special session) (Enrolled House Bill 4035), is amended to read:
Sec. 28. (Insert text)

Remember to adjust the text from the earlier Act by deleting all material that appears in [*brackets and italic*] type and changing all **boldfaced** text to lightface. This can be accomplished by running the CLEAN CLIST in DW370. Then use [*brackets and italic*] type and **boldfaced** type to indicate only the material to be deleted or inserted by the current special session Act.

If the bill amends a section that was enacted by the earlier special session, the amending clause addresses the session law from the earlier special session:

> **SECTION 10.** Section 4, chapter 5, Oregon Laws 2002 (Enrolled House Bill 4019), is amended to read:
> **Sec 4.** (Insert text)

The text set forth for amending is lightface. Use [*brackets and italic*] type for deletions and **boldfaced** type for insertions by the current special session bill.

Converting References in Amended Session Law Sections. Use brackets and boldface when converting references in session law sections to "section __ of this (year) Act" or "section __ of this (year) second special session Act" to Oregon Laws references; include the session parenthetical when necessary. Also use brackets and boldface to substitute actual effective or operative dates in phrases such as "effective date of this (year) second special session Act."

Adjusting as Needed for Clarity. Adjust the citation format if necessary for absolute clarity, as in this excerpt from a 2002 second special session joint resolution:

> **PARAGRAPH 1. Senate Joint Resolution 50, Seventy-first Legislative Assembly, 2002 First Special Session, is rescinded. The Secretary of State may not refer Senate Joint Resolution 50, Seventy-first Legislative Assembly, 2002 First Special Session, to the people for their approval or rejection at a special election held throughout this state on the same date as the next primary election.**

Note the placement of the "(LC __)" reference in this example:

> **SECTION 1. Except as otherwise provided in this 2002 fifth special session Act, ORS chapters 250, 251 and 254 apply to the election on the measure submitted as House Bill ___ (LC 17) (2002 fifth special session), if House Bill ___ (LC 17) (2002 fifth special session) is referred to the people at the 2002 general election.**

APPENDIX E

REDRAFTS OF BILLS FROM PREVIOUS SESSIONS

Do not assume that a bill is ready to be introduced merely because it was introduced in a previous legislative session. The bill may have not passed due to flaws in the draft. Alternatively, the bill might have been drafted quickly and did not receive proper drafting attention. Do the following steps with a bill from a previous session that you are asked to "redraft":

1. Confirm that the bill did not become law.

   - Check the measure history for the bill, the enrolled bills database on STAIRS or the bill-to-chapter tables in the back of the session laws or in ORS volume 20.

   - Check key words on STAIRS in case the substance of the bill was stuffed into another bill that passed.

2. Check statutes amended or repealed by the bill.

   - Make sure the statutes still exist.

   - Look at the source notes and the even-year A&Rs, if applicable, to determine if the statutes were amended or repealed in the previous session or sessions. If they were amended, look at the amendments in the session laws to see if those amendments affect the amendments in the draft. Do any of the sections require additional amending because of new material or conflicting changes? Are the sections still appropriate, or could they be deleted?

   - Look at statutes surrounding the statutes amended or repealed in the bill. Have changes to them affected the way the draft should be written?

   - Re-retrieve sections to be amended. *Never copy amended sections from the old bill*, even if the sections were not amended in the previous session or sessions. The sections could contain editorial changes made during compilation or retrieval.

3. Review citations, terminology and official titles in new material.

   - Check that citations have not been affected by amendment, repeal, renumbering or codification.

   - Check STAIRS for references to repealed, renumbered or relettered sections or references to terminology changed by the draft since new references may have been created during the previous session or sessions.

- Check the official titles list to confirm an agency was not abolished or renamed or that another name change was not made.

4. Review dates that may need to be changed.

5. Change references to "this (year) Act."

APPENDIX F

SENATE COMMEMORATIONS

When the Senate assembles during the legislative interim to confirm the Governor's executive appointments under Article III, section 4, of the Oregon Constitution, the Senate occasionally requests the preparation of a Senate commemoration so that it can express its congratulations, commendation or sympathy. The form for a Senate commemoration is modeled on the form used for a concurrent resolution. The formal parts of a Senate commemoration are the *heading*, *preamble*, *resolving clause* and *body*.

Here is an example of a Senate commemoration:

HEADING

Oregon State Senate

IN COMMEMORATION

75TH ANNIVERSARY OF DEDICATION OF CURRENT STATE CAPITOL

PREAMBLE

Whereas on December 30, 1855, fire swept through a newly occupied Oregon Statehouse, completely destroying the structure; and

Whereas another Oregon Statehouse, patterned after the United States Capitol, was completed in 1876; and

Whereas on April 25, 1935, fire again destroyed the elegant Oregon Statehouse; and

Whereas after thorough discussions, the decision was made to rebuild the State Capitol on the original site; and

Whereas over 100 designs were submitted for the new building; and

Whereas the design by Francis Keally from the New York firm of Trowbridge & Livingston was chosen; and

Whereas the current State Capitol was dedicated on October 1, 1938; and

Whereas the building materials include marble from Vermont, polished rose travertine from Montana and Phoenix Napoleon gray marble from Missouri; and

Whereas the State Capitol houses the offices of the entire Legislative Branch and the ceremonial offices of the Governor, Secretary of State and State Treasurer; and

Whereas spacious hearing rooms provide Oregonians an opportunity to participate in legislative decision making and to view state government at work; and

Whereas the Oregon Pioneer statue, weighing eight and one-half tons, cast in bronze and finished in gold leaf, crowns the top of the building; and

Whereas in celebration of the 75th anniversary of the dedication of the State Capitol, an event is planned to commemorate this special milestone on October 1, 2013; now, therefore,

RESOLVING CLAUSE

Be It Resolved by the Senate in Session Assembled under Article III, Section 4, of the Oregon Constitution:

BODY

That we, the members of the Senate of the Seventy-seventh Legislative Assembly, honor and celebrate the 75th anniversary of the State Capitol; and be it further

Resolved, That a copy of this commemoration shall be sent to each member of the Oregon Congressional Delegation and to each state legislature of the United States.

Heading. The heading includes the words "Oregon State Senate," gives the reason for the commemoration (e.g., "IN COMMEMORATION" or "IN MEMORIAM") and identifies the person or organization being honored. Here is a sample "IN MEMORIAM" heading:

HEADING

Oregon State Senate

IN MEMORIAM

FORMER SENATE PRESIDENT JASON BOE, 1929-1990

Preamble. The preamble follows the heading and precedes the resolving clause. It follows the same form as a preamble used for joint resolutions. See Preamble on page 16.2 of this manual.

Resolving Clause. The resolving clause differs from the resolving clause used for resolutions and memorials considered during a regular session. The resolving clause for a Senate commemoration is always flush with the left margin and reads:

Be It Resolved by the Senate in Session Assembled under Article III, Section 4, of the Oregon Constitution:

Body. The text is lightface and may have numbered paragraphs or may take the following form:

- Begin the first paragraph with the word "That."
- Begin the second and subsequent paragraphs with the words "Resolved, That."
- End each paragraph except the last with a semicolon and the words "and be it further."
- End the last paragraph with a period.
- If the body includes a provision for sending copies, use the phrase ". . . that a copy of this commemoration. . . ." rather than ". . . this resolution. . . ."

Signature Block. A Senate commemoration is prepared in its final form and includes a signature block that reads:

Adopted by Senate (Month) (day), (year)

_____

Secretary of Senate

_____

President of Senate

Footer. The LC draft number appears in lightface type in the lower left corner of the last page.

APPENDIX J

OREGON STATUTORY INTERPRETATION

Generally. In interpreting a statute, a court's goal is to ascertain the meaning intended by the enacting legislature. Oregon courts follow the methodology in State v. Gaines[1] and PGE v. Bureau of Labor and Industries.[2] That methodology is a "distillation of settled interpretive principles, some of which have been codified in Oregon statutes since early statehood and others of which have been articulated in [the Oregon Supreme Court's] case law for many years."[3] Under Oregon's methodology, a court first considers the text and context of a statute. Second, the court considers relevant legislative history. Finally, and only if the Legislative Assembly's intent remains unclear, the court may resort to general maxims of statutory construction to resolve the remaining ambiguity.

PGE and Gaines, compared. Under PGE, a court would consider legislative history under step two "if, but only if" it found the statute ambiguous after examining the text and context. In 2001, the Legislative Assembly responded to the rigidity of that framework by amending ORS 174.020 to allow courts to consider pertinent legislative history alongside a statute's text and context. The Oregon Supreme Court in Gaines construed the amendment to eliminate PGE's "if, but only if" requirement. Under Gaines, a court now considers legislative history after considering a statute's text and context, even if it does not perceive an ambiguity in the statute's text.

Ultimately, the amendments to ORS 174.020, as interpreted by Gaines, did not significantly alter the PGE analysis.[4] Although a court now always may consider pertinent legislative history, "the extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine."[5] Moreover, the "text and context remain primary, and must be given primary weight in the analysis."[6] Therefore, when statutory text is unambiguous, a party seeking to overcome that text with legislative history "has a difficult task before it."[7]

Reference materials. For more comprehensive guidance on statutory interpretation—including what constitutes a statute's "text," "context" and "legislative history" and applying rules of construction—the following resources are available in the LC Library:

- Interpreting Oregon Law (Jack L. Landau ed., 2009). This publication is also available online through the Oregon State Bar's BarBooks website.
- Norman J. Singer and J.D. Shambie Singer, Sutherland Statutory Construction (7th ed. 2009).

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[1] State v. Gaines, 346 Or. 160, 171-172 (2009).
[2] PGE v. Bureau of Labor and Industries, 317 Or. 606, 610-612 (1993).
[3] Gaines at 164.
[4] For a more in-depth discussion of how Gaines modified the PGE analysis, see Interpreting Oregon Law, at 1-5 to 1-7 (Jack L. Landau ed., 2009).
[5] Gaines at 172.
[6] Id. at 171.
[7] Id.

APPENDIX K

CONFIDENTIALITY CLAUSES AND PUBLIC RECORDS REQUEST EXEMPTIONS

1. OVERVIEW.

ORS 192.314 provides that the public has the right to inspect any public record unless the record, or information contained on the record, is made explicitly exempt from public disclosure. ORS 192.355 (9)(a) provides that any record or information that is made confidential, privileged or for which disclosure is prohibited, is exempt from public disclosure under Oregon's public records law. Furthermore, ORS 192.390 limits most public records request exemptions to 25 years from the date that the public record was created.

There are hundreds of existing public records request exemptions within Oregon law. Generally, it is best to modify or expand an existing confidentiality clause or public records request exemption rather than create a new one that parallels an existing one. Care should be taken to ensure that the confidentiality clause or public records request exemption is narrowly tailored to only exclude from public disclosure those records and information that the exemption is meant to exclude.

If the requester wishes to protect records or information from public disclosure, the drafter must first ascertain the desired level of protection. The highest level of protection is afforded when disclosure is prohibited, or the records or information are made confidential. The intermediate level of protection is provided by an unconditional public records request exemption. Finally, the lowest level of protection is provided through a conditional public records request exemption.

Next, the drafter must establish the proper location for the public records request exemption. Confidentiality clauses and temporary provision are generally placed within the substantive body of law. Care should be taken with temporary provisions to ensure that protection for a type of record is not lost when a law sunsets if the records will still exist after the sunset and the requester does not intend for the records to become available to the public at that time. Unconditional public records request exemptions should be placed within ORS 192.355. Conditional public records request exemptions should normally be placed within ORS 192.345 if the standard public interest balancing test is desired and within ORS 192.355 if a custom public interest balancing test is preferred.

2. CONFIDENTIALITY CLAUSES.

Confidentiality clauses are used when a public body has or will have records that the requester of the measure does not want shared with the others. There are three types of confidentiality clauses: absolute confidentiality clauses; confidentiality clauses with exceptions; and clauses that exclude records from the public records request process.

The following is a standard confidentiality clause:

(11) The department shall make available to consumers, online and by telephone, a process for consumers to notify the department about an increase in the price of a prescription drug. Personally identifiable information about a consumer who notifies the department of an increase in the price of a prescription drug under this section, including the consumer's name, address, telephone number or electronic mail address, is confidential and not subject to further disclosure under ORS 192.311 to 192.478.

The following are standard confidentiality clause with exceptions:

(3) Confidential business information submitted to the department by a network company under this section is confidential and not subject to public disclosure under ORS 192.311 to 192.478, except that the department may disclose summarized information or aggregated data if the information or data does not directly or indirectly identify the confidential business information.

(4) An application submitted under this section and information related to applying for or renewing a license under this section are confidential and not subject to public disclosure under ORS 192.311 to 192.478. However, the department may share an application submitted under this section and information related to applying for or renewing a license under this section with the Department of Justice, the Oregon Health Authority or with a city or a local public health authority that adopts an ordinance under section 18 of this 2021 Act.

Excluding a record from Oregon's public records request law does not control the use or disclosure of the record outside of the public records request process. It is also unlikely to exclude it from the state's public records retention law unless the series ORS 192.005 to 192.170 is included in the confidentiality clause. The first example below only excludes the records from the public records request process, whereas the second example also excludes it from records retention and limits the use of the records outside of the public records request process. The following are clauses that exclude records from the public records request process:

SECTION 15. On or before March 1 of each odd-numbered year, the Department of Justice shall submit a report to the chairpersons of the standing or interim Joint Committee on Ways and Means regarding materially significant or noteworthy litigation involving the state that is ongoing or that concluded in the biennium preceding the report. Notwithstanding ORS 192.311 to 192.478, the report described in this section is not a public record and is not subject to public disclosure.

c) Information received under this section is confidential and is not a public record as defined in ORS 192.005 to 192.170 or ORS 192.311 to 192.478. An education provider may use the information only for the purpose of evaluating an applicant's eligibility to be hired.

3. PUBLIC RECORDS REQUEST EXEMPTIONS.

a. Unconditional public records request exemptions.

Unconditional public records request exemptions allow public bodies to exclude records and information from public records requests. Generally, the responding public body may waive the public records exemption and release the record or information at the discretion of

the public body. Unconditional public records request exemptions should be placed within ORS 192.355.

b. Conditional public records request exemptions.

Conditional public records request exemptions are only exempt from public disclosure if non-disclosure is in the public interest. These types of exemption are subject to a public interest balancing test that balances the public interest in disclosure against the public interest in non-disclosure. The default public interest test contained in ORS 192.345 is that "the public records are exempt from disclosure under ORS 192.311 to 192.478 unless the public interest requires disclosure in the particular instance." Although this appears to be a high bar to overcome, the public records request law is principally a law of disclosure and is heavily skewed in favor of disclosure. See *Jordan v. Motor Vehicles Div.*, 308 Or. 433, 438 (1989); see also *ACLU of Or., Inc. v. City of Eugene*, 360 Or 269, 280 (2016).

If the requester would like a custom public interest balancing test, then the public records exemption should generally be placed in ORS 192.355. That section has multiple examples of custom public interest tests that range from those skewed in favor of disclosure to those skewed in favor of non-disclosure.

Finally, a conditional public records request exemption might also need its own section if conditions are placed on the disclosure of records or information that exceed two or three subsections. An example of this type of public records request exemption is contained in ORS 192.355 (3) and 192.363 relating to public body employee information. These sections require a specific format for the request, a modified public interest balancing test, employee notification of the request and a delay in providing the requested information.