

OVERVIEW OF APA RULEMAKING

Steven Wolf, Chief Counsel
Amy Alpaugh, Opinions Counsel
General Counsel Division
Oregon Department of Justice

I. BASIC PRINCIPLES AND OVERVIEW

1. **An agency may adopt rules only pursuant to statutory authority.**
Administrative rules are one of the two principle mechanisms (the other being orders) through which an agency can exercise its authority. Agencies may not adopt rules that are beyond their rulemaking authority. An agency may not adopt a rule that is unconstitutional, conflicts with a valid statute, or is outside of the range of discretion allowed by the statute the agency has been authorized to implement.
2. **Agencies must have independent legal authority to make rules or to issue orders.** An agency's enabling statute usually contains the necessary general authority. However, sometimes an agency must rely on implied authority in order to implement the statute.
3. **The agency must try to assess the potential fiscal impact of the proposed rule.** This includes estimating the cost of compliance by small businesses. The agency must also invite comment on options for achieving the rule's goals while reducing the negative economic impact on business, and must respond to any such comments received.
4. **The agency must provide public notice of rulemaking and provide an opportunity for public input before adopting a permanent rule, and must "consider fully" all such input.**
5. **In appropriate circumstances, an agency may adopt a temporary rule (good for 180 days) without advance notice or public comment.**
6. **Rules are subject to several varieties of review after adoption.**

II. PERMANENT RULE ADOPTION

- A. An agency must comply with the rulemaking requirements of ORS chapter 183 when adopting, amending or repealing a rule, unless exempt from those requirements. An agency must also comply with any statutory requirements unique to the agency, and with the agency's own rules pertaining to rulemaking, including the Attorney General's Model Rules, if adopted by the agency. *See, e.g.,* OAR 436-001-0005 (adoption of AG model rules by DCBS).

B. Consider public input early in the process.

1. Advisory committees.

An agency may choose to appoint an advisory committee that will represent the interest of persons likely to be affected by the rule. ORS 183.333(1). If the agency appoints an advisory committee, it must seek the committee's recommendations on the fiscal impact of the potential rule. ORS 183.333(3). If the agency does not use an advisory committee, the agency must include in the Notice of Proposed Rulemaking an explanation of the reasons why it chose not to do so. ORS 183.335(2)(b)(F). Some agencies are required by law to use advisory committees. Those agencies may not appoint an officer, employee or agent of the agency to serve on the committee.

2. Collaborative rulemaking committees

An agency may use a collaborative rulemaking committee to develop a single consensus recommendation that speaks for all interests represented on the committee. Before choosing to use a collaborative rulemaking committee, the agency should assess whether it is practical in the given situation. *See* OAR 137-001-0009.

C. Oregon law requires notice and comment rulemaking.

1. Notice and comment rulemaking does not require rule adoption to be based on the record after an evidentiary hearing. In this sense, it may be described as "informal." In contrast, the federal APA provides procedures for both informal and formal rulemaking.
2. The APA establishes **minimum** requirements for agency rulemaking. Individual agencies may be subject to additional requirements under their own statutory schemes.

D. The notice of proposed rulemaking must include all of the following items:

1. A fifteen word caption reasonably identifying the subject matter of the rulemaking, a statement of the subject matter and purpose of the intended action in sufficient detail to inform a person that the person's interests may be affected.
2. Date, time and place of hearing if one is scheduled.
3. A copy of the proposed rule or explanation how a person may get a copy of the rule.
4. Citation of statutory authority for the rule.
5. Citation of statute or law the rule is intended to implement.
6. Statement of need for the rule and statement of how the rule is intended to meet the need.

7. List of principal documents relied upon and statement where they are available for public inspection.
 8. Fiscal impact statement for all agencies, including a housing cost impact statement for certain agencies. An agency has to consider available information but does not have to do original research. But the agency must use available information to project any significant economic effect on business, including a “cost of compliance effect” on small businesses (defined as an independent entity with 50 or fewer employees, ORS 183.310(10)). Agencies must, to the extent consistent with the public health and safety, attempt to reduce any significant adverse effect on small business. *Failure to include a legally adequate fiscal impact statement will invalidate the rule.*
- NOTE:** If the agency did not appoint an advisory committee to assist with development of the rule, 10 or more people (or an organization with 10 or more people) likely to be affected by the rule may object to the fiscal impact statement and require the agency to appoint a fiscal impact advisory committee. ORS 183.333(5).
9. Explanation if an advisory body was not appointed.
 10. A request for public comment on whether other options should be considered for achieving the rule’s substantive goals while reducing the negative economic impact of the rule on business.

See ORS 183.335(2)(a), (b).

E. Providing notice.

1. The agency must have a Notice Rule before doing any kind of rulemaking. ORS 183.341(4). The Notice Rule must “provide a reasonable opportunity for interested persons to be notified of the agency’s intention to adopt, amend or repeal a rule.” It may impose requirements on the agency that are more stringent than, or in addition to, the notice requirements contained in the APA. The agency then must provide notice of its proposed rulemaking as specified in its Notice Rule. ORS 183.335(1)(a).
2. **At least 49 days** before the effective date of the proposed rule, the agency must send the notice of proposed rulemaking to certain legislators (including the legislator who introduced the bill and the chair or co-chairs of all committees that reported the bill out). ORS 183.335(1)(d), 183.335(15).

NOTE: Upon request of any legislator or any person who would be affected by the rulemaking, the committees receiving notice of the rulemaking shall review the proposed rule for compliance with the pertinent legislation and shall submit comments to the rulemaking agency. ORS 183.335(16).

3. **At least 28 days** before the effective date of the proposed rule, the agency must give notice of its intended rulemaking action to persons on its mailing list. ORS 183.335(1)(c). Each agency must establish and maintain a mailing list of persons who request in writing that they receive notice of the agency intent to adopt, repeal or amend a rule. ORS 183.335(8).
4. **At least 21 days** before the effective date of the proposed rule, the agency must give notice by publication in the Secretary of State's Bulletin. ORS 183.335(1)(b).

F. Provide opportunity for public comment or hearing.

1. Hold a hearing for oral testimony on agency's own initiative, or if 10 or more persons timely request one, or if a group representing 10 or more persons timely requests one. ORS 183.335(3)(a).
2. If the proposed rule applies to or affects only a limited geographical area in the state, the hearing must be held in that area at a location convenient for the majority of the area's residents. ORS 183.335(3)(b).
3. Give 21 days notice of hearing to requestors and persons on mailing list; publish notice of hearing in Secretary of State's bulletin at least 14 days before the hearing. *Id.*

NOTE: In many cases, it probably is most efficient to schedule a hearing and provide the date and location information in the notice of rulemaking. This avoids having to set a later hearing date and do a separate mailing if the requisite number of persons request a hearing. If an agency chooses this option it issues a Notice of Proposed Rulemaking Hearing.

4. If an "interested person" submits a timely request for additional time to submit written data, views or arguments on the proposed rule, postpone the date of intended rule adoption by at least 21 days, but no more than 90 days. ORS 183.335(4).
5. If a person does not file a timely request, the agency may extend the deadline for comments, but if it does so for one person it must extend the deadline for all. An agency cannot consider comments submitted by another *agency* after the deadline has passed. ORS 183.335(14).

NOTE: At the request of five or more persons before the earliest date the rule could become effective, the agency must provide a statement that identifies the objective of the rule and a statement of how the agency will determine whether the rule is accomplishing that objective. ORS 183.335(3)(d)

G. Make a record of public comment and agency response.

Create and maintain a record of the public comments received, including all written materials submitted and a recording or summary of oral testimony presented at hearings. Agencies must “consider fully” all written or oral submissions in deciding on the final version of a rule. ORS 183.335(3)(a). The agency must respond to comments submitted as to whether other options should be considered for achieving the rule’s substantive policy goals while reducing the negative economic impact on business. ORS 183.335(3)(e)(C).

H. Adopt the rule.

1. A board or commission must adopt rules at a public meeting but does not necessarily have to allow testimony at that meeting. This is a Public Meetings Law requirement, not an APA requirement.
2. An agency headed by a director or administrator authorized to adopt rules should develop a process for formalizing and recording the adoption of rules.
3. An agency may delegate its rulemaking authority to a named officer or employee within the agency. Such delegation must be made in writing **and** be filed with the Secretary of State before the filing of any rule adopted pursuant to the delegation. ORS 183.325.

I. File a certified copy of the rule with the Secretary of State. ORS 183.355(1)(a).

The rule is effective upon filing with the Secretary of State unless a later effective date is required by statute or is specified in the rule. ORS 183.355(2).

J. File a copy of the rule with Legislative Counsel’s Office. ORS 183.715(1).

Within 10 days after filing the adopted or amended rule with the Archives Division, Secretary of State, the agency must file a copy with the Legislative Counsel. ORS 183.715. *Rules not filed with Legislative Counsel as required are not valid.* ORS 183.335(11)(b).

III. TEMPORARY RULES

A. Temporary rule justification and statement of need.

1. Under certain circumstances, an agency may adopt, amend or repeal a rule without giving notice or opportunity to comment, or by giving an abbreviated period for notice and comment. ORS 183.335(5).
2. The agency must prepare a written statement that includes:

- (a) Findings by the agency that its failure to act promptly will result in serious prejudice to the public interest or to the interests of the parties concerned. This finding should state:
- (1) The specific consequences that would result from a failure to immediately adopt, suspend or amend the rule and why these consequences would constitute a serious prejudice;
 - (2) Who would suffer these consequences;
 - (3) Why or how failure to immediately take the rulemaking action would cause these consequences; and
 - (4) How the temporary rulemaking action will avoid or mitigate these consequences;
- (b) Specific reasons why the agency's failure to act promptly will result in serious prejudice to those interests;
- (c) Citation to the legal authority relied upon and bearing upon the adoption, amendment or repeal of the rule;
- (d) A statement about the need for the rule and how the rule is intended to meet the need; and
- (e) A list of the principal documents, reports or studies, if any, prepared by or relied upon by the agency in considering the need for and in drafting the rule, and a statement of location where those documents are available for public inspection.

Some agencies also must file a housing cost impact statement with a temporary rule. ORS 183.534.

B. If possible, get comments on temporary rules before they are adopted.

Comments on proposed temporary rules may be useful in identifying unexpected problems or issues before the rules are adopted.

C. Filing requirements

Temporary rules must be filed with the Secretary of State and with Legislative Counsel, just like permanent rules.

D. Effective date

Temporary rules are effective upon filing with the Secretary or at a later date designated in the rule, *not* the date the rule is adopted. ORS 183.355(2)(b).

E. Time limit

Temporary rules are effective for not **more than 180 days** and **may not be renewed**. The agency may adopt an identical permanent rule after following the public notice and comment requirements. ORS 183.335(6)(a).

IV. RULES COORDINATOR

- A. Each agency must appoint a rules coordinator and file a copy of that appointment with the Secretary of State. ORS 183.330(2).
- B. The rule coordinator's duties are:
 - 1. To maintain copies of the agency's rules and to provide information to the public about the status of the rules;
 - 2. To provide information to the public on the agency's rulemaking procedures;
 - 3. To keep and make available the agency's mailing list.
- C. Resources for any rules coordinator or anyone involved in the rulemaking process are:
 - 1. ATTORNEY GENERAL'S ADMINISTRATIVE LAW MANUAL AND UNIFORM AND MODEL RULES OF PROCEDURE UNDER THE ADMINISTRATIVE PROCEDURE ACT.
 - 2. The Secretary of State's rules for filing administrative rules. OAR chapter 166, division 500.

V. REVIEW OF RULES

A. Legislative Counsel Review of Rules

- 1. The Legislative Counsel *may* review a proposed or adopted rule of a state agency either on its own initiative or upon written request of any person "affected" by the rule. ORS 183.720. Legislative Counsel *must* review a proposed or adopted rule at the written request of any member of the legislature. ORS 183.720(2).
- 2. When reviewing any agency rule, the Legislative Counsel must determine whether the rule: 1) appears to be within the intent and scope of the enabling legislation, and 2) raises any other constitutional issue.
- 3. After reviewing a rule, Legislative Counsel must prepare written findings of its determination and send a copy to the Legislative Council Committee and the person who requested the review, if any. ORS 183.720(3)-(6). If Legislative Counsel determines that a proposed or adopted rule is not within the intent and scope of the enabling legislation, or that the rule is unconstitutional, Legislative Counsel must also send a copy of the determination to the state agency. The

agency must either respond in writing to the determination or appear at a meeting of the Legislative Counsel Committee. ORS 183.722.

4. In addition, a member of the legislature or any person affected by an agency's rule may ask Legislative Counsel to prepare a report on a rule asserted to be duplicative of or in conflict with another rule adopted by a state or federal agency. ORS 183.720(7). The Legislative Counsel must send its report to the Legislative Counsel Committee, which may issue a determination that the two rules are duplicative or in conflict. A copy of the report and any determination must be sent to each state agency concerned and to the person requesting the review. The Committee may direct Legislative Counsel to send a copy to the presiding officer of a house of the legislature, who may refer the determination to any legislative committee.
5. ORS 183.725 authorizes the Legislative Counsel Committee to review, at any time, any proposed or adopted rule and make recommendations regarding the rule to the agency.

B. Agency Review of Rules

Every agency must review all of its new rules within five years of adoption. ORS 183.405. The review must include an analysis of whether the rule had its intended effect, whether the fiscal impact was under- or overestimated; whether the rule remains consistent with the law; and whether the rule is still needed. If the agency adopted the rule with the assistance of an advisory committee, the agency must provide a copy of the report developed on review to the members of that committee.

C. Judicial Review of Rules

Any person may petition the Court of Appeals to review the validity of any rule. A court may declare a rule invalid if the rule is unconstitutional, exceeds the agency's authority or was adopted without compliance with the applicable rulemaking procedures. ORS 183.400(4).

VI. PETITION FOR RULEMAKING

Any interested person may petition an agency to adopt, amend or repeal a rule. ORS 183.390. The agency must either deny the petition or initiate rulemaking. If the petition asks the agency to amend or repeal a rule, the agency must invite public comment and request comment on whether options exist for achieving the rule's goals while reducing the negative impact on business. The agency must consider: (1) the continued need for the rule; (2) the nature of the complaints and comments; (3) the complexity of the rule, whether it is duplicative or conflicting with other government regulations; (4) whether technology, economic conditions or other factors have changed; and (5) the legal basis for the rule.