

# Issue Brief: Agency Rulemaking and Legislative Oversight

LPRO

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This brief is divided into two sections. First, [Agency Rulemaking](#) summarizes selected statutes governing the administrative rulemaking process including:

- [Rulemaking Authority and Judicial Review](#) (page 2),
- [Permanent Rulemaking Procedures](#) (page 2), and
- [Temporary Rulemaking Procedures](#) (page 6).

Second, [Legislative Oversight of Agency Rulemaking](#) (page 7) reviews the Legislative Assembly's duties, powers, and current practices related to agency rulemaking including:

- [Legislative Contact with Agency Rulemaking](#) (page 7),
- [Legislative Review of Agency Rulemaking](#) (page 7), and
- [Current Rule Review Practices](#) (page 9).

## Agency Rulemaking

Agency rulemaking is governed by [ORS 183.310 to 183.690](#), the Administrative Procedures Act (APA).<sup>1</sup> For the purposes of the APA:

“Agency” means any state board, commission, department, or division thereof, or officer authorized by law to make rules or to issue orders, except those in the legislative and judicial branches. [...]

“Rule” means 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.<sup>2</sup>

Permanent and Temporary Agency Rules have different notice and hearing requirements, including the agency notice to the Legislative Assembly and opportunities for legislative oversight of agency rulemaking activities.

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<sup>1</sup> A complete review of agency rulemaking procedures, including the Attorney General's model rules and unique agency rulemaking procedure requirements, is beyond the scope of this brief. For a more complete review of the administrative rulemaking process LPRO recommends the [Attorney General's Administrative Law Manual and Uniform and Model Rules of Procedure Under the APA](#).

<sup>2</sup> [ORS 183.310\(1\) and \(9\) \(2023\)](#).



## Rulemaking Authority and Judicial Review

Agency rules must be authorized by constitutional or statutory authority.<sup>3</sup> The Court of Appeals may determine the validity of any rule and must declare a rule invalid if it finds the rule:

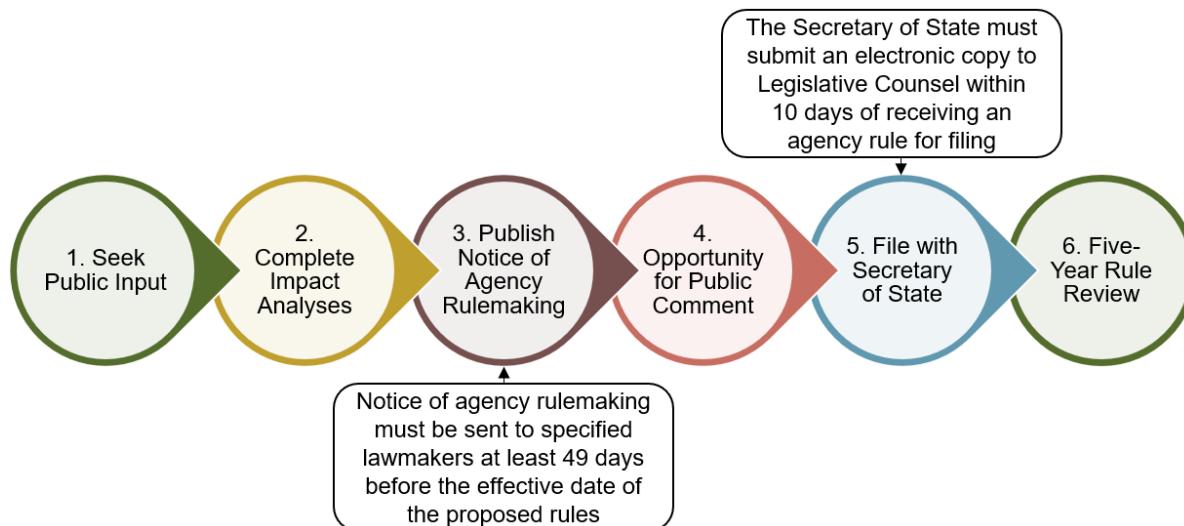
- violates constitutional provisions,
- exceeds the statutory authority of the agency, or
- was adopted without compliance with applicable rulemaking procedures.<sup>4</sup>

## Permanent Rulemaking Procedures

The APA establishes procedures that each agency must follow when adopting, amending, or repealing a rule.<sup>5</sup> Each agency must also “adopt rules of procedure to be utilized in the adoption of rules” and may utilize all or part of Model Rules of Procedure, which are prepared by the Attorney General.<sup>6</sup> The specific rulemaking process can vary by agency, but will generally include six steps: (Figure 1)

1. Seek Public Input
2. Complete Impact Analyses
3. Publish of Notice of Agency Rulemaking
4. Opportunity for Public Comment
5. File with Secretary of State
6. Five-Year Rule Review

**Figure 1: Six Steps of Agency Permanent Rulemaking**



Source: Legislative Policy and Research Office

<sup>3</sup> [ORS 183.400 \(2023\)](#).

<sup>4</sup> [ORS 183.400\(4\) \(2023\)](#).

<sup>5</sup> [ORS 183.310 to 183.355 \(2023\)](#).

<sup>6</sup> [ORS 183.341 \(2023\)](#). Oregon Department of Justice (DOJ), *Attorney General Model Rules*, <https://www.doj.state.or.us/oregon-department-of-justice/client-resources/attorney-general-model-rules/> (last visited February 4, 2025).



## 1. Seek Public Input

The APA includes a finding and declaration by the Legislative Assembly “that it is the policy of this state that whenever possible the public be involved in the development of public policy by agencies and in the drafting of rules.”<sup>7</sup> All agencies are encouraged “to seek public input to the maximum extent possible before giving notice of intent to adopt a rule,” including the use of an advisory committee that represents the interests of persons and communities likely to be affected by the rulemaking to make recommendations for the required impact analyses.<sup>8</sup>

Special emphasis is placed on the potential impact of agency rulemaking on small businesses, which the APA defines as independently-owned, for-profit entities with 50 or fewer employees.<sup>9</sup> The Small Business Rules Advisory Committee (SBRAC), a standing nine-member body composed primarily of representatives of small businesses, is established “to serve as an advisory committee for agencies adopting new administrative rules and to review the effectiveness of existing administrative rules.”<sup>10</sup>

## 2. Complete Impact Analyses

The APA requires a fiscal impact analysis and racial equity impact analysis to be completed for all agency rulemaking. Agencies with authority in areas related to housing development are also required to complete a housing cost impact analysis.

### Fiscal Impact

Before issuing a notice of rulemaking, all agencies must prepare a fiscal impact statement identifying the state agencies, units of local government, and the public that may be economically affected by the proposed rulemaking and an estimate of that economic impact on the affected parties.<sup>11</sup> Agencies are encouraged to consider an advisory committee’s recommendations on the fiscal impact of the proposal, and required to establish an advisory committee for such a purpose upon the objection of 10 or more persons likely to be affected by the rule.<sup>12</sup>

The fiscal impact statement must also estimate the cost of compliance on small businesses. If the estimate shows that a rule has a “significant adverse effect upon small businesses” then the agency must, “to the extent consistent with the public health and safety purposes of the rule, [...] reduce the economic impact of the rule” by “establishing less intrusive or less costly alternatives applicable to small business” including “exempting small businesses from any or all requirements of the rule.”<sup>13</sup>

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<sup>7</sup> [ORS 183.333 \(2023\)](#).

<sup>8</sup> *Id.*

<sup>9</sup> [ORS 183.310\(10\) \(2023\)](#).

<sup>10</sup> [ORS 183.407 \(2023\)](#).

<sup>11</sup> [ORS 183.335\(2\)\(b\)\(E\) and 183.336 \(2023\)](#).

<sup>12</sup> [ORS 183.333\(3\)-\(6\) \(2023\)](#).

<sup>13</sup> [ORS 183.540 \(2023\)](#).



## Racial Equity Impact

All agencies are also required to prepare a statement identifying how the proposed rulemaking will affect racial equity in the state.<sup>14</sup>

## Housing Cost Impact

Specified agencies with authority related to development are required to prepare a housing cost impact statement which estimates “the effect of a proposed rule or ordinance on the cost of development of a 6,000 square foot parcel and the construction of a 1,200 square foot detached single family dwelling on that parcel” using a form adopted by the Housing and Community Services Department.<sup>15</sup> The Housing Cost Impact statement is not required for the adoption of procedural rules. Failure to prepare a housing cost impact statement has no effect on the validity or effective date of any rule or ordinance.<sup>16</sup>

### **3. Publish Notice of Agency Rulemaking**

An agency must give notice of intent to adopt, amend, or repeal a rule.<sup>17</sup> The notice must include, among other requirements:

- citation of the statute or other legal authority the rule is intended to implement,
- a statement of the need for the rule and a statement of how the rule is intended to meet the need,
- if relevant, an explanation as to why no advisory committee was used to assist the agency in drafting the rule,
- the fiscal impact, racial equity impact, and, if required, housing cost impact statements.<sup>18</sup>

The agency's notice of rulemaking must be:

- sent by e-mail to specified lawmakers at least 49 days before the effective date (Figure 2, page 5),
- sent to interested individuals at least 28 days before the effective date, and
- published in the [Oregon Bulletin](#) at least 21 days before the effective date of the rule.<sup>19</sup>

The notice is given either to the lawmaker who introduced the measure that enables the rulemaking and chair or cochairs of committees that reported the measure out (if the legislation was passed within two years of the date of notice) or to the chairs or cochairs

<sup>14</sup> [ORS 183.335\(2\)\(b\)\(F\) \(2023\)](#).

<sup>15</sup> [ORS 183.530 to 183.534 \(2023\)](#). Failure to prepare a housing cost impact statement has no effect on the validity or effective date of any rule or ordinance.

<sup>16</sup> [ORS 183.538 \(2023\)](#).

<sup>17</sup> [ORS 183.335\(1\) \(2023\)](#).

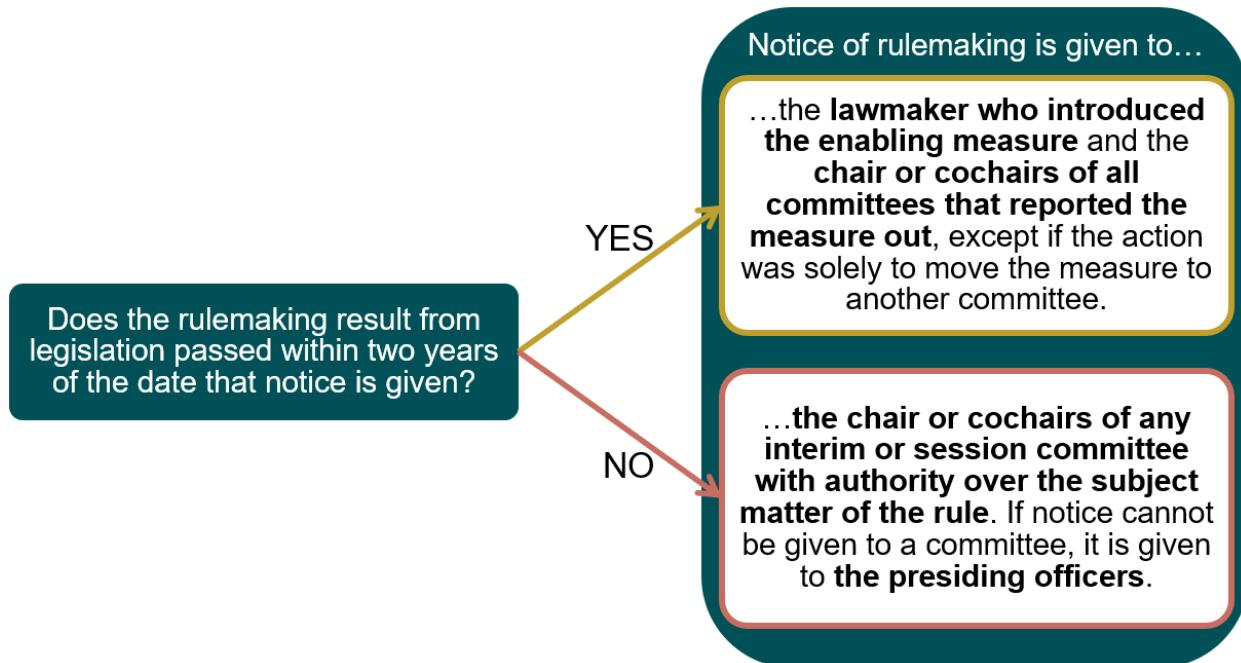
<sup>18</sup> [ORS 183.335\(2\) \(2023\)](#).

<sup>19</sup> [ORS 183.335\(1\) \(2023\)](#). “The Oregon Bulletin is a monthly online publication containing Notices of Proposed Rulemaking, Permanent and Temporary Administrative Rule filings, along with rule text; as well as Minor Correction filings. The Bulletin also includes non-OAR items when they are submitted, such as Executive Orders of the Governor and Opinions of the Attorney General.” Oregon Secretary of State, *The Oregon Bulletin Archive*, <https://sos.oregon.gov/archives/Pages/oregon-bulletin.aspx> (last visited February 4, 2025).



of any interim or session committee with authority over the subject matter of the rule (if the legislation was passed more than two years ago).

**Figure 2: Legislative Notice Requirements for Agency Permanent Rulemaking**



Source: Legislative Policy and Research Office  
 Data: [ORS 183.335\(15\) \(2023\)](#).

#### **4. Opportunity for Public Comment**

An agency that proposes rulemaking must “give interested persons reasonable opportunity to submit data or views.”<sup>20</sup> Some agencies are required to hold a public hearing to receive public comment on proposed rulemaking, while others are required to hold a public hearing only when requested by 10 or more persons or by an association with at least 10 members.<sup>21</sup>

Upon the request of a member of the Legislative Assembly or of a person who would be affected by the proposed rulemaking, the legislative committees receiving notice of rulemaking must review the proposed rules for compliance with the authorizing legislation and submit their comments on the proposed rulemaking to the agency.<sup>22</sup>

#### **5. File with Secretary of State**

Agency rules become effective after they are filed with the Secretary of State (SOS).<sup>23</sup> After an agency files a permanent rule, the SOS has 10 days to electronically submit a

<sup>20</sup> [ORS 183.335\(3\)\(a\) \(2023\)](#).

<sup>21</sup> *Id.*

<sup>22</sup> [ORS 183.335\(16\) \(2023\)](#).

<sup>23</sup> [ORS 183.355\(2\)-\(3\) \(2023\)](#).



copy of the adopted, amended, or repealed rule to Legislative Counsel (LC).<sup>24</sup> The role of LC in the legislative rule review process is discussed in [Legislative Oversight of Agency Rulemaking](#) (page 7).

## 6. Five-Year Rule Review

Each agency must review, not later than five years after adoption, a new agency rule to determine:

- whether the rule has had the intended effect,
- whether the anticipated fiscal impact of the rule was underestimated or overestimated,
- whether subsequent changes in the law require that the rule be repealed or amended,
- whether there is continued need for the rule, and
- what impacts the rule has on small businesses.<sup>25</sup>

The SBRAC is authorized to complete the review and reporting requirement at the request of an agency.<sup>26</sup>

A report on each review of a rule must be submitted to the SOS, who must submit an annual report to the Legislative Assembly compiling all agency rule review reports submitted during each calendar year.<sup>27</sup>

## Temporary Rulemaking Procedures

The APA authorizes an agency to adopt, amend, or suspend a rule for up to 180 days without fulfilling the permanent rulemaking notice and hearing requirements with the agency's finding that "failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned."<sup>28</sup> An agency must still prepare certain items for temporary rulemaking, including:

- citation of the statute or other legal authority the rule is intended to implement,
- a statement of the need for the rule and a statement of how the rule is intended to meet the need,
- a statement finding that failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned which includes the specific reasons for those findings, and
- for agencies with authority related to development, a housing cost impact statement.<sup>29</sup>

<sup>24</sup> [ORS 183.355\(10\) and 183.715 \(2023\)](#).

<sup>25</sup> [ORS 183.405\(1\) \(2023\)](#). Rule amendment and repeal, and rulemaking for the following purposes, are exempt from the rule review requirement: rules adopted to implement court orders or the settlement of civil proceedings; rules that adopt federal laws or rules by reference; rules adopted to implement legislatively approved fee changes; or, rules adopted to correct errors or omissions. [ORS 183.405\(5\)-\(6\) \(2023\)](#).

<sup>26</sup> [ORS 183.405\(2\) \(2023\)](#).

<sup>27</sup> [ORS 183.405\(4\) and \(7\) \(2023\)](#).

<sup>28</sup> [ORS 183.335\(5\) \(2023\)](#).

<sup>29</sup> *Id.*



## Legislative Oversight of Agency Rulemaking

This section summarizes the statutes that govern legislative oversight of agency rulemaking, including the points of legislative contact built into the rulemaking process and legislative review of agency rulemaking.

### Legislative Contact with Agency Rulemaking

For permanent rulemaking, the APA requires:

- an agency to give notice to specified lawmakers and legislative committees at least 49 days before the effective date of the proposed rules (Figure 2, page 5).<sup>30</sup>
- the SOS to submit an electronic copy of the adopted, amended, or repealed rule to Legislative Counsel (LC) within 10 days of filing.<sup>31</sup>
- each agency to make an annual rulemaking report to the Legislative Assembly.<sup>32</sup>

The annual rulemaking report must include for the preceding 12-month period the number of permanent rules adopted, amended, or repealed.<sup>33</sup> It must also include a list of all temporary rules, the statement of need prepared for each temporary rule, and an explanation of why temporary rulemaking was more appropriate than permanent rulemaking. Annual rulemaking reports are posted on the Oregon Legislature's website under [Reports Required by Statute](#).<sup>34</sup>

### Legislative Review of Agency Rulemaking

LC is authorized to review agency rules and produce written determinations regarding whether the rules are within the intent and scope of enabling legislation, or duplicative of or in conflict with another state or federal agency rule or regulation. This subsection summarizes statutory provisions related to the legislative review of agency rulemaking and is divided into the following sub-subsections:

- [Planning for Interim Review of Agency Rules](#),
- [Within the Intent and Scope of Enabling Legislation](#), and
- [Identification of Duplicative or Conflicting Rules](#).

LC's [Administrative Rule Review webpage](#) provides a detailed description of the current process.<sup>35</sup>

<sup>30</sup> [ORS 183.335\(1\)\(d\) \(2023\)](#).

<sup>31</sup> [ORS 183.355\(10\) and 183.715 \(2023\)](#).

<sup>32</sup> [ORS 183.403\(2\) \(2023\)](#).

<sup>33</sup> *Id.*

<sup>34</sup> Oregon State Legislature, *Publications and Reports*, [https://www.oregonlegislature.gov/citizen\\_engagement/Pages/Publications-Reports.aspx](https://www.oregonlegislature.gov/citizen_engagement/Pages/Publications-Reports.aspx) (last visited February 4, 2025).

<sup>35</sup> Legislative Counsel, *Administrative Rule Review*, <https://www.oregonlegislature.gov/lc/Pages/ARRs.aspx> (last visited February 4, 2025).



## ***Planning for Interim Review of Agency Rules***

Certain duties of the legislative review of agency rulemaking are the shared responsibility of interim committees. After the end of each odd-numbered year regular session, LC must develop and distribute a list assigning state agencies to at least one interim committee.<sup>36</sup> Assignments are based on subject-matter and made with the goal of ensuring that the rule review workload is approximately equally distributed between the interim committees of both chambers.<sup>37</sup> Requirements for legislative review of agency rulemaking by an interim committee are satisfied when considered by an interim committee in either chamber.<sup>38</sup> The interim committee assignment list is posted on [LC's Administrative Rule Review webpage](#).

## ***Within the Intent and Scope of Enabling Legislation***

LC must review a proposed or adopted rule of a state agency when directed by the LC Committee or upon the written request of any member of the Legislative Assembly and may do the same upon the written request of any person affected by the rule.<sup>39</sup> When reviewing an agency rule, LC must:

- determine whether the rule appears to be within the intent and scope of the enabling legislation purporting to authorize its adoption,
- determine whether the rule raises any constitutional issue, and if so, the nature of the issue,
- prepare written findings of determinations,
- send a copy of determinations to the appropriate interim committee or, if the review was requested by a member of the Legislative Assembly or by a person affected by the rule, to the person requesting the review.<sup>40</sup>

If LC determines that a rule is not within the intent and scope of the enabling legislation or that the rule raises a constitutional issue (a “negative determination”), then LC must also send a copy of the negative determination to the agency that adopted the rule.<sup>41</sup> An interim committee must consider, at a meeting, the negative determination produced by LC along with any state agency response.<sup>42</sup> An agency in receipt of a negative determination from LC must indicate, either in a written response or appearing before the interim committee, if the agency intends to repeal, amend, or take other action with respect to the rule. If the interim committee is not satisfied with the response made by the state agency, the committee may request that one or more representatives of the agency appear at a subsequent meeting of the committee along with a representative of the Oregon Department of Administrative Services for the purpose of further explaining the position of the agency.<sup>43</sup>

<sup>36</sup> [ORS 183.724\(1\) \(2023\)](#).

<sup>37</sup> [ORS 183.724\(2\) \(2023\)](#).

<sup>38</sup> [ORS 183.724\(3\) \(2023\)](#).

<sup>39</sup> [ORS 183.720\(1\)-\(2\) \(2023\)](#).

<sup>40</sup> [ORS 183.720\(3\)-\(6\) \(2023\)](#).

<sup>41</sup> [ORS 183.720\(6\) \(2023\)](#).

<sup>42</sup> [ORS 183.722\(1\) \(2023\)](#).

<sup>43</sup> [ORS 183.722\(2\) \(2023\)](#).



If the interim committee adopts the negative determination, LC must post the negative determination on the LC website where it must remain until:

- the rule is modified and LC determines the rule is within the intent and scope of enabling legislation and otherwise constitutional,
- a court makes a final determination that the rule is within the intent and scope of enabling legislation and otherwise constitutional, all appeals of the court's determination are exhausted, and the state agency notifies LC of the determination, or
- the Legislative Assembly modifies the enabling legislation so as to bring the rule within the intent and scope of the enabling legislation.<sup>44</sup>

### ***Identification of Duplicative or Conflicting Rules***

LC must, when requested by a member of the Legislative Assembly, or may, when requested by a person affected by the rules in question, prepare a report to the appropriate interim committee on a rule adopted by a state agency that the requester asserts is duplicative or conflicts with another state agency or federal rule or regulation.<sup>45</sup> The request must be in writing and contain copies of the two rules that are claimed to be duplicative or conflicting. The report prepared by LC for the interim committee must include a copy of the request, including copies of the two rules that the member asserts are conflicting or duplicative, and LC's analysis of the requirements of the two rules. A copy of the report must be sent to the agency that adopted the rule in question.<sup>46</sup> An interim committee in receipt of a report from LC may determine that the rule is duplicative or conflicts with the other cited rule or regulation.<sup>47</sup>

## **Current Rule Review Practices**

LC's [Administrative Rule Review webpage](#) describes rule review as a 4-step process (Figure 3, page 10).<sup>48</sup>

1. The Secretary of State electronically submits an adopted, amended or repealed rule to Legislative Counsel within 10 days after the agency files the rule with the Secretary of State.
2. Legislative Counsel makes "written findings" determining whether the rule is within the intent and scope of the enabling legislation or raises constitutional issues.
3. Legislative Counsel makes "written findings" determining whether the rule is within the intent and scope of the enabling legislation or raises constitutional issues.
4. Negative determinations are posted on the Legislative Counsel website until resolved.

<sup>44</sup> [ORS 183.722\(1\)\(b\) \(2023\)](#).

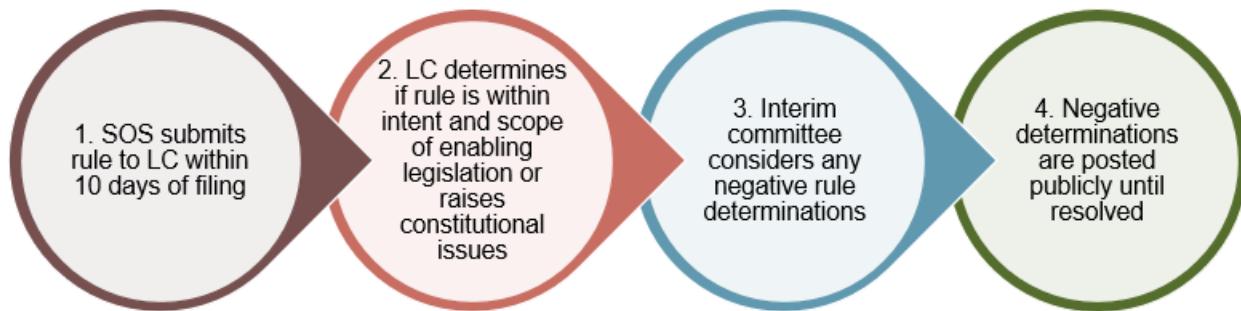
<sup>45</sup> [ORS 183.720\(7\) \(2023\)](#).

<sup>46</sup> [ORS 183.720\(9\) \(2023\)](#).

<sup>47</sup> [ORS 183.720\(8\) \(2023\)](#).

<sup>48</sup> Legislative Counsel, *Administrative Rule Review*, <https://www.oregonlegislature.gov/lc/Pages/ARRs.aspx> (last visited February 4, 2025).



**Figure 3: LC's Four Steps of Administrative Rule Review**

Source: Legislative Policy and Research Office

Data: [Legislative Counsel](#)

As of February 4, 2025, there is a single negative rule determination posted on [LC's Administrative Rule Review webpage](#). The determination was adopted in 2010 and identifies a constitutional issue with rules adopted by the Department of Human Services.<sup>49</sup>

## Staff

Tyler Larson, [Tyler.Larson@oregonlegislature.gov](mailto:Tyler.Larson@oregonlegislature.gov)

## Legislative Policy and Research Office

Oregon State Capitol | (503) 986-1813 | [www.oregonlegislature.gov/lpro](http://www.oregonlegislature.gov/lpro)

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<sup>49</sup> Memo dated April 13, 2010, from BeaLisa Sydlik, Deputy Legislative Counsel, Legislative Counsel, to Annette Tesch, Rules Coordinator, Department of Human Services, Subject: Written Findings of Negative Determination, <https://www.oregonlegislature.gov/lc/ARRs/ARR%20201.pdf>.

