

**CHAPTER NINE**  
**FISCAL PROVISIONS**

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A drafter cannot rely solely on the material in this chapter or other parts of this manual in preparing a bill that involves fiscal matters. The law applicable to and the procedures followed by agencies change from time to time. ORS chapters 291, 292, 293 and 294 are relevant when the draft relates to fiscal affairs of a state agency. Chapter 12 of this manual deals with problems involving effective dates and emergency clauses.

**1. APPROPRIATIONS.**

**a. Constitutional Provisions.**

Section 4, Article IX, Oregon Constitution, provides that money shall not be drawn from the State Treasury except in pursuance of an appropriation made by law. This means that a bill launching a new activity that requires expenditure of moneys must contain an appropriation to pay for the activity. The appropriation must be either in that bill or in a separate bill, unless the Emergency Board (ORS 291.322 to 291.334) is to be the source of moneys. This decision is always a matter for the requester. But if the Emergency Board is to be the source, the drafter should verify that the expenditure is within the board’s authority. For an example where the Emergency Board would exceed its authority, see 41 Op. Att’y Gen. 462 (1981); Planned Parenthood Assn. v. Department of Human Resources, 297 Or. 562 (1984); and Gilliam County v. Department of Environmental Quality, 316 Or. 99 (1993); rev’d on other grounds sub nom. Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93 (1994). (**Note:** A continuing appropriation fulfills the requirement of section 4, Article IX. Holmes v. Olcott, 96 Or. 33 (1920).)

In addition to section 4, Article IX, there are several other constitutional provisions relating to appropriations. Section 5, Article I, provides that no money may be appropriated for the benefit of any religious or theological institution. A free textbook statute was held invalid under this section in Dickman v. School Dist. 62C, 232 Or. 238 (1961), *cert. denied*, 371 U.S. 823 (1962). Section 15a, Article V, authorizes the Governor to veto single items in appropriation bills. Section 24, Article IV, provides that no special Act making

compensation to any person claiming damages against the state shall be passed. The enactment of ORS 30.260 to 30.300 in 1967 makes it unlikely that a drafter ever will be asked to draft a bill of this sort.

A drafter must be attentive to section 7, Article IX, which provides:

**Sec. 7.** Laws making appropriations, for the salaries of public officers, and other current expenses of the State, shall contain provisions upon no other subject.

The Oregon Supreme Court has held that this provision does not invalidate, in an Act designed to accomplish a particular purpose, a provision appropriating the moneys necessary to accomplish that purpose. Thus, an Act that creates an agency also may appropriate moneys to pay the expenses of that agency. Evanhoff v. State Ind. Acc. Comm., 78 Or. 503 (1915).

A bill also may comply with the “particular purpose” requirement if it appropriates moneys to and limits expenditures of an existing agency for specific programs or agency functions that are demonstrably distinct from the agency’s general expenses.

Here is an example, in which sections 2 to 9 of the Act establish a pesticide use reporting system:

**SECTION 10.** Notwithstanding any other law, the amount of \$80,000 is established for the biennium beginning July 1, (year), as the maximum limit for payment of expenses from fees, moneys or other revenues, including Miscellaneous Receipts, but excluding lottery funds and federal funds, collected or received by the State Department of Agriculture for the purposes of developing and implementing the pesticide use reporting system under sections 2 to 9 of this (year) Act.

The Attorney General appears to take the view that a bill appropriating moneys for current expenses may not include provisions appropriating moneys for capital construction or reflecting “major policy changes.” See 33 Op. Att’y Gen. 403 (1967), and 33 Op. Att’y Gen. 417 (1967).

### **b. State Fund Structure.**

The single largest source of funding for the state’s activities is the General Fund. Moneys within the General Fund can be said to be divided into two separate classifications: those that are available for general governmental purposes and those that by statute are continuously appropriated for specific purposes. Moneys within the General Fund that are available for general governmental purposes are revenues received by the state from the personal income tax, the corporate income and excise taxes and all other sources of revenue that by statute or by the Oregon Constitution are not set aside or appropriated for specific purposes.

### **c. Appropriation of Specific Amounts.**

If the bill other than an appropriation bill appropriates a specific amount of money, the draft must designate all of the following:

- (1) The state officer or agency to which the appropriation is made;
- (2) The source of the appropriation (most often the General Fund);

- (3) The amount of the appropriation;
- (4) The period for which it is appropriated (usually a biennium beginning on July 1 of an odd-numbered year and ending on June 30 of the next odd-numbered year); and
- (5) The purpose for which the moneys are appropriated.

This is the most common type of appropriation in a nonbudget bill, and it takes the following form:

**SECTION \_\_\_\_.** There is appropriated to the Oregon Department of Administrative Services, for the biennium beginning July 1, (year), out of the General Fund, the amount of \$1,400,000 for the purpose of carrying out the provisions of section \_\_\_\_ of this (year) Act.

Moneys remaining at the end of the designated period are no longer available for expenditure because, absent any directive, the moneys revert to the source from which they were appropriated. See ORS 293.190. In making an appropriation for a project that may not be completed within a single biennium, it is necessary that the unexpended portion of the appropriation be available until completion of the project, without reverting. The following is an appropriation for capital purposes:

**SECTION \_\_\_\_.** There is appropriated to the Oregon Department of Administrative Services, out of the General Fund, the amount of \$50,000 for the purpose of erecting a bicycle shed on the Capitol Mall. This appropriation is available continuously until expended for the purpose specified in this section.

With an appropriation that does not revert automatically, all of the moneys may not be expended in completing the project contemplated by the appropriation. If unexpended and unobligated moneys remain when the project is completed, a provision somewhat like the following example should be used to avoid another bill at a later session to transfer that unexpended balance back to its source:

**SECTION \_\_\_\_.** Not later than the 60th day after completion of the project described in section \_\_\_\_ of this (year) Act, the Director of the Oregon Department of Administrative Services shall certify the completion of the project and the amount of the unobligated balance of the appropriation made by section \_\_\_\_ of this (year) Act. Upon certification, the unobligated balance reverts to the General Fund.

The phrase “in addition to and not in lieu of any other appropriation” may be placed at the beginning of any appropriation to an agency that is in addition to its biennial appropriation in order to indicate that the subsequent appropriation is not intended to supersede the earlier one.

The Legislative Assembly may make a special purpose appropriation to the Emergency Board as follows <spm approp-spec-purp>:

**SECTION \_\_\_\_.** (1) In addition to and not in lieu of any other appropriation, there is appropriated to the Emergency Board, for the biennium beginning July 1, (year), out of the General Fund, the amount of \$\_\_\_\_\_, to be allocated to \_\_\_\_\_ (agency) for \_\_\_\_\_ (purpose).

(2) If any of the moneys appropriated by subsection (1) of this section are not allocated by the Emergency Board prior to December 1, (year+1), the moneys remaining on that date become available for any purpose for which the Emergency Board lawfully may allocate funds.

**d. Appropriations for Building Projects.**

In drafting an appropriation for a building project, the drafter must consider whether some of the money appropriated is to be expended for the acquisition of real property. If authority to purchase real property is intended, that authority should be expressly stated. The following example does not provide for the acquisition of real property but does authorize the construction, furnishing and equipping of a specified project:

**A BILL FOR AN ACT**

Relating to a shop building for Oregon Institute of Technology; and appropriating money.

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

**SECTION 1.** In addition to and not in lieu of any other appropriation, there is appropriated to the Oregon University System, out of the General Fund, the sum of \$414,360 for planning, constructing, altering, repairing, furnishing and equipping a shop building at Oregon Institute of Technology, to be expended as follows:

- (1) Shop building.....\$322,960
- (2) Equipment.....91,400

**SECTION 2.** The appropriation made by section 1 of this (year) Act is available continuously until expended for the purposes specified in section 1 of this (year) Act. However:

- (1) Except for planning, the Oregon University System may not begin any project or allow any contract to be let for such project without first reporting to the Emergency Board.
- (2) Not later than the 60th day after completion of the project described in section 1 of this (year) Act, the president of the State Board of Higher Education shall certify to the Oregon Department of Administrative Services the completion of the project and the amount of the unobligated balance of the appropriation made by section 1 of this (year) Act. Upon certification, the unobligated balance reverts to the General Fund.

A provision similar to subsection (1) of section 2 in the example is usually used when appropriating moneys for a building project. Examples include ORS 291.336, section 2, chapter 223, Oregon Laws 1967, and section 3 of House Bill 1694 (1967).

An appropriation to prepare plans and specifications, and to locate and purchase land, for a particular building, may be drafted somewhat as follows:

**SECTION 1.** In addition to and not in lieu of any other appropriation, there is appropriated to the Oregon Department of Administrative Services, out of the General Fund, the sum of \$250,000 for preparing plans and specifications, and locating and purchasing land, for a general mental hospital to be located within a 20-mile radius of the county courthouse of Multnomah County.

**SECTION 2.** The Oregon Department of Administrative Services shall report to the Emergency Board before accepting plans and specifications or purchasing or contracting to purchase land for the project described in section 1 of this (year) Act.

A provision similar to section 2 in the example is often used.

**e. Initial Appropriation for New Agency.**

The alternative to a lump sum appropriation for a new agency is an appropriation that segregates the amount appropriated into classes of expenditures based on the Governor's

budget even though the agency is not included in that budget. If the appropriation for a new agency is not included in the bill creating the agency, and the appropriation is not provided for in any other bill, then the Emergency Board (ORS 291.322 to 291.334) probably will be called on to finance the new agency. All this is a matter of policy to be decided by the requester.

The expenses of organizing a new agency that is to be self-supporting may be met by a provision advancing moneys from the General Fund. Repayment to the General Fund out of receipts of the new agency can be specified. See page 9.11 for an example.

**f. For Current Biennium.**

Occasionally an agency requires an additional appropriation or increased expenditure limitation to complete the biennium during which the session occurs. A deficiency for a past biennium is a “current expense of the state.” Burch v. Earhart, 7 Or. 58 (1879). An additional appropriation is worded in the same manner as the usual appropriation provision **except** that the biennium is the one beginning prior to the session and may be referred to either as “the biennium beginning July 1, 1999” or “the biennium ending June 30, 2001.” For example: <spm approp-addition>

**SECTION 1.** In addition to and not in lieu of any other appropriation, there is appropriated to the Oregon Department of Administrative Services for the biennium ending June 30, (year), out of the General Fund, the amount of \$250,000, which may be expended for the purpose of. . .

For an increase in an expenditure limitation, reference to intervening legislative or Emergency Board action may be required, for example: <spm ex-limit-adj-no> (var.)

**SECTION 4.** Notwithstanding any other law limiting expenditures of the Oregon Health and Science University hospital for the payment of expenses from fees, moneys or other revenues, excluding lottery funds and federal funds, collected or received by the Oregon University System for the Oregon Health and Science University, for the biennium ending June 30, (year), the limitation on expenditures established by law, as modified by legislative or Emergency Board action, is increased by \$3,190,493.

Here is another example:

**SECTION 5.** Notwithstanding any other law limiting expenditures by the State Department of Agriculture for the payment of expenses from federal funds received by the State Department of Agriculture for the biennium beginning July 1, (year), there is authorized to be expended, in addition to other limitations established by law, as modified by legislative or Emergency Board action, the sum of \$41,600. Such sum may be expended only as follows:

- (1) Personal services . . . . . \$15,500
- (2) Services and supplies. . . . . 26,100

Appropriation and expenditure limitation bills that make fiscal adjustments for the current biennium require an emergency clause to make the bill effective “on its passage” because the Governor must sign the bills and the bills must take effect **before** the end of the current biennium.

### **g. Appropriation for Expenses of Interim Committees.**

ORS 171.640 provides for the appointment of interim committees. However, if an interim committee is created by joint resolution (see ORS 171.610), moneys cannot be appropriated by the resolution (see section 4, Article IX, Oregon Constitution). An appropriation is enacted each session for the payment of expenses of the Legislative Assembly. Chapter 433, Oregon Laws 1993, is an example. The joint resolution creating an interim committee may authorize it to expend a certain amount of the moneys already appropriated for legislative expenses. If the expenses of a committee are to be paid from some source other than the legislative appropriation, a bill must be used.

Specific authorization probably is necessary for an interim committee to accept and use moneys offered by other public or private sources. 29 Op. Att’y Gen. 284 (1959). An example is House Joint Resolution 52, paragraph (12) (1979). In a Letter of Advice (OP-6373) dated April 9, 1991, the Attorney General opined that certain legislative interim committees or studies cannot be funded from lottery funds.

Chapters 16 and 19 contain other provisions that may be included in a joint resolution creating an interim committee. The requester of a resolution to establish an interim committee should be advised, however, that under current practice, interim committees are more often created under the authority of the presiding officers. See ORS 171.640.

### **h. Emergency Clause for Appropriations.**

The fiscal biennium begins on July 1 of the odd-numbered year. Because adjournment sine die often does not occur until **after** the beginning of the biennium, and bills **normally** take effect on January 1 of the year following enactment, it is necessary to include an emergency clause in a regular biennial appropriation bill. When the July 1 date is used, but the Governor signs the bill after July 1, the effective date is the date of the signature notwithstanding the date given in the bill.

In the case of regular biennial appropriations, the following emergency clause should be used: <spm emer>

**SECTION \_\_\_\_. This (year) Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this (year) Act takes effect July 1, (year).**

An emergency clause may be included in any other appropriation bill if it is desired to have the moneys available for expenditure soon after adjournment. The clause may specify an effective date “on its passage” or on some specified date. However, it is wise to avoid using “on its passage” when the bill involves a biennial appropriation because the agency might argue that it can commence spending its biennial appropriation before the biennium commences. An emergency clause is not required if the authority to expend moneys is delayed by, for example, an operative date.

**i. Audit and Warrant Clause.**

The procedure for approval and payment of claims is set out in ORS 293.295 to 293.515, and it is unnecessary to have a provision in a bill with respect to this matter unless an exceptional procedure is being established.

**j. Consumer Price Index.**

If inflation becomes a factor in computing some cost or benefit, the Consumer Price Index may be useful. It is defined in ORS 327.006.

**k. Federal Funding.**

Many state programs operate with federal funding on which certain conditions are placed. In order to protect the federal funding when there is a potential for conflict, the following may be useful; but note that it also may be a questionable delegation and should be used only when the need for it is raised as an issue:

**SECTION 4. Notwithstanding any provision of sections 1 to 3 of this (year) Act, the applicable federal laws and regulations shall apply in any case where federal funds are involved and the federal laws and regulations conflict with any of the provisions of sections 1 to 3 of this (year) Act or require additional conditions not authorized by sections 1 to 3 of this (year) Act.**

**L. New Funds and Accounts. (See also FUNDS AND ACCOUNTS, this chapter.)**

The legislature has declared that interest earned by state funds should be paid to the General Fund unless otherwise provided by law. ORS 293.140. When creating a new fund (or account), the drafter should ask the requester for directions as to disposition of the interest.<sup>1</sup>

If the requester wants the interest earned by the new fund to be paid into the fund, the draft must specifically indicate that the interest “earned by the fund shall be credited to the fund.” In addition, the State Treasurer and the Legislative Fiscal Office would like the draft to indicate that the fund is “separate and distinct from the General Fund.” The following language should be used: <spm interest-to-fund>

**SECTION 1. The (name) Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned by the (name) Fund shall be credited to the fund.**

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<sup>1</sup> Some accounts or funds may have enough money for their purposes without retaining their interest. For example, if an account is established for fees from issuance of a license, the fees are designed to cover the costs to the agency of regulating licensees, and the amount of the fee is set so that the agency will collect enough to cover its costs, the requester may want the interest to go to the General Fund for general governmental purposes.

## **2. EXPENDITURE LIMITATIONS.**

### **a. Other Funds.**

When the Legislative Assembly has by past action continuously appropriated funds to an agency or for a purpose, a biennial appropriation is no longer required. Technically the agency can expend any amount of money it collects. Traditionally, continuing appropriations are made for self-supporting activities, such as occupational licensing, that are fee-supported. However, in developing a biennial budget, neither the Governor nor the Legislative Assembly is willing to omit these agencies from overall budgetary control. The technique used is referred to as an “expenditure limitation,” and the effect is to say, “Regardless of the amount collected, the agency may spend no more than \$\_\_\_ in the coming biennium.” An example, including the title, is: <spm ex-limit-no-fed>

#### **A BILL FOR AN ACT**

Relating to the financial administration of the Oregon State Veterinary Medical Examining Board; limiting expenditures; and declaring an emergency.

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

**SECTION 1. Notwithstanding any other law limiting expenditures, the amount of \$85,735 is established for the biennium beginning July 1, (year), as the maximum limit for payment of expenses from fees, moneys or other revenues, including Miscellaneous Receipts, but excluding lottery funds and federal funds, collected or received by the Oregon State Veterinary Medical Examining Board.**

**SECTION 2. This (year) Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this (year) Act takes effect July 1, (year).**

Much of the material relating to appropriations also applies to expenditure limitations. See page 9.5 of this chapter for examples of increasing expenditure limitations for the current biennium.

### **b. Federal Funds.**

In the foregoing discussion, little has been said about the manner in which moneys received from the federal government are handled. With the exception of revenue sharing moneys, federal funds are processed in the same manner as any dedicated or continuously appropriated revenue. Again, neither the Governor nor the Legislative Assembly has been willing to allow state agencies to spend federal funds without overall budgetary control. The result is that expenditure of federal funds to which a state agency is otherwise entitled is made subject to an expenditure limitation: <spm ex-limit-fed>

**SECTION \_\_. Notwithstanding any other law limiting expenditures, the amount of \$\_\_\_\_\_ is established for the biennium beginning July 1, (year), as the maximum limit for payment of expenses for \_\_\_\_\_ from federal funds collected or received by the Department of Transportation.**

When state agencies are supported in part by federal grants for administrative expenses or for carrying out particular programs, it is important that federal funds are not lost because of a requirement in a bill that conflicts with the terms of a federal grant. See page 9.7.

### **3. LOTTERY ALLOCATIONS.**

Revenues from lottery sales are transferred from the Oregon State Lottery Commission to the Administrative Services Economic Development Fund. Lottery proceeds are then **allocated** to various agencies to finance specific projects. Each allocation consists of three subsections. The first subsection states to whom the allocation is made; the second subsection establishes the amount of the allocation as a limitation on agency expenditures and often states the purpose or project for which the moneys are to be used; the third subsection was inserted at the request of bond counsel and the State Treasurer and deals with the constitutional allocation of some lottery proceeds and with bond repayments. For example: <spm lottery-alloc>

**SECTION \_\_\_\_.** (1) There is allocated to the (agency) from the Administrative Services Economic Development Fund the amount identified in subsection (2) of this section.

(2) Notwithstanding any other law limiting expenditures, the amount of \$\_\_\_\_\_ is established for the biennium beginning July 1, (year), as the maximum limit for payment of expenses by the (agency) from the Administrative Services Economic Development Fund for (purpose).

(3) The allocation of moneys from the Administrative Services Economic Development Fund under this section is subject to the requirements in section 4, Article XV of the Oregon Constitution, for deposit of specified amounts of the net proceeds from the Oregon State Lottery into the Education Stability Fund and into the Parks and Natural Resources Fund and shall be made only after satisfaction or payment of:

(a) Amounts allocated to Westside lottery bonds issued under ORS 391.140 or to the reserves or any refunding related to the Westside lottery bonds in accordance with the priority for allocation and disbursement established by ORS 391.130;

(b) All liens, pledges or other obligations relating to lottery bonds or refunding lottery bonds that are due or payable during the biennium beginning July 1, (year); and

(c) Amounts required by any other pledges of, or liens on, net proceeds from the Oregon State Lottery.

Note that for purposes of the title, subsections (1) and (3) of the example are “creating new provisions” and subsection (2) is “limiting expenditures.”

### **4. FUNDS AND ACCOUNTS.**

ORS 291.001 provides:

**291.001** (1) As used in the statute laws of this state, unless the context or specially applicable definition requires otherwise, the words “subaccounts,” “accounts” or “funds” are used interchangeably, where such use is consistent with state accounting principles and is accepted for use by the State Treasurer.

(2) Unless the context or a specific provision of law provides otherwise, when a law of this state requires that a payment or transfer of moneys be made by warrant, check or electronic funds transfer the payment or transfer may be made by warrant, check, electronic funds transfer or an accounting entry in the appropriate records of any affected state agency. The Oregon Department of Administrative Services shall determine which method of payment or transfer is most appropriate, taking into consideration the established state banking, funds transfer and accounting practices at the time of the payment or transfer.

(3) The State Treasurer, in consultation with the Oregon Department of Administrative Services, may establish or designate, whenever necessary or convenient to the carrying out or administration of the accounting, budget preparation, cash management, financial management, financial reporting or similar laws of this state, subaccounts, accounts and funds in addition to or

within the subaccounts, accounts and funds created by the Oregon Constitution and statutes. Subaccounts, accounts and funds established or designated under this subsection shall be administered as prescribed by written directive or policy issued or approved by the State Treasurer. The authority granted by this subsection is in addition to, and not in limitation of, the authority granted by ORS 293.445 and 293.447.

The result of this statute is that drafters usually do not need to worry whether something is called a “fund” or an “account” or whether moneys are drawn from it by check or by warrant. While the difference between a fund and an account may be important for accounting purposes, it is no longer important for drafting purposes.<sup>2</sup>

Currently, the moneys in the General Fund that are appropriated or dedicated for specific purposes are carried in separate **accounts** in the General Fund. Not all the accounts in the General Fund are designated as such; some are incorrectly designated as “funds.” Although there are many statutory examples of specially dedicated accounts established in the General Fund, it is not clear that establishing such accounts in the General Fund accomplishes anything anymore. As of October 2000, the State Treasurer would prefer that moneys appropriated or dedicated for specific purposes be carried in funds separate and distinct from the General Fund. Thus when a drafter is creating a new “pot of money” and dedicating it to a specific purpose or continuously appropriating it to a specific agency for a specific purpose, the following language should be used:

**SECTION 2. The \_\_\_\_\_ Fund is established separate and distinct from the General Fund.<sup>3</sup>**

The bill should also specify the sources and uses of the moneys in the fund.

In addition to the General Fund, there are many other separate funds maintained in the State Treasury. Many of these are trust funds. ORS 291.002 defines a trust fund as a “fund in the State Treasury in which designated persons or classes of persons have a vested beneficial interest or equitable ownership, or which was created or established by gift, grant, contribution, devise or bequest that limits its use to designated objects or purposes.”

Many of these trust funds are moneys donated to the state. An example of this type of fund was the State Flag Donation Fund, which was established for the purposes of acquiring and sending state flags to units of the Armed Forces of the United States. Other trust funds include the Public Employees Retirement Fund, the State Accident Insurance Fund and the State Highway Fund.

Other funds are established by provisions of the Oregon Constitution. These include the Common School Fund and various bond funds, including funds for the proceeds from the sale of the bonds and sinking funds to redeem the outstanding bonds and interest coupons. In addition, some funds, such as the State School Fund, are established as separate funds by statute. Still other funds are established as a result of federal requirements. For example, moneys received by the Employment Department for the purpose of providing unemployment benefits are held in a separate fund.

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<sup>2</sup> Generally, moneys are drawn from a fund through a warrant process. Moneys in an account may be drawn through a check or a warrant. All funds are subject to the control accounting process at the Oregon Department of Administrative Services.

<sup>3</sup> For language for a fund that is to retain its interest, see “f. Interest to Fund.” in this section.

**a. “Self-Sustaining” Activities; “Earmarked” or “Dedicated” Funds and Accounts.**

In a great number of instances, the financing of governmental activity is supplied by the direct recipients or beneficiaries of such activities. The revenue from each such activity is “earmarked” or “dedicated” solely for that particular activity. A fund or account is established by statute, and the money is **continuously appropriated** from the specific fund or account, again by statute, for a specific purpose. The balance in these funds and accounts has in recent years been well in excess of \$100 million.

One example of a self-sustaining account is the State Capitol Operating Account, which is under the control of the Legislative Administration Committee. All moneys received by the committee for the rental of quarters in the State Capitol are to be credited to the State Capitol Operating Account. ORS 276.003 provides that moneys credited to the account are continuously appropriated to the committee to pay the expenses of operating and maintaining, protecting and insuring the Capitol.

The receipts of most occupational and professional licensing boards from fees for licenses and other activities are used to pay the expenses of licensing and regulating the occupation or profession. This used to be accomplished by depositing the receipts to the credit of a specified account within the General Fund and continuously appropriating all the moneys deposited in that account for the purpose of paying the expenses arising out of the activity. Examples are ORS 342.430 and 677.290.

As of October 2000, the State Treasurer and the Legislative Fiscal Office would prefer that for these purposes, newly created funds be established separate and distinct from the General Fund. Unless the requester wants interest earned by the fund to be deposited to the fund, the draft should **remain silent** on the disposition of interest. This will mean, in accordance with ORS 293.140, that interest earned by the fund will be paid to the General Fund.

Since self-sustaining functions initially have to operate for a brief period before any revenue comes in, it is usual to give the operating agency a start-up loan. For example:

**SECTION 9.** (1) There is appropriated to the State Board of \_\_\_\_\_, for the biennium beginning July 1, (year), out of the General Fund, the amount of \$4,500 for the purpose of carrying out the provisions of sections \_\_\_ to \_\_\_ of this (year) Act.

(2) When the board determines that moneys in sufficient amount are available in the State Board of \_\_\_\_\_ Fund created by section \_\_\_ of this (year) Act, but in no event later than June 30, (year+2), the board shall reimburse the General Fund without interest, in an amount equal to the amount from the General Fund appropriated and expended as provided in subsection (1) of this section. The moneys used to reimburse the General Fund under this subsection shall not be considered as a budget item on which a limitation is otherwise fixed by law, but shall be in addition to any specific biennial appropriations or amounts authorized to be expended from continuously appropriated moneys for any biennial period.

ORS 291.272 to 291.278 provide for the allocation of governmental service expenses among all state agencies. This system replaced the “tithing” system under which certain state agencies paid 10 percent of their revenues to the General Fund. As in the case of the older tithing system, ORS 291.272 to 291.278 recognize that many governmental costs are attributable to each state agency, regardless of the manner in which the agency is financed.

The State Treasurer maintains approximately 200 so-called unreceipted or checking accounts in the State Treasury. These accounts are maintained with the various agencies, and records of the accounts are not maintained by the Oregon Department of Administrative Services. As in the case of trust funds, the unreceipted or checking accounts have been established for a variety of reasons. Many are revolving funds, such as the Public Employees Retirement Fund. In this instance, the Public Employees Retirement System submits a claim to the Oregon Department of Administrative Services for the total monthly retirement benefits. The Oregon Department of Administrative Services in turn issues one warrant to PERS. The warrant is then deposited into a checking account, and PERS then issues individual checks to retired employees. The same procedure is used for unemployment benefits, welfare benefits and numerous other activities where the volume and the nature of the disbursements make it more economical for the agency to issue checks than for the Oregon Department of Administrative Services to issue individual warrants. In addition, many agencies initially deposit their revenue collections into one of these unreceipted or checking accounts. After issuing any refund checks that may be payable, the agency then requests the State Treasurer to transfer the balance from its unreceipted or checking account to an account within the General Fund or to one of the separate funds. This transfer is then recorded by the Oregon Department of Administrative Services as a deposit to the individual agency's account within the General Fund or to a separate fund. The drafter should consider whether the draft needs to contain special provisions authorizing or modifying these types of transactions.

**b. Continuing Appropriation of Earmarked or Dedicated Funds.**

The following is a sample provision making a continuing appropriation from a newly created earmarked or dedicated fund:

**SECTION \_\_\_\_ . Not later than the 10th day of each month, the State Board of \_\_\_\_ shall pay into the State Treasury all moneys received by the board during the preceding calendar month. The moneys shall be deposited in the State Board of \_\_\_\_ Fund. The moneys in the State Board of \_\_\_\_ Fund are continuously appropriated to the board to pay its expenses in administering and enforcing sections \_\_\_\_ to \_\_\_\_ of this (year) Act.**

**c. One General Account for State Agency.**

Some state agencies that administer several laws involving different activities have a single account into which all moneys received are deposited. In other words, even though the receipts from a particular self-sustaining activity are continuously appropriated for that activity, the moneys from many of such activities are deposited in the single account. The agency keeps internal accounting records to determine the receipts and expenditures for its various activities.

A drafter should **not** create a new account if the state agency that is to administer an activity already has one general account into which all its receipts are deposited. ORS 423.097 is one example of a section creating a general account for a state agency:

423.097. (1) The Department of Corrections Account is established in the General Fund of the State Treasury. Except for moneys otherwise designated by statute, all fees, assessments, proceeds

from the issuance of certificates of participation and other moneys received by the Department of Corrections shall be paid into the State Treasury and credited to the account. All moneys in the account are continuously appropriated to the department for purposes authorized by law.

(2) The department shall keep a record of all moneys deposited in the account. The record shall indicate by separate cumulative accounts the sources from which the moneys are derived and the individual activity or program against which each withdrawal is charged.

(3) The department may accept gifts, grants and donations from any source to carry out the duties imposed upon the department.

If a drafter is asked to prepare a bill draft that creates a new source of moneys for an agency that already has a single account, the following language could be used to deal with receipts from the new source and to provide for the deposit of the moneys into the agency's general account:

**SECTION \_\_\_\_ . All moneys received by the \_\_\_\_\_ Department under sections \_\_\_\_ to \_\_\_\_ of this (year) Act shall be paid into the State Treasury and deposited to the credit of the Department of \_\_\_\_\_ Account. Such moneys shall be used by the Department of \_\_\_\_\_ for the purposes of sections \_\_\_\_ to \_\_\_\_ of this (year) Act.**

The section in the preceding example does not appropriate the moneys to the department. The appropriation already has been accomplished by the section that establishes the account. If the section that establishes the account does not continuously appropriate the moneys in the account, the appropriation must be done in a specific section. For example, if ORS 423.097, above, did not continuously appropriate the moneys in the Department of Corrections Account, the drafter could include a section like this:

**SECTION \_\_\_\_ . All moneys received by the Department of Corrections under section \_\_\_\_ of this (year) Act shall be paid into the State Treasury and deposited in the Department of Corrections Account. Such moneys are continuously appropriated to the department for the purposes of sections \_\_\_\_ to \_\_\_\_ of this (year) Act.**

In creating a general account for a state agency to replace many separate accounts, it may be helpful to review chapter 414, Oregon Laws 1987.

#### **d. Petty Cash Fund.**

Many state agencies have statutes that establish petty cash funds. A general procedure for establishing a petty cash fund is provided by ORS 293.180. This procedure is satisfactory in most cases and a special statute is probably unnecessary. If a special statute is needed, see ORS 561.155 and 677.305 for examples.

#### **e. Revolving Fund.**

The establishment of a revolving fund for a state agency may be requested. Generally, a revolving fund statute permits a state agency to deposit designated moneys with the State Treasurer and to write checks against the revolving fund. The revolving fund is periodically reimbursed by drawing warrants against the appropriate funds or accounts to cover the checks issued. The following is typical:

**SECTION \_\_\_\_.** (1) When requested in writing by the Director of the Department of \_\_\_\_\_, the Oregon Department of Administrative Services shall draw a warrant on the Department of \_\_\_\_\_ Account in favor of the Department of \_\_\_\_\_ for use as a revolving fund. Warrants drawn to establish or increase the revolving fund, rather than to reimburse it, may not exceed the aggregate sum of \$\_\_\_\_\_. The revolving fund shall be held in a special account against which the Department of \_\_\_\_\_ may draw checks.

(2) The Department of \_\_\_\_\_ may use the revolving fund for the purposes specified in section \_\_\_\_ of this (year) Act.

(3) All claims for reimbursement of advances paid from the revolving fund are subject to approval by the Director of the Department of \_\_\_\_\_ and by the Oregon Department of Administrative Services. When such claims have been approved, a warrant covering them shall be drawn in favor of the Department of \_\_\_\_\_, charged against the appropriate funds and accounts and used to reimburse the revolving fund.

For another example, see ORS 1.007, which establishes a revolving fund for the Judicial Department.

ORS 279A.290 provides for Miscellaneous Receipts accounts for state agencies. These accounts can be used as revolving funds when one state agency performs services for another.

#### **f. Interest to Fund.**

At the request of the State Treasurer, when establishing a fund that is to retain its interest, please use the following language: <spm interest-to-fund>

**SECTION 1.** The (name) Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned by the (name) Fund shall be credited to the fund.

The standard drafting approach is to remain silent on the disposition of interest in a fund. Silence means the interest will be paid to the General Fund.

Do not put the provision about interest in a section separate and distinct from the section establishing the fund. The State Treasurer needs to find the interest provision and is more likely to do so if it is with the provision establishing the fund.

#### **g. Investment of Moneys in a Fund Separate and Distinct From the General Fund.**

ORS 293.723 addresses investment of moneys in various funds and accounts. As described earlier in this chapter, if a bill draft is silent on the disposition of interest earned by a fund, the interest will be paid to the General Fund in accordance with ORS 293.140. If interest earned by the fund is instead to be credited to the fund, the section creating the fund should specifically state that “interest earned by the fund shall be credited to the fund.” See sections 4a. and 4f. of this chapter.

In addition to decisions about the disposition of interest earned by a fund, the legislature may also specify how moneys in the fund are to be invested by the Oregon Investment Council and the State Treasurer. ORS 293.701 to 293.820 generally govern the investment of state funds. Under those laws, state funds may be invested separately (discretely) or as

part of a pool. Funds invested as part of a pool are generally invested in the Oregon Short Term Fund, which is a lower risk investment vehicle. ORS 293.723 describes how the legislature should provide guidance to the State Treasurer regarding how moneys in a particular fund should be invested.

Under ORS 293.723, moneys in a fund separate and distinct from the General Fund must be invested as part of pooled moneys unless the law specifically states that moneys in the fund may be “invested.” Language that requires interest earned by the fund to be retained by the fund is not enough to allow moneys in the fund to be discretely invested.

Put another way, if you want to allow the State Treasurer to discretely invest moneys in a fund, and therefore assume higher investment risk, the bill needs to say that the “moneys in the fund may be invested” or “may be invested as provided in ORS 293.701 to 293.820.” Some form of the word “invest” must be used. Do not use this “invest” language unless specifically requested to do so.

If you want to require the State Treasurer to invest moneys in a fund in the pooled Oregon Short Term Fund, do not include language referring to “investment” of moneys in the fund. This is the standard default position.

**To summarize:**

- (1) The standard drafting approach is to remain silent on the disposition of interest in a fund. Silence means the interest will be paid to the General Fund. (See section 4a.)
- (2) If you want the fund to retain the interest, include language stating that interest earned by the fund shall be credited to the fund. (See section 4f.)
- (3) If you want to allow discrete (more risky) investment of moneys in a fund, use the “invest” language described in this section. This language should be used only in response to a specific request. Do not use the “invest” language as a standard approach.

**h. Trust Fund or Account.**

A fund (or account) should not be called a trust fund (or account) unless it meets the definition of ‘trust fund’ in ORS 291.002.

**i. Allotment System.**

The control procedures maintained by the Oregon Department of Administrative Services include the allotment system, which is prescribed by ORS 291.232 to 291.260. It was established (1) to ensure that the various state agencies operate their programs within legislatively established limitations or within the amounts appropriated and (2) to avoid excessive expenditures early in the biennium that would deplete the appropriations. It also provides the method by which the Governor is able to reduce state agency expenditures in order to avoid a deficit.

At the beginning of each biennial period, each state agency files with the Oregon Department of Administrative Services an expenditure plan showing the amount of

limitation or appropriations, or both, that it plans to spend during each three-month period of the biennium. Budget analysts review each agency's expenditure plan and then notify the agency whether the plan is approved. The agency in turn submits an allotment request for the first three-month period of the biennium that, when approved by the Oregon Department of Administrative Services, is allotted to the appropriation or limitation established by statute. The amount of the allotment then becomes the maximum amount that the agency can expend during the first three-month period. This procedure is then repeated for each three-month period of the biennium. If a requester asks for an exception to the allotment system, the drafter may be well advised to consult with senior staff members.

There is some difference of opinion as to the types of appropriations to which the allotment system applies. See 42 Op. Att'y Gen. 332 (1982). Appropriation bills (House bills numbered in the 5000s and Senate bills numbered in the 5500s) may make specific reference to the allotment system in a separate section that reads: "Notwithstanding any other law, sections \_\_\_ to \_\_\_ of this (year) Act are subject to Oregon Department of Administrative Services rules related to allotting, controlling and encumbering funds."

**j. Bonds. (See chapter 21 of this manual for a description of bonding issues.)**

**k. Certificates of Participation. (Also see chapter 21 of this manual related to bonding.)**

A newer method of financing construction is through certificates of participation. See State ex rel Kane v. Goldschmidt, 308 Or. 573 (1989). If an agency has authority to enter into lease purchase agreements, bonding attorneys generally opine that the agency may issue certificates of participation to finance the lease purchase. See ORS 271.390 and 283.085 to 283.092. Under ORS 286A.035, the Legislative Assembly sets biennial limits on certificates of participation that may be incurred by state agencies. See, e.g., chapter 903, Oregon Laws 2009.

**5. "DIS"APPROPRIATIONS.**

When it is necessary to reduce appropriations to avoid a deficiency, either generally or specifically, the format that has been used may be found in chapter 32, Oregon Laws 1982, and chapter 95, Oregon Laws 2010. Another type of disappropriation may be found in chapter 1, Oregon Laws 1982 (second special session). In 42 Op. Att'y Gen. 332 (1982), the Attorney General has ruled that the allotment system can be used to avoid a deficiency, which opens the possibility that no legislation is required. See ORS 291.261.

**6. FEES.**

Fees often are established by statute, either as a fixed figure or as "not to exceed" a specified figure. Occasionally, the agency is given discretion to set fees, usually with the limitation that the fees not exceed the cost of providing the service or administering the program for which the fees are charged. Note that ORS 291.050 to 291.060 provide that some new agency fees and increases in fees are automatically rescinded unless approved by the Legislative Assembly.

## **7. LOCAL MANDATES.**

Section 15, Article XI, Oregon Constitution, generally requires the Legislative Assembly to appropriate and allocate moneys to a local government when the Legislative Assembly enacts a law that requires the local government to establish a new program or increase the level of services under an existing program.

The moneys allocated to a local government under this constitutional provision must be at least 95 percent of the usual and reasonable costs incurred by the local government in operating the program or an amount that does not require the local government to spend more than one-hundredth of one percent of the local government's budget for the program.

For the purposes of the local mandates provision, a "program" is any program under which a local government must provide specified services to persons, government agencies or the public generally. A "local government" includes all units of local government except school districts.

Unlike other constitutional provisions relating to legislation, such as section 25, Article IV ("[t]hree-fifths of all members elected to each house shall be needed to pass bills for raising revenue"), failure by the Legislative Assembly to comply with section 15, Article XI, does not, with one exception, result in an invalid law, but only in a law that local governments are not required to obey.

The one instance in which noncompliance with section 15, Article XI, prevents the Legislative Assembly from validly enacting a law is described in section 15 (6), Article XI. That subsection requires approval by three-fifths of the membership of each house to enact a law that has an anticipated effect of reducing the amount of state revenues derived from a specific state tax and distributed to local governments as an aggregate during a specified distribution period.

In lieu of appropriating and allocating moneys to a local government to pay the costs of a required state program, the Legislative Assembly may identify and direct the imposition of a fee or charge to be used by the local government to recover the actual costs of the program.

Section 15, Article XI, also describes a variety of laws that require local governments to establish programs but to which the requirement for state funding does not apply. Perhaps the most important of these exceptions to the state funding requirement is any law approved by three-fifths of the members of each house of the Legislative Assembly.

A basic obligation of a drafter who prepares a bill that may reduce the amount of state revenues derived from a specific state tax that are distributed to local governments is to notify the requester that the bill may require passage by three-fifths of the members of each house of the Legislative Assembly. Unlike a bill for raising revenue, the requirement for a "supermajority" does not appear in the title of the bill. Therefore, to avoid unpleasant surprise, embarrassment or enactment of a bill of doubtful constitutionality, a requester must be made aware by the drafter of the possibility of a requirement for a supermajority.

Similarly, when a drafter prepares any bill that imposes a requirement for a new program or an increased level of services for an existing program and the bill is not one of the class of bills excepted from the requirements of section 15, Article XI, the drafter should so inform the requester. If the requester nonetheless decides to introduce the bill and urge its passage, the drafter can suggest the following five methods of complying with section 15, Article XI:

(1) Appropriate money (in the requested bill or an appropriation bill) to the local government to pay the usual and reasonable costs of the new program or the increased level of services under an existing program.

(2) Identify and direct the imposition of a fee or charge to be used by the local government to recover the actual costs of the new program or increased level of services.

(3) Obtain approval by three-fifths of the members of each house of the Legislative Assembly.

(4) Obtain approval by a simple majority of the members of the Legislative Assembly with no appropriation of moneys or identification of a charge or fee and allow local governments to comply with the law at their discretion.

(5) Make the program or service levels described in the bill optional and not mandatory.

## **8. CONTINUING RESOLUTION.**

A new biennium begins on July 1 of each odd-numbered year. Generally, agency authority to spend money ends at the end of a biennium. If the Legislative Assembly has not enacted a budget for an agency by the beginning of the biennium, the agency usually has no authority to spend money. When the legislature knows that it will not complete budget work by July 1, it often enacts a measure (called, in the Capitol vernacular, a “continuing resolution”) to authorize spending until budgets are adopted. The “continuing resolution” is neither continuing nor a resolution. It is a bill that usually allows any agency for which a budget has not been adopted to spend an amount of money based on the amount authorized for the last quarter of the prior biennium. The bill appropriates the money necessary for those expenditures and subjects actual spending levels and final reconciliation to rules of the Oregon Department of Administrative Services. Usually, the substantive sections of the bill are repealed at the end of July. The bill contains an emergency clause, effective July 1.

If it is necessary to extend the “continuing resolution,” a bill amending the section of the session law that repeals the substantive parts of the bill will accomplish the extension. (See chapter 626, Oregon Laws 2003.)

The continuing resolution for 2003 (chapter 514, Oregon Laws 2003) has been turned into boilerplate and may be used as a model (<boiler nobudget>). Like all boilerplate, it should be read carefully to be sure it fits the current circumstances.

## **9. DUTIES OF STATE TREASURER.**

The State Treasurer sent this message (edited for clarity) in March 2004 and asked Legislative Counsel to keep this distinction in mind:

Because Treasury is simply acting as the bank for state agencies, any language assigning an administrative duty to the Treasurer, like transferring funds once certain conditions are met, is almost always inappropriate. Duties should instead be assigned to the subject agency. This is probably the most common language tweak we have to make each session.

The example given was: “The balance of moneys received shall be transferred by the State Treasurer to the account of the ... (agency).” The State Treasurer would prefer language that requires the agency that receives the money to do the transfer.

## **10. EMERGENCY BOARD.**

Section 3, Article III of the Oregon Constitution, authorizes the Legislative Assembly to establish (by law) a joint committee to function during the interim and to exercise specific, enumerated powers dealing with budgetary matters. ORS 291.322 to 291.334 establish the Emergency Board and give it the powers authorized by section 3, Article III. Note that if a committee like the Emergency Board had not been specifically authorized by the Constitution, the powers given it would likely violate section 1 of Article III. See 25 Op. Att’y Gen. 139 (1951). The Emergency Board is an administrative body, not a legislative body. It allocates moneys appropriated by the Legislative Assembly and makes other budgetary decisions that would, absent the constitutional authority, be carried out by the executive branch (or by the Legislative Assembly as a whole). 37 Op. Att’y Gen. 130 (1974).

Oregon courts have said that the Emergency Board may not be given powers other than those specified in the Constitution.<sup>4</sup> In Gilliam County v. DEQ, 114 Or. App. 369 (1992), the court declared former ORS 459.298 unconstitutional. The statute provided that rules of the Environmental Quality Commission could not become effective until the Emergency Board (during the interim) or the Ways and Means Committee (during the session) had approved the rules. The court held that the provision amounted to a legislative veto of the rules and that such a veto is not among the powers authorized by section 3, Article III, so cannot be statutorily granted to the Emergency Board. (The court also held that the power could not be given to the Ways and Means Committee because the committee is a subset of the Legislative Assembly and the “veto” would be a legislative act – one that only the Legislative Assembly as a whole may exercise.) Note that ORS 291.375 (2) is unconstitutional under the reasoning of the Gilliam County case.

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<sup>4</sup> Note that many Attorney General Opinions about the Emergency Board were issued prior to Gilliam County or Planned Parenthood. Be wary, therefore, of citing pre-1984 Attorney General opinions for the proposition that the legislature may delegate to the Emergency Board authority that is not specifically mentioned in the Constitution.

In Planned Parenthood Association v. Department of Human Resources, 297 Or. 562 (1984), the court held that the Emergency Board does not have (and cannot be granted) supervisory power over decisions the Department of Human Resources is statutorily authorized to make. “Neither the constitution nor the statute conferring the Emergency Board’s powers ascribe to it a legislative function.” Planned Parenthood at 569.