

CHAPTER EIGHT

ADMINISTRATIVE PROVISIONS

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1. GENERALLY.

The administrative provisions of a bill ordinarily follow the provisions creating new rights and liabilities. However, in a bill creating a new department or reorganizing an old one, the sections on administration usually express the leading purpose of the bill and should be placed immediately following the definition section. The administrative provisions should be arranged in a manner that gives a clear picture of the administrative organization and procedures. For example, in a bill creating a Corrections Division (renamed the Department of Corrections, chapter 320, Oregon Laws 1987), section 1 set out definitions and section 2 created the agency. The next five sections provided for the duties of the agency, the selection of its chief administrator and subordinate employees, and the adoption of its rules. (Chapter 616, Oregon Laws 1965.)

Bills that transfer functions from one agency to another also should be organized to make it easy for the reader to see what the bill does. Usually the transfer section states the leading purpose of the bill and should be near its beginning. However, if the bill abolishes an existing agency and transfers its functions to one or more other agencies, the provision abolishing the existing agency normally should be first. In either case, the leading purpose section is followed by provisions disposing of the functions transferred. Existing statute sections will probably need to be amended to reflect the transfers and to solve transitional problems. (Chapter 828, Oregon Laws 1979.)

The remainder of this chapter contains sample provisions that cover various problems arising in the drafting of administrative provisions of a bill. The requester may or may not want all of these provisions in the bill. Each sample must be carefully tailored to fit the requirements of the particular bill in which it is used. There is no such thing as a “pre-fab” bill.

2. ESTABLISHING NEW STATE AGENCY.

See Appendix A for the complete text of the BOILER NEWAGENCY boilerplate. The following section provides for the establishment of a new state agency:

ESTABLISHING NEW STATE AGENCY

- SECTION 1.** (1) The Department of _____ is established.
(2) The department shall _____.
(3) The department may _____.

Sometimes the provision creating a new agency attempts to summarize its functions. This is dangerous! If this is done, the drafter must be careful not to create an inconsistency between these provisions and later sections that spell out the agency’s functions in detail. However, a drafter may want to make a general statement of the functions of the new agency in the section creating it. The following provision is based on ORS 184.125 (1967 Replacement Part):

- SECTION _____.** (1) The _____ Division is established within the Department of Commerce.
(2) The division shall formulate and direct a program of economic development for the state. Through research, promotion and coordination of activities in this state, the division shall foster the most desirable growth and diversification of resources, agriculture, industry and commerce in this state. The division shall serve as a central coordinating agency and clearinghouse for activities and information concerning the resources and economy of this state.

A drafter may, but generally does not need to, indicate specifically that an enumeration of functions is not a limitation of other powers. However, when there is need, 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.

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” is used occasionally, its use suggests a commission and may be misleading if there is none.

a. Basic Provision.

The following sample may be considered as basic 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.

Section 4, Article III of the Oregon Constitution, provides that the Legislative Assembly by law may require that gubernatorial appointments be subject to Senate confirmation. If the requester wants confirmation, use the following text from the BOILER NEWAGENCY boilerplate:

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.

A general statute governs the status of persons holding appointive offices. ORS 236.140 provides:

236.140. Any person holding an appointive office in any of the offices, departments or institutions of this state, shall hold the same for an indefinite term, not exceeding four years, and shall at all times be subject to removal by the appointive power which made the appointment. The appointive power may in all cases appoint a successor.

Because of ORS 236.140, a special provision for a specific term of office is rarely needed for an individual executive officer. Although ORS 236.140 also applies to boards and commissions, board and commission members generally serve for fixed terms that are staggered.

A drafter may be asked to provide that an officer serve for a specified term. Section 2, Article XV, Oregon Constitution, limits terms of officers other than judges to four years,

while section 1, Article VII (Amended), limits the terms of judges to six years. If a longer term is requested, the requester should be told of the constitutional problem. The following alternate 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 the position of an officer or employee, it is not customary to set a definite amount of salary nor to limit the maximum amount of salary. The Personnel Relations Law provides for the setting of salaries of employees in the classified service. In the case of an employee in the unclassified or exempt service, the draft should include a provision like subsection (3) of the basic provision, indicating the officer or body authorized to prescribe the amount of compensation but not specifying a definite amount.

e. Travel and Subsistence Expenses.

Except in unusual cases, a drafter 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 drafter should use the following standard phrase:

<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.

f. Fidelity Bond.

ORS 291.011 provides that the Director of the Oregon Department of Administrative Services may require a fidelity bond of any officer, employee or agent of a state agency, who has charge of, handles or has access to any state money or property, and who is not otherwise required by law to give a fidelity bond. The director may fix the amount of the bond, except as otherwise provided by law, and must approve the sureties. The premium on the bond is to be paid by the state agency employing the individual who is bonded, usually through a blanket bond obtained for the state by the Oregon Department of Administrative Services. Although this section generally makes specific bonding provisions unnecessary, it does not require a corporate surety and it does not prescribe any definite amount. If the request requires something other than the statutory default language, 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.

ORS 742.354 provides that a state or local officer or employee who is required to give a bond for the faithful performance of duties is allowed the amount paid to a surety company for the bond. The premium is to be paid out of the proper state or local funds. Consequently, a drafter does not have to require that the state or local government pay the cost of the bond. But if there is any doubt as to the account or fund from which the premium on the bond is to be paid, it can be made clear as follows: “The premium on the bond shall be paid from the State Forestry Department Account.”

g. Special Requirements and Qualifications.

Most statutes creating a state office do not prescribe special qualifications for an appointee. 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 drafter can do this by adding them to subsection (2) of the basic provision or may set them out in a separate section, particularly if the qualifications are lengthy. The standard phrase reads as follows:

<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.

ORS 756.026 provides another example.

The drafter 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 seems hardly necessary, but it does no harm if the requester wants it included.

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) There is established a State Board of _____ consisting of _____ members appointed by the Governor.

(2) The term of office of each member 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.

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

(4) 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 _____, (year+1).

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

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

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

The term for new members added later may be done 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).

The material in section 2 of the examples should use the same day in each subsection. The provision is temporary and should not be placed in section 1 of the example. If enacted in one section, the temporary part must be compiled. By placing the temporary material in a separate section, it need not be compiled in *Oregon Revised Statutes* but will be carried as a note in ORS for as long as it has current application.

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.

ORS 440.330 is an example of a determination by lot of the length of terms of first board members. This method is not ordinarily used for state boards but sometimes is found at the local government level.

Changes in terms of office may require a special provision, e.g., section 35, chapter 198, Oregon Laws 1977.

ORS 204.017 and 264.410 are examples for electing members.

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

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 are the same as for confirmation of the appointment of a director (see page 8.3). However, the drafter should not assume that the requester wants members confirmed by the Senate and should request instructions. 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 (see page 8.4) can be used with necessary adjustments.

d. Oath of Office.

If the requester wants to require an oath of office for members of a board or commission, the form for directors (see page 8.5) may be used as adjusted to fit the needs of the bill being drafted. An example may be found in ORS 677.240.

e. Qualification of Members.

A drafter may be asked to include in a bill special eligibility requirements for members of a board or commission. The qualifications should be placed as 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 drafter may be requested to include a provision that members be selected from congressional districts in order 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 have members selected from areas or zones, as in the case of the State Board of Forestry under ORS 526.009, boundaries for which are fixed by statute and do not change automatically (and perhaps unexpectedly) when congressional districts are redrawn.

If the drafter is requested to require special qualifications for membership, it is important to take care in describing those qualifications. For instance, 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, in violation of the Oregon Constitution. 45 Op. Att’y Gen. 160, 167 (1987). Legislation that requires the appointment of privately selected persons violates section 1, Article IV of the Oregon Constitution. That provision vests the power to make and declare laws exclusively in the Legislative Assembly conditioned by the initiative and referendum process. Further, section 1 of Article III separates government into three departments: legislative, executive (including administrative) and judicial. Section 21 of Article I requires that no law be passed that depends upon any other authority to take effect. 45 Op. Att’y Gen. at 167-170. See also Van Winkle v. Fred Meyer, Inc., 151 Or. 455 (1935), finding it unconstitutional to delegate price-setting authority to private parties. In Corvallis Lodge No. 1411 v. OLCC, 67 Or. App. 15, 19-22 (1984), the court held that delegation of governmental authority to private parties fails to provide procedural safeguards against unaccountable exercise of authority. In 28 Op. Att’y Gen. 69 (1957), the Attorney General concluded that “all appointive power is vested in the three departments of government” and may not constitutionally be delegated to nongovernmental bodies.

The creation of a **nonadvisory** board or commission that exercises governmental functions and that includes members of more than one branch of government raises constitutional separation of powers issues under section 1, Article III of the Oregon Constitution. The situation usually arises with a request for an executive branch board or commission that includes legislators, though a drafter should consider the issue with any request for a board, commission or other 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. For a discussion of separation of powers issues see Monaghan v. School District No.1, 211 Or. 360 (1957) (superseded by Article XV, Oregon Constitution that allows public school teachers to serve in legislature, eliminating separation of powers issue 49 Op. Att’y Gen. 254 (2000); 46 Op. Att’y Gen. 133 (1989); 43 Op. Att’y Gen. 205 (1983).

If a drafter receives a request to have representatives from more than one branch of government on a **nonadvisory** board or commission, the drafter should:

1. Discuss with the requester the possibility of removing some of the members so that all members are from one branch of government;
2. Change the duties of the board or commission so that the board or commission is **advisory**. For example, place the nonadvisory functions of the board or commission in an independent executive branch agency; or
3. If it is an executive board or commission, allow the legislators or judges to remain on the board or commission, but as advisory members and without a vote on the matters that are properly under the purview of the executive branch.

Note: If you want a member of a board or commission to be a nonvoting member, say 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.

f. Salary, Per Diem and Travel Expenses.

Many state boards and commissions in Oregon 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. The drafter should be sure that the requester intends both the per diem and the expense allowance. Legislator members receive per diem and expenses under ORS 171.072 when serving ex officio on other than legislative committees if the reimbursement is specified. Legislators are considered full-time public officials and can receive no per diem under ORS 292.495.

If a per diem is intended, the drafter should incorporate the standardized ORS 292.495 by reference rather than to write a new per diem or expense provision.

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 drafter 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.

g. Officers of Board; Quorum; Voting.

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 to be the case, the drafter must also provide for the election of a secretary. A drafter 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, ORS 198.220 is an example of a provision requiring a bond. The drafter should be sure of the requester's purpose because the issue of secretary-member v. secretary-employee has generated some controversy.

ORS 174.130 provides that “[a]ny authority conferred by law upon three or more persons may be exercised by a majority of them unless expressly otherwise provided by law.” It is not clear whether action may be taken by a majority vote, a quorum being present, or whether action may be taken only upon the approval of a majority of the members of the board. The draft should provide specifically for the number of members required to make a quorum, pending clarification of ORS 174.130.

Customarily, the vote of a majority of the quorum is required for official action. Occasionally a drafter is requested to increase the number of affirmative votes, usually on issues perceived to be more significant. When a drafter is requested to require a greater number of votes, it should be done specifically so that the majority of the quorum can adjourn meetings, etc. The drafter should also be aware of Larson v. State Board of Parole, 91 Or. App. 642 (1988). In ORS 144.054 reference is made to the “full membership of the board.” The court held that the phrase does not require all five members at all times because of provisions for filling vacancies and for disqualification of a member in a conflict of interest situation. The court construed the phrase to mean all voting members holding office and not disqualified from voting rather than the number of members who constitute the full membership authorized by law.

h. 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 (ORS 192.610 to 192.690). A drafter should never presume that a board is to be exempted from that law since state policy is to the contrary. An exemption would not be “boilerplate” and must be checked with the requester.

5. EMPLOYEES.

A bill creating a new state agency usually contains a section providing for the appointment of employees. Most state employees are in the classified civil service, and the

State Personnel Relations Law (ORS chapter 240) provides the procedure for their appointment and discharge and for the fixing of their salaries. The following sample provision for employees of a department, including a deputy director, is part of the <BOILER NEWAGENCY> 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.

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 drafter is ready to 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 should be used. The detailed procedures to be followed by the agency would then follow. The procedures should be consistent with the Administrative Procedures Act (ORS chapter 183). ORS 657.683 is an example of a provision relating to hearings before a state agency that is not subject to the Administrative Procedures Act.

If there is a desire to cause judicial review of agency orders that differs from the Administrative Procedures Act or is to be expedited, usually because of the controversial nature of the powers in which the order is based, the following may be useful:

SECTION _____ (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.

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.

Rulemaking is discussed in *Planned Parenthood Assn. v. Department of Human Resources*, 297 Or. 562 (1984), and in the *CLE Administrative Law Handbook*. As defined in ORS 183.310, “rule” means an agency directive, standard, regulation or statement of general applicability. 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 referred to are of federal or local government origin. Since the Administrative Procedures Act uses “adopt” rather than “adopt and publish” or “promulgate,” “adopt” should be used in context of administrative rules. The following excerpt from the BOILER NEWAGENCY boilerplate is a sample provision in a bill creating a new agency:

GENERAL AUTHORITY TO ADOPT RULES

SECTION 5. In accordance with applicable provisions of ORS chapter 183, the Director of the Department of _____ may adopt rules necessary 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 Director of the Department of _____ may adopt rules necessary for the administration of sections _____ to _____ of this (year) Act.

Use or adapt the following standard phrase language for agency rulemaking regarding licensing:

<spm agency-lic-rules>

SECTION ____. In accordance with applicable provisions of ORS chapter 183, the Director of 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.

b. Delegation of Powers.

By section 1, Article III, and section 1, Article IV, Oregon Constitution, the legislative power of this state is vested in the Legislative Assembly. Numerous cases have held that these constitutional provisions mean that the Legislative Assembly cannot divest itself of its legislative power by conferring it on someone else. However, the Legislative Assembly may authorize others to do certain things that it might properly do, but cannot advantageously undertake. There is no invalid delegation of power so long as a bill determines the policy of the law and prescribes a method for its application or prescribes procedures to protect the public, even though it delegates to an agency the application of these principles in particular cases.

In older cases, regulatory acts lacking adequate standards have been held unconstitutional. For example, a crop dusting statute was held invalid in Demers v. Peterson, 197 Or. 466 (1953).

More recently, however, the Oregon Supreme Court has stated that the important consideration is not whether the statute delegating the power expresses **standards**, but whether the procedure established for the exercise of the power furnishes adequate **safeguards** to those who are affected by the administrative action. Warren v. Marion County, 222 Or. 307 (1960); Oregon Assn. of Rehab. Prof. v. Dept. of Ins. and Fin., 99 Or. App. 613 (1989). Roseburg Lumber Co. v. State Tax Comm., 223 Or. 294 (1960), required an administrative agency to state reasons for a decision made in an administrative hearing.

The decision to supply standards or to rely on procedural safeguards lies with the requester and may to some extent depend on the subject of the bill. The use of standards may limit administrative discretion more than the procedural approach but, because of the detail involved, may excite more controversy.

Though 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, the bill cannot adopt, or compel adoption of, rules of another entity that may be adopted in the future. Hillman v. N. Wasco Co. P.U.D., 213 Or. 264 (1958) (overruled on other grounds); General Electric Co. v. Wahle, 207 Or. 302 (1956). A bill probably could, however, direct an agency to consider, and to the extent practicable to adopt, rules or policies of a public or private entity as those rules or policies exist at the time of the agency rule adoption (which may be long after the enactment of the enabling legislation). For example, "In adopting rules under section ____ of this (year) Act, the (adopting 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.

The drafter should carefully examine the phrase “rules of _____, as they may be from time to time amended” wherever it or a similar phrase appears. A fixed date is more proper, even if it is less flexible.

In enacting a law complete in itself and designed to accomplish the regulation of particular matters falling within its jurisdiction, 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. Cancilla v. Gehlhar, 145 Or. 184 (1933), upheld a provision authorizing the State Department of Agriculture to make rules regarding transportation of produce by certain licensees. In Southern Pacific Ry. Co. v. Consolidated Freightways, 203 Or. 657 (1955), a statute was upheld that authorized the Public Utility Commissioner to fix maximum speeds for railroad trains, such speeds to be “commensurate with the hazards presented and the practical operation of the trains.” McCarthy v. Coos Head Timber Co., 208 Or. 371 (1956), is another example.

In a bill that affects the property rights of individuals or their privilege to engage in a trade or profession, more definite standards may be needed than are required in one dealing with the public health, safety or welfare. State ex rel. Public Welfare Commission v. Malheur County Court, 185 Or. 392 (1949).

In Van Riper v. Oregon Liquor Control Comm., 228 Or. 581 (1961), the court held that an agency cannot undertake anything contrary to a statute, but it can “fill in interstices in the legislation” and help the statute accomplish its purpose. Many other Oregon authorities hold that unless the Constitution expressly provides otherwise, the Legislative Assembly may not delegate legislative functions to executive officers or bodies, but that, having established a policy, standard or rule for their guidance, it may leave to them matters of administrative detail, including the making of rules and the determination of facts:

Winslow v. Fleischner, 112 Or. 23 (1924).

Livesay v. DeArmond, 131 Or. 563 (1930).

Van Winkle v. Fred Meyer, Inc., 151 Or. 455 (1935).

City of Portland v. Welch, 154 Or. 286 (1936).

Savage v. Martin, 161 Or. 660 (1939).

LaForge v. Ellis, 175 Or. 545 (1945).

M.&M. Wood Working Co. v. State Ind. Acc. Comm., 176 Or. 35 (1945).

Foeller v. Housing Authority of Portland, 198 Or. 205 (1953).

Seale v. McKennon, 215 Or. 562 (1959).

Dilger v. School Dist. 24 CJ, 222 Or. 108 (1960).

The question for the drafter is how much detail the requester wants to leave to the administrative agency. The current rule in Oregon according to later cases seems to permit greater authority in the agencies, but the issue of whether to shift emphasis from standards to procedural safeguards is a policy decision for the Legislative Assembly to make.

When rulemaking authority is granted and there is need to ensure initial adoption by a specified date, it is unwise to insert that date in the section granting the authority because

the date raises the issue that perhaps after that date, the authority lapses. The better approach is:

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

8. ADMINISTRATIVE PROCEDURES ACT; OFFICE OF ADMINISTRATIVE HEARINGS.

The Administrative Procedures Act (APA) (ORS chapter 183) applies to all state agencies that are not exempted by law. Generally, a drafter will not want to exempt a new agency from the rulemaking requirements of the APA (ORS 183.325 to 183.410), since all agencies need to have some procedure governing the manner in which rules will be adopted.

If the requester requests that specific provisions of the Administrative Procedures Act 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 ____.

If the drafter wishes to exempt the new agency from the contested case procedures of the Administrative Procedures Act, the drafter should amend ORS 183.315 to add the agency to the list of exempt agencies. Most of the exempt agencies have alternative statutory procedures (e.g., workers' compensation cases) for adjudicatory hearings.

An agency is required to use administrative law judges from the Office of Administrative Hearings (ORS 183.605 to 183.690) to conduct adjudicatory proceedings (primarily contested case hearings) unless the agency is specifically exempted. If the requester asks that the new agency be exempted from the requirement of using administrative law judges from the office, ORS 183.635 should be amended to add the new agency to the list of exempted agencies.

Unless the requester specifically so requests, it is preferable not to exempt agencies or officers from provisions of generally applicable law. There might be exceptions to this general rule if federal requirements impose different procedures or a collective bargaining remedy has replaced a statutory procedure.

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 drafter 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:

<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 such advisory and technical committees as the director considers necessary. These committees may be continuing or temporary. The director shall determine the representation, membership, terms and organization of the committees and shall appoint their members. The director is 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 them in the performance of their official duties in the manner and amount provided in ORS 292.495.

Examples of legislation authorizing or establishing permanent advisory committees may be found in ORS 329.700 (2005 Edition) (Oregon 21st Century Schools Advisory Committee), ORS 366.112 (advisory committee on bicycle lanes and paths), ORS 418.005 (advisory committee on child welfare services) and ORS 682.039 (State Emergency Medical Service Committee).

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

A sample of provisions necessary to transfer functions from one state agency to another has been set out in Appendix A.

12. CHANGING NAME OF AGENCY.

Sometimes a drafter is asked to prepare a draft that changes the name of an agency, program or account. The general rule in such a situation is that each statute containing the name must be examined and amended. However, if there are many statutes containing the name, the drafter may 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. Even if a name change provision is used, however, the drafter 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 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”

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

- 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.

When you change the name of an agency, program or account, be sure to look for related names that might need to be changed. 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.

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 an example for abolishing an agency if the function that the agency performed is no longer to be performed. That section provides a procedure to be used in winding up the affairs 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. Chapter 196, Oregon Laws 1957, is an example of an Act that abolished an agency (Battleship Oregon Commission) and disposed of its property.

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 drafter should exempt the agency from ORS chapters 291, 292 and 293, dealing with state financial administration, budgeting and salaries. The agency should remain subject to audit by the Secretary of State.

Semi-independent state agencies establish the fees they charge, although maximum fee amounts are sometimes established by statute. The agency fee decisions are not subject to review by the Legislative Assembly, the Oregon Department of Administrative Services or the Emergency Board. 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 may help a drafter to reduce the number of new sections that must be drafted from scratch.

A drafter using or copying ORS 182.456 to 182.472 should be aware that ORS 182.462 allows an agency to adopt rules donating all or part of the agency's civil penalty receipts to the 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, the drafter should provide for moneys received by the agency to be deposited to an account established by the semi-independent state agency in compliance with ORS chapter 295. ORS 182.470 provides an example. If the drafter 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 account appropriation language in ORS 182.470. The drafter 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 is to have authority to administer a bill, generally it is sufficient that the agency be given authority to prescribe any necessary forms. 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.

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 that is set forth between hairline rules does not require quotation marks.

Blanks in a statutory form are indicated by coded underscored blank spaces rather than dashes. The matter to be completed in a statutory form should be indicated, either by a statement following the form, as in the example, or by using parentheses immediately after

the blank; for example, “(insert name of county).” Since brackets are used to indicate the deletion of material by amendment, brackets **must not** 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**_____. Publication specialists and copy editors check that coding for short blanks and long blanks is standardized.

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.

Although type size is generally consistent within a form, notice or table, publication specialists may need to change type sizes in order to accommodate tab stops within a form and the varying column widths of legislative publications.

The form is separated from the rest of the section by lines known as hairline rules that are drawn above and below the form as follows:

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.

(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.

ORS 25.384, 90.610 and 279C.370 provide additional examples of statutory forms. ORS 472.470 (1981 Replacement Part) provides an example of a ballot form used to submit a measure to the voters of a county or city. The form text should generally follow legislative form and style. Capitalization and punctuation should be consistent within each form.

16. REPORTS TO LEGISLATURE.

Many statutes require state agencies to report regularly to the Legislative Assembly. Task forces, special interim committees and advisory bodies may also be required to report summarily or periodically to the legislature as a logical consequence of their reason for being. However, the question has often been raised by reporting agencies and the legislature itself as to the procedure for complying with reporting requirements, a question resolved with the enactment in 1991 of ORS 192.230 to 192.250. The drafter must be familiar with the general provisions of these statutes and the particular provisions of ORS 192.245 when drafting a bill that requires a report to the legislature.

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, a drafter may be asked to require the appointment of the director of the state agency prior to the date on which the state agency is to begin operation. 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.

See chapter 12.6 of the drafting manual for a discussion of the use of operative dates.

