

# Legislative Fiscal Office

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## Budget Information Brief / 2006-2

### Budget Note

The use of budget notes is a long established legislative practice, spanning at least the last 17 biennia. This Budget Information Brief provides a definition of a budget note and discusses their origin, legal standing, and use.

#### **What is a budget note?**

There is no statutory, administrative, or formal legislative definition of a budget note for the State of Oregon. The closest there is to a definition comes from the Joint Committee on Ways and Means Committee Rule #13<sup>i</sup>, which states...

In the event that the Joint Committee identifies a need for language to clarify or expand upon administrative requirements which are directly related to the execution of budgets during the fiscal period covered by the appropriation and expenditure limitation, such language may be included within the Budget Report for the bill.

The Ways and Means rule further states...

If the Joint Committee identifies the need for a statement of policy or administrative direction which goes beyond the criteria described above, such statement or directive shall be handled as a separate bill, a resolution, or by amendment to the appropriation bill.

In short, a budget note is a formal directive to a state agency expressing legislative intent for a particular budget issue. A budget note is technical in nature, directing an agency to take administrative and managerial action relating to the agency's execution of its biennial budget. A budget note is of limited scope, not intended to circumvent, supplant, or replace other substantive or policy measures or law. The directive of a budget note typically expires at the end of the biennium for which it pertains. Budget notes are neither required nor necessary for every Ways and Means measure.

Most frequently, a budget note directs an agency to make follow-up progress reports on budget-related items to the Emergency Board, an interim policy committee, or the next Legislative Assembly. For example, a budget note may outline the reporting conditions necessary for allocation to an agency of a special purpose appropriation made to the Emergency Board. Less frequently, a budget note may direct a specific agency management action related to the budget. For example, an agency may be instructed to review how it allocates certain program funds, or be directed to maximize an Other Funds revenue stream.

#### **Who drafts and reviews budget notes?**

A budget note originates from one legislative committee, the Joint Committee on Ways and Means<sup>ii</sup>, and is found exclusively in a budget report, which is the measure summary that accompanies all

<sup>i</sup> 73<sup>rd</sup> Legislative Assembly.

<sup>ii</sup> The only exception is in the case when separate Senate and House Budget Committees are appointed.

appropriation measures passed by Ways and Means. <sup>iii, iv</sup> While budget notes can be written for substantive measures considered by Ways and Means, they are almost exclusively associated with measures appropriating or limiting expenditures (e.g., agency budget measures).

A budget report may contain more than one budget note, which is typically the case for larger, complex agencies. A budget note may be agency-wide or program-specific. A joint budget note is one that affects more than one agency and usually appears in each agency's budget report.

Budget note language originates from a variety of sources, but, like legislation, most are "sponsored" by individual legislators (both Ways and Means and non-Committee members). In other instances, Legislative Fiscal Office (LFO) staff recommend the inclusion of budget notes to deal with specific budget issues. Proposed budget notes must be approved by the Co-Chairs of Ways and Means prior to consideration by a Subcommittee. The Co-Chairs encourage legislative members to first present their draft language to the LFO budget analyst assigned to the involved agency(ies) so that the analyst can provide members with feedback, ask questions to confirm the intended outcome of the budget note, suggest improvements, and be in a position to explain it to the Co-Chairs and Subcommittee members. The intended focus on administrative requirements means budget notes that contain policy language, such as from a policy measure that has not been passed, are not appropriate. Unlike a measure or amendment to a measure, a budget note's language is typically not drafted nor reviewed by Legislative Counsel unless concern arises about its potential legality. A budget report may include language to establish the context or provide additional information on a specific budget note, either in the budget report text or as a separate budget note comment.

A budget note can receive a high level of public and legislative scrutiny. Generally, a budget note corresponds to a topic directly related to budget execution and is discussed during the Subcommittee review process. A discussion of each budget note may also be included in the LFO work session papers for the measure. If the measure is voted out of Subcommittee, a Full Committee vote will then be held. An affirmative vote sends the measure (with the accompanying budget report and budget note) to either the House or Senate Desk for the scheduling of a floor vote. Budget notes can receive debate on the floor in conjunction with the measure. The Governor also may consider the merits of a budget note when deciding whether to sign, veto, or let a measure become law. The Governor, however, does not have line-item veto authority over a budget note since its language is contained in a budget report rather than in the measure itself.

### **Does a budget note have the force of law?**

For a budget note to be effective or executable, it must be associated with a measure passing both houses of the Legislature, and signed by the Governor, filed without the Governor's signature, or passed by both houses of the Legislature over the Governor's veto. So, while many budget notes are proposed, and some are included in a budget report passed by one or both houses, relatively few are associated with an enacted measure. For these, a common question is whether the budget note has the force of law and can legally compel agency action. The answer: a budget note lacks the force of law because it was not enacted in accordance with the constitutional requirements for the enactment of laws. As then Attorney General (now federal judge) James A. Redden explained:

Budget notes adopted by subcommittees of the Joint Ways and Means Committee are not formally approved by the Legislative Assembly, and are not part of any legislation. For this reason, budget notes are not legally binding; they are solely advisory in nature.<sup>v</sup>

In *Sierra Club v. United States Fish and Wildlife Service*<sup>vi</sup>, federal courts agreed that a "budget note . . . has no force of law."

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<sup>iii</sup> A budget report is a summary of the Committee action on the budget; it is drafted by the Department of Administrative Services and reviewed and approved by the Legislative Fiscal Office. The report is prepared for all measures appropriating funds or limiting expenditures and takes the place of a staff measure summary and fiscal impact statement.

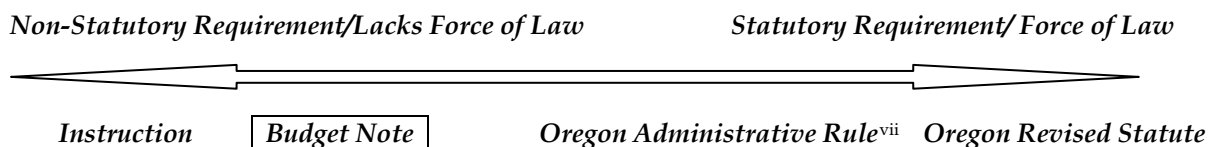
<sup>iv</sup> House and Senate Rules (73<sup>rd</sup> Legislative Assembly), 8.20(3)(g) and 8.50(4)(f), respectfully, require any budget note to be included in the report accompanying a measure being reported out of Committee.

<sup>v</sup> 38 Op. Attorney General 1731, 1732 (1978).

<sup>vi</sup> 235 F. Supp.2d 1109, 1142 (D. Or. 2002).

Thus, a budget note is advisory and has no legal effect. It is a note of legislative intent.

The following continuum shows where budget notes fall in comparison to other legislative instruction, more formal legislatively delegated authority or administrative rule, and statute. A budget note carries greater authority than an instruction but lacks the legal basis of administrative rule or revised statute.



Agencies whose budget report contains a budget note are not legally compelled to comply with the note. As a historic practice, however, Executive, Judicial, and Legislative Branch agencies do pay deference to budget notes and take steps to fulfill any expectations that are described. Agencies do so for three primary reasons: (a) a mutual interest in what the budget note seeks to accomplish; (b) an interest in maintaining good relations with the Legislative Assembly in general or an interim legislative committee in particular (e.g., Emergency Board, Joint Legislative Audit Committee, Joint Legislative Committee on Information Management and Technology, Judiciary Committee, etc.); and (c) the desire by the Legislature and agencies to avoid unnecessary statutory language to satisfy legislative concern over a technical or non-policy issue.

Unless the budget note is tied to the allocation of a special purpose appropriation made to the Emergency Board, the only direct connection between a budget note and an agency's budget is when the Ways and Means Subcommittee reviews budget note outcomes as part of the next biennium's budget review and approval process.

#### **How frequently are budget notes used?**

For the 2005 legislative session, there were 110 budget reports written for enacted measures, which contained a total of 92 budget notes. Forty-four budget reports contained a budget note or multiple budget notes, with 13 being duplicate budget notes appearing in more than one agency's budget report. This means that approximately 40% of budget reports contained one or more budget notes. These budget notes are associated with 39 state agencies, with over 75% pertaining to submission of a report to the Legislature. All measures containing a budget note were appropriation measures (i.e., 5000- and 5500-series measures); no substantive measures that were reported out of Ways and Means with a budget report contained a budget note. Over the last 17 biennia, the use of budget notes has tended to increase.

#### **Who bears the costs of a budget note?**

Generally, approved budget notes do not require actions that create a fiscal impact on an agency. Agencies implement a budget note within existing budgetary authority unless the note is specifically tied to an Emergency Board special purpose appropriation or its execution becomes financially problematic for an agency. However, the outcome of a budget note may trigger an agency request to the Legislature for additional General Fund or Other Funds/Federal Funds expenditure limitation, either in the current or next biennium.

#### **Where can a copy of a budget note be found?**

A budget note is found in a budget report for a measure. Budget reports are included as supporting documentation in the original bill files maintained by the House and Senate Desks. Upon third reading of the measure, budget reports are available for public access through the "Committees" link on the Legislature's website (<http://www.leg.state.or.us>).

After session, the Legislative Fiscal Office, with the assistance of the Department of Administrative Services' Budget and Management Division, publishes a compilation of session budget notes in a Budget Information Report entitled *Compiled Budget Notes*. The report is available through the "Publications" link on the Legislative Fiscal Office website (<http://www.leg.state.or.us/comm/lfo/home.htm>).

<sup>vii</sup> An administrative rule is any agency directive, standard, regulation, or statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of any agency.

### **Conclusion**

Budget notes, while advisory, serve an important function for both agencies and the Legislature by articulating legislative intent in a form and format that is more preferable than statutory language for certain issues and directions. The key factor in legitimizing the use of budget notes is that all three branches of government continue to voluntarily direct and complete budget note requirements.

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