

**BALLOT MEASURE 2:
CREATING ACCOUNTABILITY OR WREAKING HAVOC?**

AMENDING THE OREGON CONSTITUTION
TO ALLOW CITIZEN PETITIONS TO INVALIDATE ADMINISTRATIVE RULES
UNLESS THE RULES RECEIVE LEGISLATIVE APPROVAL

SUSAN L. SMITH
PROFESSOR OF LAW
WILLAMETTE UNIVERSITY COLLEGE OF LAW
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Biographical Sketch of Professor Susan L. Smith

Professor Susan L. Smith served as principal investigator for this report. Professor Smith has been a Professor of Law at Willamette University College of Law for the past 11 years. She specializes in environmental and natural resources law, but has practiced, taught, and lectured on federal and state administrative law for the past 20 years. Prior to joining the Willamette faculty, Professor Smith served as a trial attorney, senior trial attorney, and Assistant Chief, Environmental Defense Section, Land and Natural Resources, U.S. Department of Justice. She also spent several years in private practice with Holland & Hart, primarily representing the mining and oil and gas industries. Professor Smith received her law degree from Harvard Law School, a Masters in Public Policy degree from the Kennedy School of Government, Harvard University, and her undergraduate education at Reed College in Portland, Oregon.

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DISCLAIMER

This report is intended to provide the public with useful information about a pending ballot initiative. To accomplish that purpose, it provides a brief and somewhat simplified analysis of a number of complex administrative law questions. It should not be relied upon as a complete and authoritative opinion as to any legal issue it addresses. Any person seeking legal advice on any issue addressed by this report should secure the counsel of an attorney with expertise in administrative law.

Any opinions expressed in this report represent only the views of the author, not necessarily the views of Willamette University, 1000 Friends of Oregon, or the Hewlett Foundation.

EXECUTIVE SUMMARY

How Measure 2 Works

- C Administrative rules are critical to the operation of most significant state programs. They are currently formulated by a process that insures both public input and legislative review of proposed rules.
- C Measure 2 provides for three rounds of legislative review on rules adopted regarding a given issue or subject with quite different consequences.
 1. Round 1: after a rule is challenged by a voter petition, the rule becomes invalid unless approved by the Legislature through a special legislative review process.
 2. Round 2: if a rule on an issue or subject does not gain legislative approval in Round 1, all subsequently adopted rules regarding a given issue or subject are automatically subjected to the special legislative review process. All rules on that issue or subject become invalid unless approved by the Legislature. Measure 2 grants the Senate President enormous power to decide whether other rules are on the same issue or subject as an invalidated rule.
 3. Round 3: if a rule on an issue or subject does not gain legislative approval in Round 2, no rules on that issue or subject are valid unless and until the Legislature has acted to approve the rules.
- C There are a great number of unanswered, and perhaps unanswerable, questions about how Measure 2 would work. Some of those questions include:
 1. Will the Secretary of State or the Legislature have authority to protect the integrity of the Measure 2 petition process? For example, will either have authority to prevent Measure 2 petition sponsors from paying voters to sign petitions?
 2. Will Measure 2 petitions be verified by the Secretary of State and by what process?
 3. Will the Secretary of State's decision to give notice of a Measure 2 petition be subject to judicial review?
 4. What will be the process for the special legislative review of administrative rules prescribed by Measure 2?
 - a. To what extent will the Legislature follow the standard legislative processes in

considering administrative rule approval bills required by Measure 2?

- b. Will either the Senate or the House actually consider the merits of administrative rule approval bills?
5. As rules are invalidated by legislative inaction or gubernatorial veto, when does that invalidation become effective? What will be the effect of invalidation on pending administrative actions and those who have secured permits, licenses, or other rights under challenged rules?
6. Will entire, broad categories of rules such as “land use” or “water pollution” be subject to legislative review and thus invalidation by legislative inaction?
7. What will be the status of a rule approved by an administrative rule approval bill – will it remain a regulation or will it become a statutory law?

Existing Processes for Review of Administrative Rules

- C The results from current processes for legislative and judicial review of administrative rules suggest that less than 1/5 of 1% of all administrative rules are either unconstitutional or contrary to legislative intent.
- C There are eight existing processes for review of administrative rules after they are adopted:
 1. Current impartial review of the constitutionality of administrative rules and the compliance of the rules with statute, conducted by the Legislative Counsel.
 2. Enacting legislation amending, disapproving, or removing agency authority to adopt administrative rules, through normal legislative process.
 3. Controlling state programs and implementing rules through the budgetary process.
 4. Voter-initiated legislation amending, disapproving, or removing agency authority to adopt administrative rules, through existing initiative process contained in the Oregon Constitution.
 5. Petition to the agency to amend or repeal administrative rules.
 6. Judicial review of administrative rules for consistency with the Constitution and with the agency’s statutory authority.
 7. Review of agency actions under the administrative rules by a neutral administrative law

judge, conducted through a formal, contested case hearing – with possible invalidation of the rule as contrary to statute.

8. Judicial review of agency actions under the administrative rules, including the constitutionality of the rules and the consistency of the rules with the agency's statutory mandate.
- C The existing processes effectively correct administrative rules that are contrary to statute or legislative intent. The existing, impartial and non-partisan legislative review process conducted by the Legislative Counsel is particularly effective since 90% of the rules criticized by the existing legislative review process are corrected by the agency. The existing judicial review process also effectively eliminates improper rules. While only a tiny percentage of rules are challenged in court (roughly ½ of 1%), the courts take such challenges seriously, invalidating 1 out of 3 challenged rules.

Targets of Measure 2

- C The Oregon land use planning rules are the most immediate target of Measure 2. However, analysis of the rules opposed by Measure 2 supporters indicates that other immediate targets of Measure 2 are (1) other state rules that regulate natural resources use and protect the environment, and (2) rules that set standards for public and private elementary and secondary education.
- C Other targets identified by Measure 2 opponents are less likely to be attacked by Measure 2 petitions in the near future. However, Measure 2 indeed could potentially affect many important state programs, including:

Environmental and Natural Resources

Rules protecting fish and wildlife, parks, trails, open space, forests, wetlands, scenic areas, beach access, air and water quality, drinking water, rules governing toxic waste cleanup, as well as land use goals and regulations.

Worker Protection

Rules affecting worker health and safety, worker's insurance such as worker's compensation and unemployment insurance, minimum wage and anti-discrimination enforcement, employer/employee relations.

Health

Rules implementing the Oregon Health Plan, communicable disease control, privacy of medical records, nursing home licensing and standards, restaurant and foodcart health inspections, ambulance availability and standards.

Consumer Protection

Rules regarding utility rates and billing, renter and senior mobile parks, building safety codes, nursing home resident rights, food growing and packaging standards.

Crime

Rules providing crime victim compensation, sentencing guidelines, sex offender registration, standards for employing law enforcement officers.

Education

State curriculum standards and teacher licensing rules.

Likely Impacts of Measure 2 on Oregon Land Use Laws

- C The Oregon land use planning system, like many other state service and regulatory programs, is highly dependent on statewide planning goals and other administrative rules.
- C Oregon land use rules are currently subject to many existing review processes, but most of those processes involve either (1) expert judgment about the constitutionality and consistency of the rule with legislative mandates or (2) a collective judgment with input from many different segments of the public that the rules do or do not represent good public policy. Thus far, most state land use rules have survived that scrutiny.
- C State land use rules are the most likely immediate target of Measure 2 petitions, given the stated targets of Measure 2 supporters.
- C State land use rules are more vulnerable than many other rules. The financial impact of the land use rules is principally felt by well-organized, well-financed groups such as real estate developers, whereas the benefits of those rules are widely dispersed upon members of the public. Under such circumstances, legislators will prefer inaction to recorded votes on sensitive, controversial topics - and inaction under Measure 2 leads to invalidation of the challenged rule.
- C Measure 2 poses a “clear and present danger” to the Oregon land use planning system because opponents of that system (1) certainly have resources to file Measure 2 petitions seeking to disrupt that system and (2) may secure the legislative assistance to prevent enactment of bills approving state land use rules, even though opponents of the system have been unable to secure sufficient legislative support for bills that fundamentally weaken the land use rules.

BALLOT MEASURE 2: CREATING ACCOUNTABILITY OR WREAKING HAVOC?

INTRODUCTION

This report was prepared under a contract with 1000 Friends of Oregon, which requested that the Willamette University Public Policy Research Center answer four questions:

- C How would Measure 2 work?
- C What are the existing processes for citizens, the courts and the Legislature to review administrative rules?
- C Assuming Measure 2 passes, what administrative rules are most likely to be the subject of the Measure 2 petition process in the near term?
- 1. What could the impact of Measure 2 be on Oregon's land use planning laws, specifically the provisions that were adopted to curb urban sprawl and protect farm and forest lands, conserve natural resources and reduce barriers to affordable housing?

The report was funded through a grant from the Hewlett Foundation to 1000 Friends for research and analysis concerning the public policy choices to be made by Oregon voters in the November 2000 election. Although the research and analysis contained in the report was prepared under contract with 1000 Friends of Oregon, it was prepared under a strict guarantee of intellectual freedom. Thus, the Hewlett Foundation and 1000 Friends of Oregon are in no way responsible for its contents or the views expressed.

Question 1: How would Measure 2 Work ?

To understand how Measure 2 would work, we must consider the role of administrative rules in state government and how those rules are currently formulated.

I. Why Do State Agencies Adopt Administrative Rules?

The Legislature enacts statutes that authorize state agencies to operate a variety of programs, which run the gamut from licensing drivers and doctors, to regulating day care providers, to providing workers' compensation and health care benefits, to regulating land use and controlling pollution. These programs differ in their subject matter. But they also differ greatly in other ways. They differ in scope – which and how many Oregonians are affected. They differ in impact – most provide benefits and impose costs – either large or small. They differ in complexity – some are as simple as taking a test to get a driver's license, others are quite complex. And they differ in level of controversy – when a state program imposes significant costs on, or denies much desired benefits to, members of politically organized and well-financed groups, that program tends to generate a great deal of controversy.

When the Legislature writes a statute creating a state program to be administered by a state agency, it usually provides just the broad outline of the program. To make the program work, a state agency is authorized by the Legislature to adopt administrative rules that provide the details of the program. Without administrative rules, most state agencies could not operate and most state programs would not work. Those agencies that could operate state programs without significant administrative rules would do so with far fewer constraints on their discretion. Administrative rules not only affect the public, they provide law that the agencies have to live by.

However, administrative rules often become the focus of political controversy for two reasons. First, administrative rules are the key to making state programs work. If a group opposes the fundamental concepts of a state program enacted by the Legislature, then the next and sometimes easier target for that group will be the administrative rules implementing the program. Second, the manner in which the administrative rules governing a state program are drafted can substantially affect who is positively or adversely impacted by the program as well as the extent of the impact. For that reason, the administrative rules are the battleground for competing groups and the losers in those battles often contend that the agency acted in a manner contrary to statute or otherwise illegally in adopting the rules.

II How are Administrative Rules Adopted by State Agencies?

When the need for a rule has been identified, an agency begins the rulemaking process by appointing an advisory committee to represent the persons likely to be affected by the rule to provide public views that assist the agency in drafting the rule.¹ In many cases, the agency will use an advisory committee or a collaborative rulemaking committee to actually draft the rule. Indeed, if the agency chooses not to form an advisory committee, it must justify that choice in the public notice of the proposed rule.² The agency

may seek public input by holding a public meeting, holding separate meetings with various interest groups, and discussing the issue with experts outside state government. The agency may also secure additional information and input from other state and federal agencies as well as legislators.

The agency then gives notice of the proposed rule by publishing a public notice in the Oregon Bulletin which is published by the Secretary of State.³ The agency also gives notice by mail to individuals who request notice.⁴ The notice states the subject matter and purpose of the proposed rule and usually provides the text of the proposed rule.⁵ In addition, the notice provides a statement of need for the proposed rule so that the public understands what the agency perceives is the need,⁶ a list of principal documents relied upon by the agency in preparing the proposed rule so that the public can address the factual basis for the agency's rule in written and oral comments,⁷ and a statement of the fiscal impact of the proposed rule so that those potentially affected by the rule can understand its significance.⁸

The agency must allow the public an opportunity to provide written comments or data regarding the proposed rule.⁹ The agency also must hold a public hearing on the proposed rule if 10 or more persons (or an organization representing 10 or more members) requests a hearing.¹⁰

Apart from the provisions assuring public notice, comment, and hearing regarding proposed rules, there are provisions guaranteeing legislative review of proposed rules before they are adopted. The agency also gives notice to the legislator who introduced the bill that was subsequently enacted and to the chair of all committees in the legislature involved in the passage of the bill, if the bill was passed within two years of the proposal.¹¹ For proposed rules where more time has passed, the agency gives notice to the chair of all interim or session committees with authority over the subject matter of the rule.¹² If such notice is not possible, the agency gives notice of the rule to the Senate President and the Speaker of the House.¹³ The notice alone does not trigger legislative review of proposed rules. Instead, legislative review of proposed rules is triggered by a request from any legislator or any person who would be affected by a proposed rule. Upon such request, all committees receiving notice must review the proposed rule for compliance with the legislation that the proposed rule implements.¹⁴ The committees must submit their comments on the proposed rule to the agency proposing the rule.¹⁵

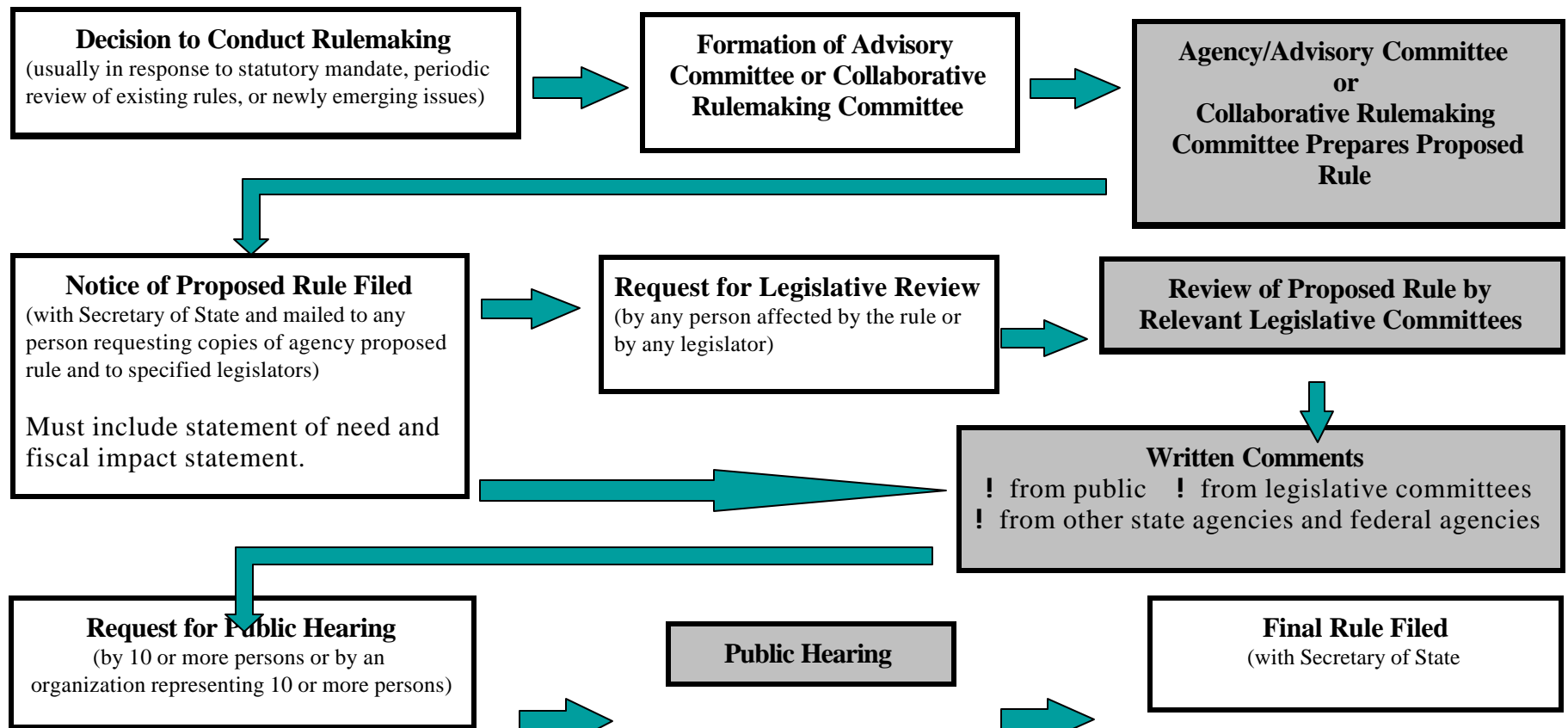
After considering public and legislative comments on the proposed rule, the agency then adopts a final rule. That final rule becomes effective when it is filed with the Secretary of State. The agency also must file a copy of the final rule with the Legislative Counsel to permit Legislative Counsel review of administrative rules. Oregon law thus provides significant opportunities for public involvement in the adoption of administrative rules as well as a mechanism for legislative review of proposed rules.

Oregon law also provides additional mechanisms for executive branch review of proposed rules. During the preparation of major rules, the Assistant Attorney General charged with counseling an agency is likely to review the rules to advise the agency concerning the legality of the proposed rules. Additionally, although the Governor cannot monitor every proposed rule,¹⁶ the Governor does maintain some influence and control over proposed rules. The Governor's staff monitors major rules of specific agencies in which

the Governor has a special interest.¹⁷ The Governor or his staff also informally approves rules from every agency that are deemed to have broad policy implications.¹⁸

Chart 1:

Simplified Flowchart of Current Rulemaking Process



Note: Gray shading indicates opportunities for public or legislative input.

III. A Summary of How Measure 2 Works

Measure 2 is a proposed change in the Oregon Constitution that would dramatically increase the likelihood that administrative rules adopted by state agencies would be challenged and invalidated.

The certified ballot title for Measure 2 describes it as providing for legislative review of administrative rules. Actually, Measure 2 provides for three rounds of legislative review on rules adopted regarding a given issue or subject with quite different consequences. In the first round, the rules are challenged by a voter petition and the rules become invalid unless approved by the Legislature through a special legislative review process. In the second round, all subsequently adopted rules regarding a given issue or subject are automatically subjected to the special legislative review process, if the Legislature failed to approve rules on that issue or subject after the rules were challenged by a Measure 2 petition. All rules on that issue or subject become invalid unless approved by the Legislature. In the third round, no rules on that issue or subject are valid unless and until the Legislature has acted to approve the rules.

There are a great number of unanswered, and perhaps unanswerable, questions about how Measure 2 would work.¹⁹ Some of these questions are set forth in Table 1 of this report. Nonetheless, the process set forth by Measure 2 for challenging and invalidating administrative rules can be roughly summarized as follows:

2. ROUND 1: Petition Challenging Administrative Rules

A petition by 10,000 qualified voters challenging specific rules adopted by any state administrative agency may be filed at any time.

3. Rules Become Invalid Unless Legislatively Approved

The specific administrative rules challenged by such a petition are invalidated at the end of the legislative session that follows the filing of the petition, unless the Legislature affirmatively acts to approve the challenged rules during that session.

2. ROUND 2: Subsequently Adopted Rules Adopted on the Same Issue or Subject Become Invalid Unless Legislatively Approved

After challenged rules are invalidated by failure of the Legislature to approve the rules, the administrative agency can continue to issue rules on the same issue or subject. However, rules on that issue or subject will be invalidated automatically (without further petition), unless the next Legislature affirmatively acts to approve those rules.

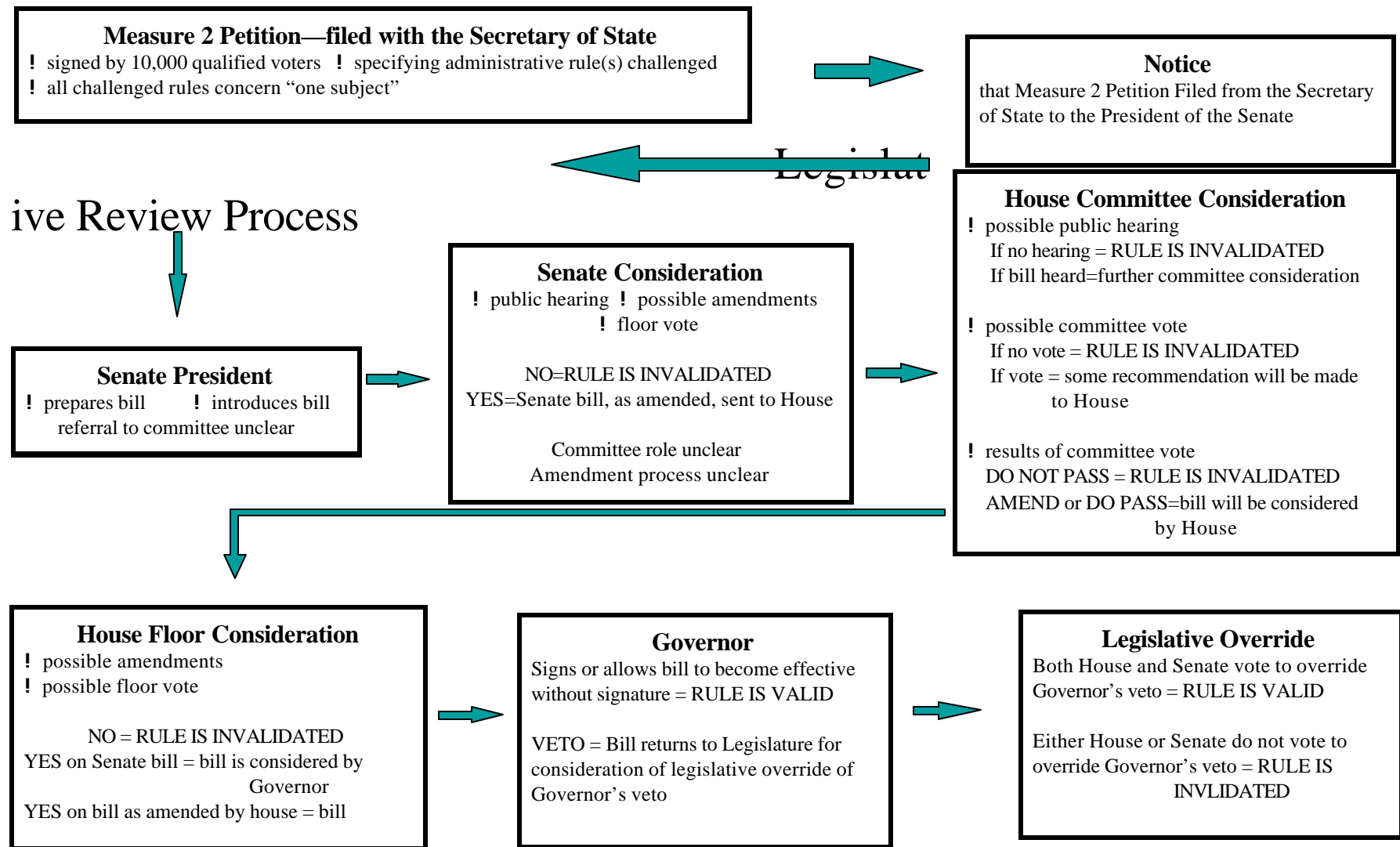
3. **The President of the Senate Decides Whether a Subsequently Adopted Rule Addresses the Same Issue or Subject**

The President of the Senate alone decides whether legislative review is required, and thus a rule may be invalidated by legislative inaction, because a subsequently issued administrative rule addresses the same issue or subject as a rule previously challenged by a Measure 2 petition and invalidated by legislative inaction. Measure 2 contemplates that the Legislature will develop some means for the courts to review the Senate President's decision that a subsequently adopted rule addresses the same issue or topic as previously challenged and invalidated rules. However, Measure 2 requires the courts to resolve any uncertainty about whether a subsequent rule addresses the same issue or subject as previously challenged and invalidated rules in favor of invalidating the rule.

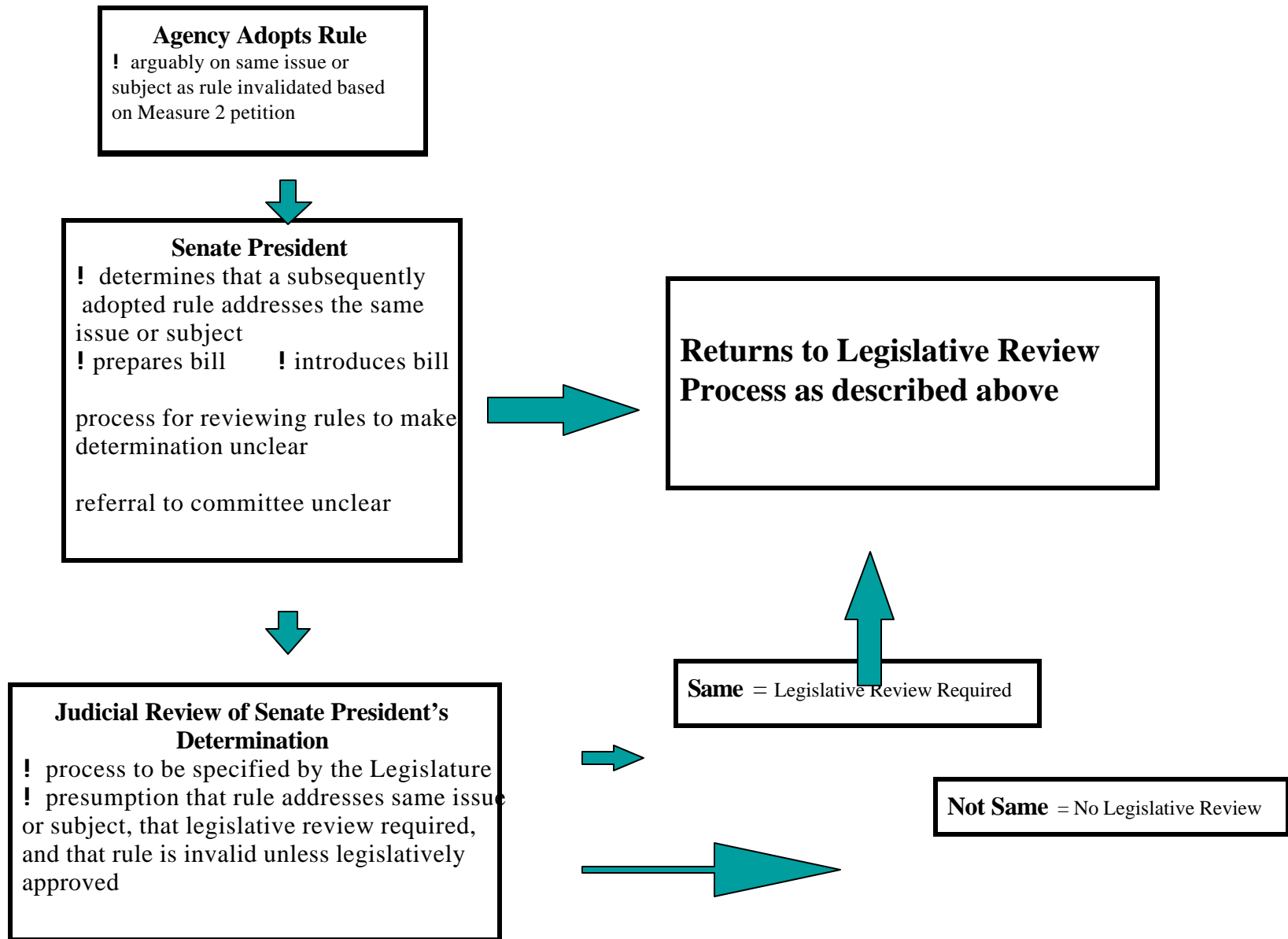
4. **ROUND 3: Agency Rules on the Same Issue or Subject are Invalid Unless and Until Legislatively Approved if the Legislature has Twice Failed to Approve Rules on that Issue or Subject**

If the Legislature has twice failed to approve rules issued about the same issue or subject, the state agency loses power to issue rules on that issue or subject without legislative approval of the rules. Measure 2 allows any person to seek a judicial determination that an administrative rule addresses the same issue or subject, which would essentially declare the administrative rule invalid. Measure 2 requires the courts to resolve any uncertainty about whether a rule addresses the same issue or subject in favor of invalidating the rule.

CHART 2: **A Simplified Flow Chart of Legislative Review of Administrative Rules After a Measure 2 Petition is Filed**



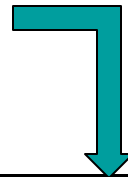
Legislative Review — Round 2



Legislative Review — Round 3

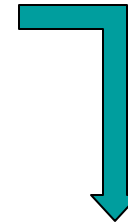
Agency Adopts Rule

- ! arguably on issue or subject where initial Measure 2 invalidation has occurred and subsequent rule has been invalidated



Rule Invalid Unless and Until Legislature Approves the Rule

- ! invalidity depends on whether rule indeed addresses same issue or subject as a rule that has been invalidated by a Measure 2 petition where a subsequent rule has been invalidated due to failure to gain legislative approval
- ! unclear whether approval considered through standard legislative process or through special legislative review process



Judicial Determination

- ! Any person may seek a judicial determination that a rule is invalid because it addresses the same issue or subject as a rule that has been invalidated by a Measure 2 petition and a subsequent rule has been invalidated due to failure to gain legislative approval
- ! Legislature to specify process for such judicial determinations

TABLE 1

SIGNIFICANT UNCERTAINTIES ABOUT
THE OPERATION OF MEASURE 2

- C Will the Secretary of State or the Legislature have authority to protect the integrity of the Measure 2 petition process?
- C Will Measure 2 petitions be verified by the Secretary of State and by what process?
- C Will the Secretary of State's decision to give notice of a Measure 2 petition be subject to judicial review?
- C What will be the process for the special legislative review of administrative rules prescribed by Measure 2?
 - C To what extent will the Legislature follow the standard legislative process in considering administrative rule approval bills required by Measure 2?
 - C Will either the Senate or the House actually consider the merits of administrative rule approval bills?
 - C Will the House lose its power to initiate bills approving administrative rules?
- C As rules are invalidated by legislative inaction or gubernatorial veto, when does that invalidation become effective and what will be the effect of invalidation on pending administrative actions?
- C Will entire broad categories of rules such as "land use" or "water pollution" be subject to legislative review and thus invalidation by legislative inaction?

IV. A More Detailed Look at the Operation of Measure 2

Measure 2 would add a new Section 34 to Article IV of the Oregon Constitution, which governs the exercise of legislative powers. The constitutional changes are proposed in the Article of the Constitution concerning the Legislature and legislation because Measure 2 would impose a duty on the Legislature to review administrative rules challenged by a voter petition and subsequently issued administrative rules on the same issue or subject.

Measure 2 actually provides for three separate rounds of legislative review on rules adopted regarding a given issue or subject. In the first round, the rules are challenged by a voter petition and the rules become invalid unless approved by the Legislature through a special legislative review process. In the second round, all subsequently adopted rules regarding a given issue or subject are automatically subjected to the special legislative review process, if the Legislature failed to approve rules on that issue or subject after the rules were challenged by a Measure 2 petition. All rules on that issue or subject become invalid unless approved by the Legislature. In the third round, no rules on that issue or subject are valid unless and until the Legislature acted to approve the rules.

Measure 2 contains many gaps and omissions of significant details, raising substantial questions about how the Measure 2 process would actually work. The description of the operation of Measure 2 that follows is based upon a detailed analysis of the measure as well as research and analysis to predict how the Secretary of State, the Legislature, and the courts would likely fill in the gaps. However, in certain respects, the uncertainty about how Measure 2 would operate is so great that we can provide little more than an educated guess based upon our experience.

A. Rules Subject to Measure 2 Petitions

To a great extent, Measure 2 defines the terms “state agency” and “rules” in a manner consistent with the Oregon Administrative Procedure Act. However, Measure 2 does consider more agency actions to be “rules” than does the Oregon APA. First, for some mysterious reason, Measure 2 was written so that it clearly allows challenges to the rules of conduct governing state prisoners.²⁰ Second, state agency policies that are directed to other state agencies or other units of government appear to be subject to Measure 2 petitions, even if they do not substantially affect the interests of the public.²¹ Third, state agency internal memoranda may be subject to Measure 2 petitions.²² Fourth, declaratory rulings made by state agencies may be subject to Measure 2 petitions.²³

Measure 2 appears to also apply to temporary rules that are issued on an emergency basis for 180 days – usually to fill in a regulatory gap until permanent rules can be issued. However, Measure 2 does not specify how legislative review of temporary rules would occur. For example, if a Measure 2 petition was filed as to a temporary rule and the temporary rule expired or had been replaced with a permanent rule, it would be illogical for the Legislature to waste its time reviewing the dead temporary rule. On the other hand, if the temporary rule was replaced with an identical permanent rule, the Legislature would logically review the permanent rule, but would Measure 2 require a new petition to be filed regarding the

permanent rule before legislative review under Measure 2 was triggered? If the temporary rule was replaced with a nearly, but not quite, identical permanent rule, it seems clear that Measure 2 would require a new petition to be filed regarding the permanent rule.

B. The Petition Requirement

The Measure 2 process for invalidation of administrative rules is triggered by filing a petition signed by at least 10,000 qualified voters with the Secretary of State. Several aspects of the petition requirement are important. First, what are the contents of a petition? Second, what restrictions, if any, are placed on the signature gathering process? Third, does the Secretary of State verify that the petition requirement has been met and by what process? Finally, when the Secretary of State either gives notice to the Senate President or refuses to give notice, is that decision subject to review by the courts and what sort of judicial review will be available?

1. Content of the Petition

Measure 2 specifies the content of the petition challenging administrative rules.²⁴ The only requirements are: (1) the petition be signed by 10,000 qualified voters,²⁵ (2) the petition be filed with the Secretary of State, (3) the petition specify the specific administrative rule or rules that the legislature is required to review, and (4) the administrative rules identified pertain to one subject.

Measure 2 sets forth little detail about the contents of the petition.²⁶ For example, Measure 2 does not require or regulate:

- C information about the chief petitioners or sponsors of the petition such as name, address, and how they are affected by the petition
- C information from the person submitting the petition such as the identity of the persons who gathered particular signatures, including name, address, place of residence, and payments made to the signature gatherer for circulating the petition
- C any additional information about the administrative rules being challenged such as a copy of the rules, the agency's rationale for the rules, or the sponsor's objections to the rules
- C information establishing that the persons who have signed are "qualified voters."

Additionally, Measure 2 does not expressly authorize either the Legislature or the Secretary of State to require such information or otherwise regulate the contents of Measure 2 petitions. Indeed, given the language of Measure 2, it is highly questionable whether either the Legislature or the Secretary of State has power to regulate or further specify the contents of such a petition. Measure 2 provides: "Upon receiving a petition that meets the requirements of subsection (2) of this section, the Secretary of State shall cause written notice to be given to the President of the Senate."²⁷ Measure 2 further provides that this notice triggers mandatory legislative review of the challenged rules and serves to invalidate those rules unless the

Legislature acts to approve them. Thus, once a petition meeting the four requirements identified above is filed with the Secretary of State, Measure 2 appears to impose a mandatory duty on the Secretary of State to give the Senate President written notice of the petition, which notice in turn triggers mandatory legislative review. The Secretary of State appears to have no leeway to refuse to give notice merely because the petition does not meet other requirements imposed by the Secretary or the Legislature.

If the Oregon Supreme Court read that Measure 2 language in light of the constitutional provisions that govern initiative and referendum petitions, the Court would likely decide that the Legislature and Secretary of State lacked power to regulate or further specify the contents of Measure 2 petitions. The Court would likely contrast the language of Measure 2 with the constitutional language concerning initiative and referendum petitions,²⁸ which provides the legislature with power to specify additional requirements on initiative and referendum measures consistent with the constitutional provision. Because Measure 2 contains no such language, the Court would likely conclude that the Legislature and the Secretary of State lack power to regulate the contents of Measure 2 petitions.

2. The Signature Gathering Process

Measure 2 does not provide any details about the signature gathering process for petitions challenging administrative rules, or otherwise allow the Legislature or the Secretary of State to regulate such details.²⁹ For example, Measure 2 does not:

- C Impose qualifications for persons gathering signatures
- C Require organizations who provide paid petition circulators to be licensed
- C Limit or prohibit payment for gathering signatures on such petitions
- C Limit or prohibit payment for signatures on such petitions
- C Require circulators to certify the authenticity of signatures gathered
- C Set any time limits on gathering signatures
- C Require entities that receive contributions or make expenditures in support of a petition to file a statement of organization with the Secretary of State or form a petition political committee
- C Require disclosure of contributions received and expenditures made in support of the petition

As indicated above, because Measure 2 requires the Secretary of State to give notice³⁰ upon filing of a petition meeting the Measure's petition requirements,³¹ it is doubtful that either the Legislature or the Secretary of State have power to regulate the signature gathering process for such petitions. In deciding that question, the Oregon Supreme Court would probably contrast Measure 2 with the existing constitutional provisions regarding the gathering of signatures for initiative and referendum petitions, which

provide numerous constraints on the signature gathering process for such petitions.³²

3. Verification of Petitions

Measure 2 does not expressly provide for the Secretary of State to conduct an inquiry to verify that a petition meets the Measure 2 petition requirements, such as signatures by 10,000 qualified voters, identification of specific administrative rules being challenged, and the challenged rules deal with a single subject. Measure 2 could be read by the courts as compelling verification, allowing verification, or preventing verification that the petition meets Measure 2 requirements.

The Oregon Supreme Court would likely decide that the Secretary at least has the power, if not the duty, to verify that the petition meets Measure 2 requirements before giving notice to the President of the Senate. The Court would infer such power from the language of Measure 2 suggesting that the Secretary of State's mandatory duty to give notice to the Senate President is triggered only upon receipt of a petition "that meets the requirements of subsection (2)."

Because Measure 2 does not expressly address the question of verification, it is unclear what the scope of such verification would be. In all likelihood, the Secretary of State would choose to verify in some manner that each of the Measure 2 petition requirements had been met, including compliance with the single-subject requirement.³³

It is also unclear how the Secretary of State would conduct the verification process. Measure 2 neither specifies the verification process, nor grants the Legislature authority to specify that process.³⁴ In particular, Measure 2 does not specify the time allowed for the Secretary of State to conduct the verification process and give the President of the Senate notice of the petition. This could be problematic for Measure 2 petitioners because, in the absence of a deadline for verification, the Secretary of State could substantially delay legislative review of challenged administrative rules, by simply choosing to verify the authenticity of each petition signature and the qualifications of each petitioner.

4. Judicial Review of the Secretary of State's Decisions Regarding Measure 2 Petitions

Measure 2 does not address whether the Secretary of State's decisions about whether petitions meet the requirements of Measure 2, thus requiring the Secretary to initiate the legislative review process by giving notice to the President of the Senate, are subject to judicial review.³⁵ Such decisions are likely to be controversial. If the Secretary of State declined to give notice after receiving a Measure 2 petition, the petitioners would likely seek judicial review of that decision. If the Secretary does give notice, proponents of the administrative rule would likely seek judicial review.

Although Measure 2 fails to address this question and any answer must be tentative, it is likely that the Secretary's decision would be reviewable under the Oregon Administrative Procedure Act (OAPA).³⁶ Actions of the Secretary of State are agency actions subject to judicial review under the OAPA.³⁷ If the

Secretary of State gave notice to the Senate President, thus triggering legislative review and invalidation of administrative rules unless the Legislature affirmatively acts, that decision would arguably constitute a final order subject to judicial review.³⁸ If the Secretary of State decided not to give notice to the Senate President, thus avoiding invalidation of the challenged administrative rules, that decision might also constitute a final order.³⁹ If the Secretary failed to decide whether to give notice, the Secretary could be compelled to act.⁴⁰

C. Legislative Review of Administrative Rules Challenged by Petition

1. The Legislative Review Process

Upon receiving notice from the Secretary of State of a petition challenging administrative rules, Measure 2 requires the Senate President to have a bill approving the challenged rules prepared and introduced during the next legislative session after the petition is filed.⁴¹ Legislative consideration of administrative rules challenged by a Measure 2 petition filed during the legislative session is delayed until the next legislative session. Measure 2 requires that a mandatory bill introduced pursuant to Measure 2 receive at least one hearing in the Senate and be submitted for a vote in the Senate before adjournment sine die of the legislative session in which the bill is introduced.⁴² Measure 2 also allows the Legislature to amend the bill to approve only some of the specified administrative rules or only part of a specified rule.⁴³

Measure 2 does not specify the details of the legislative process for such a bill. However, the Legislature would likely utilize the existing legislative process (summarized in Appendix 2), making only those modifications in the current legislative process that are affirmatively required by Measure 2.

In all likelihood, the Senate President would have the Legislative Counsel's office prepare a simple bill to approve the challenged administrative rules in toto, consistent with Measure 2. The bill would likely contain an initial paragraph indicating that the bill was prepared and introduced in response to a Measure 2 petition and a relating clause specifying the subject of the bill.

After the bill was introduced in the Senate, the Senate would likely handle the bill in a manner as close to normal legislation as possible, given the unusual requirements that the bill receive a public hearing and a floor vote in the Senate.⁴⁴ The Senate President would assign it to a committee, the committee chair would schedule a public hearing, the committee would vote to pass the bill without amendment or would amend the bill. If the committee did not want to pass a bill approving any of the challenged administrative rules, the committee would probably report the bill to the Senate with a "DO NOT PASS" recommendation, rather than simply kill the bill in committee and await a discharge motion. Then, the bill would receive a second and third reading and a floor vote.

Another unanswered question about the Senate process is what sort of vote satisfies the requirement of a "floor vote?"⁴⁵ Would a Senate vote on the bill as introduced be necessary, would a vote on the bill as amended in committee be sufficient,⁴⁶ or would a vote on the bill after substituting an entirely new text (a legislative maneuver known as "gut and stuff") satisfy Measure 2? Similarly, would a floor vote on a

motion to table, rather than on the merits of the bill, be sufficient under Measure 2?

All of these common legislative maneuvers would undercut the apparent intent of Measure 2 to require a Senate floor vote on the merits. However, to avoid them, the Senate would have to create a special legislative process for bills approving challenged rules. Creating a process that satisfies all the requirements of Measure 2 will be no small feat because the Measure 2 provisions allowing for amendment of rule approval bills are at odds with the floor vote provision.

Another aspect of the legislative review process created by Measure 2 is quite clear. Although Measure 2 might seem to provide for full legislative consideration of a bill approving challenged administrative rules,⁴⁷ it actually does not. Even though Measure 2 does require Senate consideration of the bill, it does not require House consideration of the bill. There would be several opportunities for a single person or committee in the House to kill the bill.⁴⁸ Once the bill was assigned to a committee, the committee chair might refuse to schedule a public hearing or schedule a vote on the bill. Assuming a hearing and a committee vote were to occur, the House committee might decide to kill the bill – thus allowing a few members of the House to invalidate the challenged administrative rules. Even if the House committee recommended passage of the bill – the bill might die on the House floor – thus allowing a single chamber of the legislature to invalidate challenged administrative rules.

There may be some question whether the House could initiate a bill to approve (or disapprove) challenged administrative rules. Measure 2 might be read to prevent the House from initiating a bill to approve challenged administrative rules as ordinary legislation. Measure 2 specifies that “The Legislative Assembly may approve the administrative rule or rules specified in the bill introduced under this subsection by passing the bill,”⁴⁹ “The bill” is the bill introduced by the President of the Senate after receiving notice from the Secretary of State that a Measure 2 petition has been received. This could be read as providing that the bill introduced by the Senate President is the exclusive means by which the Legislature may approve a challenged administrative rule.

2. The Effects of Legislative Review on Challenged Administrative Rules and Related Administrative Actions

Measure 2 provides that “Any administrative rule or part of a rule not approved by the passage of the bill has no further force and effect after adjournment sine die of the legislative session in which the bill is introduced.”⁵⁰ Thus, rules challenged in a Measure 2 petition are invalidated effective at the end of the legislative session unless a bill approving the rules has been passed. However, even if a bill approving the rules were passed, the Governor could veto it. Assuming the Governor’s veto occurred after adjournment sine die, a question would arise as to the effective date of invalidation of the rules – would the rules be invalidated retroactively to the date of adjournment or would the rules be invalidated as of the date of the Governor’s veto? Because Measure 2 creates a novel situation where failure of a law to pass changes the law, it is difficult to predict the courts’ answer to this question.

Invalidation of the challenged rules would also affect the fate of other administrative actions that were

based on the rule. Their fate would likely depend upon the stage of the administrative process, whether a prior version of the rule existed, and whether the agency had provided for the prior version to “spring back” into existence in the event the challenged rule was invalidated.

As to administrative actions such as permits and licenses being processed at the time that the rules are invalidated, Measure 2 would seemingly prevent continued processing of those administrative actions until new rules could be promulgated. However, where there was a prior version of the challenged rules, the agency would have to decide whether the prior version of the challenged rules “springs back” into force upon invalidation of the challenged rules. It might enhance the likelihood that a court would concur with the prior rule “springing back” into force by an explicit statement that the prior rule was repealed, but would remain in full force and effect if the new rule were invalidated by a court or by operation of Measure 2. Otherwise, the agency would need to adopt a temporary rule until a rulemaking could be completed.

As to administrative actions that have been concluded, but are still within the 60-day statute of limitations for judicial review, the challenged rules would appear to remain the applicable law. However, if a petition for reconsideration were filed, the question facing the agency would be whether to apply the challenged rules that were the law at the time of the original decision or to reconsider the decision in light of the invalidation of the challenged rules. If the agency chooses to reconsider, it would have to decide whether the immediately prior version of the challenged rule, if any, “springs back” into force.

As to administrative actions that have been concluded and for which judicial review is no longer available, the challenged rules would appear to remain the applicable law. However, under the terms of some permits, licenses, or similar administrative actions, a change in law such as invalidation of the underlying administrative rules automatically changes the permit terms or serves as cause for modification or revocation and reissuance of the permit. Thus, the invalidation of challenged rules due to legislative inaction may drastically affect those who have secured permits, licenses or other rights under the challenged rules.

D. Automatic Invalidation of Administrative Rules Adopted on the Same Topic Unless Legislatively Approved

Measure 2 provides that, after an initial invalidation due to a Measure 2 petition followed by legislative inaction, the agency will retain the power to adopt administrative rules on the same topic as the invalidated rules. However, administrative rules issued subsequent to the invalidation of challenged rules (by legislative inaction) would be automatically subjected to legislative review. Measure 2 mandates legislative review even though no citizen files a Measure 2 petition challenging the subsequently issued rules. Those subsequently issued rules would be invalidated unless the Legislature affirmatively acted to approve the rules.

1. Agency Authority to Adopt Administrative Rules on The Same Topic as Previously Challenged and Invalidated Rules

Measure 2 specifies that initial invalidation of an administrative rule would not change a state agency's authority to issue administrative rules "pertaining to the issue or issues addressed by the disapproved rule."⁵¹ As described below in II.D.1., the authority of any state agency to issue administrative rules would essentially be terminated if, after initial invalidation pursuant to Measure 2, an agency adopts another rule on the same issue and that subsequently adopted rule is invalidated by legislative inaction.

2. Automatic Legislative Review of Subsequently Adopted Administrative Rules Addressing the Same Issue as Previously Challenged And Invalidated Rules

Measure 2 provides that "[if] a state agency adopts an administrative rule or rules addressing the same issue that was the subject of a rule that was disapproved under subsection (3) of this section," the Senate President shall initiate legislative review of the rule(s).⁵²

One practical problem with this provision of Measure 2 is that Measure 2 is not clear about how the Senate President is expected to execute this mandatory duty. The Senate President appears to be required, at the beginning of each legislative session, to review every administrative rule issued since the conclusion of the previous legislative session and determine whether the topic of that rule was the subject of any rule invalidated pursuant to a Measure 2 petition and legislative inaction during any prior legislative session. Unlike legislative review under the petition provision of Measure 2, there is no "notice" that triggers the Senate President's duty. Rather, Measure 2 appears to impose a substantial, ongoing duty on the Senate President.

Apart from the initial determination of which rules must be legislatively reviewed, the process for automatic legislative review would likely follow the same process as legislative review after filing of a Measure 2 petition, discussed in Section II.B.1. above.

3. Determining Whether a Subsequently Adopted Rule Addresses the Same Topic as the Previously Challenged and Invalidated Rule

The determination of whether the topic addressed by a subsequently adopted rule ("a new rule") was the subject of a previously challenged and invalidated rule ("the old rule") would be far more difficult than the drafters of Measure 2 appear to imagine. This determination would raise huge interpretational problems, partly because the determination is so critical to whether a new rule is subject to automatic invalidation and partly because of the confusing language used in Measure 2.

The phrase used by Measure 2 to describe whether two rules concern the same topic is "addressing the same issue that was the subject of a rule that was disapproved. (Emphasis added)." That phrase is confusing because it uses two terms, "issue" and "subject," that courts may interpret very differently.

The phrase could be read very broadly. For example, invalidation of any rule concerning water pollution could require the legislature to review all new water pollution rules and would invalidate all new water pollution rules unless they were approved by the legislature because they address the "same issue"

or “subject.” On the other hand, that phrase could be read very narrowly so that, unless a new rule involved the identical words or provisions of the old rule, a new rule not be deemed to deal with the “same issue” or “subject.”

The decision whether a new rule addresses the “same issue” or “subject” is to be made solely by the Senate President. Thus, Measure 2 grants the Senate President enormous power to decide whether to initiate legislative review and presumptive invalidation of administrative rules, subject only to the limitation that some rule on the topic must have been challenged and invalidated under Measure 2.

Measure 2 does contemplate some protection against abuse of this power by the Senate President because Measure 2 requires the Legislature to provide some process for judicial review of the Senate President’s determination as to whether a new rule addresses the same topic as an old, invalidated rule. However, Measure 2 chooses to tilt that judicial review in favor of a finding that a new rule does address the same issue as an old invalidated rule.

In interpreting the meaning of “same issue” or “subject,” the Oregon Supreme Court might look to whether the old rule addressed the same “subject” as the new rule. In doing so, the Court might consider the “subject” of the Measure 2 petition that led to invalidation of the old rule as an indication of the “issues” addressed by the old rule. The Court also might consider the “subject” of the bill introduced as a result of the Measure 2 petition, particularly as the subject is reflected in the relating clause, as an indication of the “issues” addressed by the old rule. The “subject” in both a Measure 2 petition and a bill introduced under Measure 2 would likely be written broadly – which would tend to lead the Senate President as well as the Court to require legislative review and presumptive invalidation of a great number of administrative rules, where any rule in that general subject area had been invalidated by virtue of a Measure 2 petition. The Court could instead look to the “subject” as specified by the rule or as specified by the Legislative Counsel in conducting the current legislative review process. On the other hand, the Court might decide that the use of the word “issue” in the phrase, in addition to the term “subject,” was intended to communicate something far narrower than the “subject” used to comply with single-subject requirements.

E. Removal of Agency Authority to Issue Effective Administrative Rules on Topics if the Legislature has Twice Failed to Approve an Administrative Rules on a Given Topic

If the Legislature has twice failed to approve administrative rules issued about the same topic, the administrative agency loses power to adopt rules on that topic without legislative approval of the rules. Measure 2 allows any person to seek a judicial determination that an administrative rule addresses the same topic, which would essentially declare the administrative rule invalid. Measure 2 requires the courts to resolve any uncertainty about whether an administrative rule addresses the same topic in favor of invalidating the rule.

1. Loss of Agency Authority to Adopt Effective Administrative Rules

Measure 2 provides: “If an administrative rule or part of a rule is disapproved under the provisions of this subsection, any rule adopted by a state agency that addresses the same issue that was the subject of

the disapproved rule is of no force and effect until such time as the Legislative Assembly by law approves the rule.”⁵³

Measure 2 could be read to completely remove the authority of state agencies to conduct rulemaking addressing any topic if the Legislature has twice failed to approve a rule on that topic. However, the wording of Measure 2 suggests that agencies would still be allowed to adopt such rules, but the effective date of such rules would be delayed until the Legislature approves the rules. The difference between those two interpretations may have little practical significance. The bottom line is that once the legislature has twice failed to approve rules on a given topic, state agencies can do no more than make legislative proposals (perhaps in the form of administrative rules with a delayed effective date) regarding that topic.

2. Judicial Determinations of Whether Administrative Rules Are Effective Without Prior Legislative Approval

Measure 2 provides that “Any person may seek a judicial determination as to whether an administrative rule adopted by a state agency after disapproval of a rule under this subsection addresses the same issue that was the subject of the disapproved rule.”⁵⁴

Measure 2 would cast a cloud over all administrative rules adopted that related in any manner to a topic addressed by rules that twice failed to secure legislative approval. Agencies could address the uncertainty about whether they have authority to adopt rules that are effective without prior legislative approval by requesting the courts to review all such rules. More likely, agencies would assume their rules were valid, until another party sought a judicial determination of the rule’s validity.

As with judicial review of the Senate President’s determination that a new rule is on the same issue or subject as an old, invalidated rule,⁵⁵ Measure 2 chooses to tilt judicial determinations on whether agencies have rulemaking authority without prior legislative approval in favor of removing agency authority to make rules.

F. The Status of Administrative Rules Approved by the Legislature

Another question is whether the act of legislative approval of rules transforms them into statutory law. Because legislative approval of rule approval bills requires essentially a complete legislative process, including gubernatorial opportunity for veto, the courts might consider such rules to be transformed into statutes. If so, the Measure 2 petition process has drastic consequences even if the legislature concurs with an administrative rule. First, the agency could lose its power to change the rule, if the rule is essentially now a statutory provision. Second, the agency could lose its flexibility in interpreting the rule, because the courts would no longer afford any deference to the agency’s interpretation of the rule.

If the courts do not consider such rules to be transformed into statutory law by legislative approval, then presumably even legislatively approved rules remain subject to attack by successive Measure 2 petitions.

Question 2: What are the Existing Processes Available to Review Administrative Rules?

Measure 2 appears to be prompted by a perception that state agencies are out of control and frequently adopt administrative rules that are contrary to statute or clearly expressed legislative intent. Measure 2 supporters appear to reason that, if citizens are upset with a rule, automatic invalidation of the rule unless the Legislature approves the rule is necessary to keep state agencies in check. This section assesses the validity of the perception that state agencies frequently act inconsistently with their statutory mandate and the conclusion that Measure 2 is therefore necessary to provide a mechanism to control rebel agencies. It seeks to answer the questions:

- C how often do administrative agencies adopt rules contrary to statutes enacted by the legislature?
- C what are the existing processes available to review administrative rules and how frequently are these processes used?

I. How Often do State Agencies Adopt Administrative Rules that may be Contrary to Statute?

The available data indicate that administrative agencies adopt rules that may be contrary to statute relatively infrequently. Two institutions regularly conduct independent and impartial analyses of whether administrative rules are contrary to statute: the Office of the Legislative Counsel in conducting the existing process for legislative review of administrative rules, and the courts in conducting judicial review of administrative rules.

Based upon 1,000 packages of administrative rules submitted to the Legislative Counsel during June 1998 to December 1999, 2.3% of the rules contained some provision that was contrary to statute in the Legislative Counsel's opinion. While some inconsistencies were minor, even typographical errors, others were more substantive. The Office of Legislative Counsel estimates that 90% of those 23 rule packages were changed by the agency in accordance with Legislative Counsel's recommendations.⁵⁶ Overall, the rules that remained contrary to statute in the impartial opinion of the Legislative Counsel amounted to 1/5 of 1% of all rules reviewed.

Unlike the Legislative Counsel, the courts actually have the power to invalidate rules if the rules are inconsistent with statute. Between 1990 and the present, Oregon state agencies have adopted somewhat more than 7,000 packages of administrative rules.⁵⁷ Based upon judicial opinions published from 1990 to the present, approximately 1/2 of 1% of those rules were challenged on the grounds that they were contrary to statute.⁵⁸ Of those challenges, the courts upheld the rules in their entirety 68% of the time and invalidated some portion of the rule 32% of the time. Overall, the courts concluded that 1/6 of 1% of the rules adopted by state agencies were contrary to statute.

The available data does not support the contention that state agencies frequently adopt administrative rules that are contrary to statute or clearly expressed legislative intent.

EXISTING PROCESSES FOR REVIEW OF ADMINISTRATIVE RULES

- C Current process for impartial review of the constitutionality of administrative rules and the compliance of the rules with statute, conducted through the Legislative Counsel
- C Enacting legislation amending, disapproving, or removing agency authority to adopt administrative rules, through normal legislative process.
- C Controlling state programs and implementing rules through the budgetary process
- C Voter-initiated legislation amending, disapproving, or removing agency authority to adopt administrative rules, through existing initiative process contained in the Oregon Constitution.
- C Petition to the agency to amend or repeal administrative rules
- C Judicial review of administrative rules for consistency with the Constitution and with the agency's statutory authority
- C Review of agency actions under the administrative rules by a neutral administrative law judge, conducted through a formal, contested case hearing – with possible invalidation of the rule as contrary to statute
- C Judicial review of agency actions under the administrative rules, including the constitutionality of the rules and the consistency of the rules with the agency's statutory mandate

II. What are the Existing Processes Available to Review Administrative Rules in order to Retain Control of State Agencies?

There are eight existing processes available to review state administrative rules and prevent state agencies from acting outside of their authority or contrary to legislative intent. First, the Legislature already reviews administrative rules – but through a mechanism that differs significantly from the process proposed under Measure 2. Second, the Legislature can enact legislation that curtails the authority of the state agency to adopt administrative rules or that provides greater guidance to the state agency about the shape of the program desired by the Legislature. Third, the Governor and the Legislature can control state programs and state agency implementation of those programs in administrative rules through the budgetary process.⁵⁹ Fourth, through the initiative process, voters can directly pass legislation curtailing state agency authority or providing more detailed guidance to the agency about the desired shape of state programs. Fifth, interested persons may petition the agency to amend or repeal administrative rules. Sixth, any person can seek judicial review of administrative rules to assure that they are not contrary to the Constitution or the statute that authorized the rules. Seventh, if an agency seeks to apply administrative rules to a person, that person can seek an administrative hearing in front of a neutral administrative law judge to challenge the rules and their application to the person. Finally, after an agency has applied administrative rules to a person, that person can seek judicial review of the agency’s rules and application of those rules to the person. These eight avenues for challenging administrative rules adopted by state agencies are described in somewhat more detail below.

B. Legislative Review of Administrative Rules

Oregon law already provides a mechanism for legislative review of administrative rules, which assures that administrative rules that may be outside the scope and intent of the agency’s enabling legislation or that may be unconstitutional receive a high degree of legislative scrutiny.

State agencies submit copies of all administrative rules that they adopt to the Legislative Counsel, who is in charge of the Office of Legislative Counsel.⁶⁰ The Legislative Counsel is appointed by the Legislative Counsel Committee, a joint committee of 11 legislators including the President of the Senate and the Speaker of the House.⁶¹ The Office of the Legislative Counsel is a professional, impartial legal staff that provides legal services to the entire Legislature.⁶²

The Legislative Counsel is required by statute to review administrative rules proposed or adopted by state agencies if directed by the Legislative Counsel Committee⁶³ or if requested in writing by any member of the Legislature.⁶⁴ The Legislative Counsel may also review proposed or adopted administrative rules on his own initiative.⁶⁵ In addition, the Legislative Counsel may review adopted administrative rules upon the written request of any person affected by the rule.⁶⁶ In practice, the Legislative Counsel reviews all administrative rules submitted by state agencies.⁶⁷

The Legislative Counsel reviews administrative rules, answering two questions posed by statute⁶⁸ and a third question requested by the Legislative Counsel Committee:

1. Does the rule appear to be within the intent and scope of the enabling legislation?
2. Does the rule raise any constitutional issue other than described in Question 1?
3. Does violation of the rule subject the violator to a criminal or civil penalty?⁶⁹

Copies of the Legislative Counsel's review must be sent to the Legislative Counsel Committee, the state agency, the member of the Legislature if the review was requested by a member, and the person affected by the rule if the review was requested by that person.⁷⁰ Copies of the Legislative Counsel's review are also available to the public via the Internet.⁷¹

If the Legislative Counsel's administrative rule review indicates that the rule is not within the intent and scope of the agency's enabling legislation or that the rule is unconstitutional, then the state agency must either respond in writing to that determination or appear at the Legislative Counsel Committee, indicating whether the agency intends to repeal, amend or take other action with respect to the rule.⁷² If the Legislative Counsel Committee is not satisfied with the state agency's response, the Committee may request that representatives of the agency as well as representatives of the Oregon Department of Administrative Services (DAS) appear before the Committee for the purpose of further explaining the agency's position.⁷³ The Committee may also direct Legislative Counsel to send a review to the Senate President or Speaker of the House, who in turn may refer a review to the appropriate legislative committees.⁷⁴

Thus, an adverse administrative rule review by the Legislative Counsel assures that the state agency will further scrutinize the rule. After considering the rule again, if the state agency does not respond in a satisfactory manner, the Committee has the option of elevating the matter to DAS, which essentially exercises the power of the Governor with respect to legislation and state agency budgets. Ultimately, the Committee has the option to seek legislative action through referral of a review to the Legislature's presiding officers and legislative committees. The current legislative process for reviewing administrative rules is designed in a manner to assure that state agencies are highly responsive to the Legislative Counsel's presumably impartial opinion that the agency is acting outside the scope or intent of its enabling legislation.

One thousand administrative rule packages were submitted to the Legislative Counsel for review between June 11, 1998 and December 6, 1999. Of those 1,000 rules, 23 rules were deemed to be outside the scope and intent of the Legislature, either in whole or in part. Of those 1,000 rules, three were deemed to be unconstitutional.⁷⁵ Many of the errors apparently made by agencies whose rules received adverse reviews from the Legislative Counsel were quite minor in nature,⁷⁶ although others were substantive.⁷⁷ As indicated above, the Legislative Counsel's review successfully eliminated 90% of the problems identified by the Legislative Counsel.

The current legislative review process differs substantially from that proposed by Measure 2. First, the current process is triggered much more readily. It can be triggered by a single request by the Legislative Counsel Committee, a legislator or an affected person. The first round of the legislative review under the Measure 2 process would not be triggered unless a petition was signed by 10,000 qualified voters.

Second, the current process involves an independent and impartial analysis by the Legislative Counsel of whether the administrative rule is either contrary to the enabling statute or unconstitutional. Legislative review under the Measure 2 process would be subject to the vagaries of the legislative process, such as lobbying by special interests, limited time for analysis given the press of other legislative business, pressures to adjourn in a timely manner, and individual legislator's idiosyncracies. This difference is particularly significant given the most critical difference between the current legislative review process and the Measure 2 legislative review process. The current process allows the rule to live unless either legislative pressure through the Legislative Counsel Committee or legislative amendments cause the agency to amend or repeal the rule. It assumes the rule is valid and requires legislative action to kill the rule. On the other hand, the Measure 2 process kills the rule unless the Legislature affirmatively acts to approve the rule, essentially assuming that the rule should be invalidated.

B. Legislative Action to Disapprove Rules or Otherwise Alter Programs Administered by State Agencies

Another obvious mechanism for invalidating an objectionable administrative rule or an entire state program is for the Legislature to utilize the standard legislative process (see Appendix 2) to enact legislation that in essence invalidates the administrative rule or directly changes the state program that the rule implements. The Legislature can decide on public policy grounds, as opposed to the narrower grounds considered in the current legislative review process, to force an agency to change its administrative rules -- either by changing the agency's authority to adopt rules or imposing different or additional statutory requirements that must be incorporated into the agency rules.

This process is utilized constantly,⁷⁸ as the Legislature makes the adjustments that it desires in various state programs. Agencies are called upon on a routine basis to change their rules in order to address statutory changes made during each legislative session.

The ordinary legislative process again significantly differs from the Measure 2 process. With this process, the burden of invalidating or changing an objectionable administrative rule remains upon the opponents of a rule. With the Measure 2 process, the burden of securing legislative approval of a rule is shifted to the supporters of a rule.

C. Review of State Programs and Implementing Rules Through the Budgetary Process

One of the least transparent and direct, but ultimately most powerful, means by which the Legislature and the Governor control the substance of state programs is the budgetary process.⁷⁹ To put it simply, money talks and state agencies listen.

State agencies are given budgets for a biennium, a two-year period. The budget cycle is designed to coincide with the biennial legislative session. Thus, state agencies begin biennial budget planning in the early spring of even-numbered years, roughly one year before the legislative session starts (and approximately six months after they begin operating on the most recently approved biennial budget). The Governor's

budget is prepared during the fall of even numbered years, just before the legislative session starts. As the legislative session begins in January of odd numbered years, much of the work of the Legislature is devoted to the budget. The budget ultimately enacted by the Legislature takes effect in July, or whenever the Legislature passes and the Governor signs the necessary appropriations bills.

The key players in the budgetary process are the Department of Administrative Services (DAS) professional budget analysts who prepare the initial draft of the Governor's budget based upon state agency requests, the DAS and Governor's staff who consider appeals by state agencies of the decisions made on the initial draft, the professional legislative budget analysts who make recommendations about the Governor's final proposed budget, and the legislators who serve on the Joint Ways and Means Committee, who largely shape the final state agency budgets.

In the event that a state agency is adopting rules that implement a state program in a manner objectionable to the Governor or Legislature, the state agency faces a real danger that the appropriations supporting that program will be cut or eliminated. In addition, the state agency's overall budget is placed at risk of crippling cuts. Thus, the Governor and the Legislature in fact retain substantial, albeit indirect and almost invisible, influence over the substantive content of state programs and the rules implementing those programs.

The Legislature may also essentially direct certain agency actions by inserting a note into the budget, which agencies can ignore, but only by placing their future budgets in grave peril.

D. Voter Initiatives to Enact Legislation Disapproving Rules

Under the Oregon Constitution, the voters have direct legislative power to enact new laws or change existing laws through the initiative process.⁸⁰

Any citizen, acting individually or on behalf of an organization, may sponsor an initiative. The sponsors or "chief petitioners" file the proposed initiative petition with the Secretary of State, who determines whether the petition meets the procedural requirements of the Oregon Constitution for initiatives.⁸¹ At the same time, the Attorney General will prepare a ballot title for the petition. Both the Secretary of State's determination about whether the petition meets the procedural requirements and the Attorney General's ballot title are subject to public notice and comment, and to expedited judicial review to allow timely circulation of the petition.

After the initiative petition and certified ballot title are approved, the chief petitioners obtain approval from the Secretary of State of the cover and signature sheets that will be circulated for signature. The chief petitioners may then employ the help of paid or volunteer circulators to obtain signatures. At present, 66,786 signatures of qualified voters are required to place a statutory initiative on the ballot.

Once the signatures are collected, the Secretary of State verifies the validity of the signatures and places the initiative on the ballot. At present, initiatives become law if a simple majority of the voters approve the

initiative, unless the initiative imposes a supermajority requirement.

There are obvious differences between invalidating administrative rules through the initiative process and through the Measure 2 process. First, Measure 2 petitions require far fewer signatures than initiative petitions to trigger the process – 10,000 signatures as compared with nearly 67,000 signatures. Second, Measure 2 petitions result in automatic invalidation of rules unless the Legislature acts, while initiatives enact legislation invalidating rules only if a majority of the voters agree.

E. Petition for Agency Action to Amend or Repeal Administrative Rules

Any “interested” person may petition an agency to amend or repeal any administrative rule in accordance with the Attorney General’s uniform rule for the submission, consideration, and disposition of rulemaking petitions.⁸² The petition must specify the change to be made and must explain the general effect of the rule, not just the effect on the petition.⁸³ The agency must act on the petition, either by denying the petition in writing or by initiating rulemaking.⁸⁴ The agency does not need to explain its decision to deny a petition.

Petitions to amend or repeal administrative rules also differ from the Measure 2 process in significant respects. Unlike the Senate President, the agency retains discretion not to initiate rulemaking changes. In addition, unless the agency acts, the existing rule remains in effect, whereas the Measure 2 process invalidates the existing rule unless the Legislature acts.

Although precise statistics are not available, the petition device seems to be utilized infrequently. This probably derives from the fact that the petition provision only allows “interested” persons or persons with a legally recognized interest or standing to file a petition.⁸⁵ Often those who object to a rule have a general philosophical objection, rather than a legally recognized economic interest. Additionally, given the opportunities provided for public input during the typical rulemaking process, petitioners are unlikely in a petition to provide arguments or evidence much different from that already considered by the agency. Thus, prospective petitioners may believe, rightly or wrongly, that resorting to the administrative petition process is futile.

F. Judicial Review of the Facial Validity of Administrative Rules

Any person may challenge an administrative rule adopted by a state agency and ask the Oregon Court of Appeals to determine:

- C whether the rule was adopted in compliance with appropriate rulemaking procedures specified either by the Oregon Administrative Procedure Act or by the specific statute that provides the agency with authority to adopt a rule
- C whether the agency had jurisdictional authority to promulgate the rule

C whether the rule was contrary to any express or implied statutory standard

C whether the rule violates the Oregon or United States Constitutions.

This particular mechanism for judicial review of administrative rules is somewhat limited. The Court of Appeals will only consider *facial* challenges to a rule. Persons seeking to argue that the rule violates statutory or constitutional provisions *as applied* by the agency in a given situation must utilize the judicial review mechanism described below in Question 2, Part I, Section G.

As indicated before, all legal challenges in the courts to administrative rules adopted by state agencies occur relatively infrequently; roughly ½ of 1% of administrative rules are challenged. For the most part, legal challenges occur only when an individual or group believes that they will be significantly affected by the rule and when there is some plausible argument that the rules are invalid. And indeed, the courts do invalidate one of three administrative rules that are challenged. The rate of judicial invalidation is evidence that Oregon courts carefully scrutinize claims that challenged rules are contrary to statute or clearly expressed legislative intent. Indeed, unlike the federal courts, Oregon courts refuse to give deference to agency interpretations of statutes. Instead, Oregon courts insist on conducting their own independent examination of what the statute demands and whether the agency's rule complies with that statute.

G. Administrative Review of Agency Actions that Apply an Administrative Rule to an Individual

After an agency makes a tentative decision applying an administrative rule to an individual in a given situation, the person is frequently entitled to a formal administrative hearing, known as a "contested case" hearing. Contested case hearings are required when constitutional due process requires a formal hearing, when a statute or administrative rule requires a formal hearing, when the state is deciding whether to issue, suspend, or revoke a license, and when the state is deciding whether to revoke or suspend any other right or privilege.

Contested case hearings are presided over by neutral administrative law judges, following either the Attorney General's model contested case procedures or the agency's own contested case procedures. The administrative law judge renders a decision, complete with findings of fact and conclusions of law. The agency either adopts the ALJ's decision as its own or exercises its limited power to alter the ALJ's findings of facts.

The person to whom an administrative rule is being applied can challenge that rule in a contested case hearing, claiming that, for example, the rule violates the agency's statutory mandates. If the ALJ or the agency becomes convinced that the agency's proposed action under the rule is contrary to statute, then the ALJ or the agency must render a decision in accordance with the statute.⁸⁶ While the agency is generally bound to follow its own administrative rules, it can determine that those rules are invalid

H. Judicial Review of Agency Actions that Apply an Administrative Rule to an Individual

If an agency takes an action that applies an administrative rule to an individual, that action is subject to judicial review.⁸⁷ In examining the agency action, the court can also review whether the administrative rule was adopted using proper procedures, is consistent with the agency's statutory authority and mandates, and is constitutional.

For example, the state could revoke a pharmacist's license because the pharmacist dispensed prescription drugs without a prescription. In reviewing the state agency's action, the court would determine whether there was substantial evidence supporting the state's conclusion that the pharmacist had dispensed a drug on the list of prescription drugs without a prescription. The pharmacist could also claim that a drug had been improperly added to the list of prescription drugs established by administrative rule – because adding it to the list was contrary to statute, unconstitutional, or had not been done following the appropriate rulemaking procedures.

Roughly 2/3 of the legal challenges to administrative rules are facial challenges to the rule filed with the Court of Appeals. The remaining 1/3 of legal challenges are as applied challenges, usually raised in the context of a contested case hearing.⁸⁸

Question 3: What Rules would Most Likely be Challenged by Measure 2 Petitions?

The answer to this question is necessarily speculative. This answer is based upon an examination of the specific targets and general agendas of organizations supporting Measure 2 as well as an examination of the feared targets of organizations opposing Measure 2. This information has been gathered by reviewing voter pamphlet statements, publicly available information from organizational websites, and contacts with various organizations. This answer is also based upon a review of the rules typically subjected to review by the Legislative Counsel and by courts.

I. The Most Immediate Targets: Rules Targeted by Measure 2 Supporters

There are three obvious targets of Measure 2. First and foremost, supporters of Measure 2 would likely mount a broad scale attack on the rules used to administer Oregon's land use planning process – especially the rules designed to protect farmlands and forest lands from urban development, such as the prohibition against residential development in exclusive farm zones, the requirement that “farmers” engage in legitimate farming activity, and the rules containing urban development within urban growth boundaries.⁸⁹ Supporters of Measure 2 would probably also target water quality regulations design to protect salmon, trout, and other aquatic life.⁹⁰ Finally, supporters of Measure 2 would likely target various state rules imposing fees upon those seeking state services as well as state rules imposing fines upon those violating state laws.⁹¹ These rules have been specifically targeted by the chief petitioners of Measure 2 and the organizations that they have created, such as Oregonians in Action, Citizens for Accountability in Administrative Rules, Oregon Family Farm PAC and Taxpayer Association of Oregon. They are also rules that the other public supporters of Measure 2 seem most likely to attack.

Other public supporters of Measure 2 do not indicate additional specific rules that they oppose and that might in turn be targeted for a Measure 2 petition. However, the policy agendas of those organizations suggest the types of rules that the organizations might target for a Measure 2 petition. Apart from the chief petitioners and their organizations, five organizations have published their support for Measure 2 in the voters pamphlet: the Parents Education Association, the Oregon Education Coalition, the Oregon Association of Realtors, the Oregon Cattlemen's Association, and the Oregon State Grange.

Two organizations are specifically concerned with educational issues – the Parents Education Association and the Oregon Education Coalition. The agenda of those organizations is promotion of homeschooling and private schooling. Thus, Department of Education rules imposing requirements on parents who are homeschooling their children or on private schools appear to be the most likely targets for these organizations. Additionally, Taxpayer Association of Oregon identifies rules of the Department of Education as some of the “bad” rules that it expects to be affected by Measure 2.

The agenda of the Oregon Association of Realtors is concerned with promoting real estate development. From the OAR 2000/2001 legislative policy statement, it appears that the OAR opposes:

- C many features of the current land use planning system in Oregon
- C environmental regulations requiring removal of asbestos, lead paint, underground storage tanks and wood stoves
- C rules that might restrict the availability of water for real estate development.
- C rules restricting the use of mitigation to compensate for destruction of wetlands.⁹²

Thus, Department of Land Conservation and Development land use rules, rules of the Department of Environmental Quality regulating asbestos, lead paint, underground storage tanks and wood stoves, the Water Resources Department rules, and the Department of State Land rules on wetland mitigation appear to be the most likely targets of Measure 2 petitions supported by the OAR.

Little of the agenda of the Oregon Cattlemen’s Association seems directly aimed at state administrative rules.⁹³ However, the OCA opposed efforts to enforce Oregon’s water quality standards for temperature – which have been used to argue against allowing grazing near streams and rivers.⁹⁴ These standards are designed to protect salmon, trout, and other aquatic life. Similarly, little of the Oregon State Grange’s agenda seems directly aimed at state administrative rules, except for the Grange’s attack on land use restrictions on less productive farm and forest lands (also known as secondary lands).⁹⁵ Thus, apart from the rules already identified as likely targets, there is no information about what rules the Oregon Cattlemen’s Association and the Oregon State Grange find objectionable.

Taxpayer Association of Oregon also cites the Department of Motor Vehicles, the Oregon Department of Transportation, and the Children’s Services Division (now known as Services to Children and Families) as having “bad” rules that would be affected by Measure 2. However, TAO does not identify which rules are particularly objectionable. Thus, it is difficult to predict which of the rules of these agencies might become that target of a Measure 2 petition.

This analysis indicates that the most immediate targets of Measure 2 are a host of state rules that regulate natural resources use and protect the environment as well as state rules that regulate public and private education.

II Long Term Targets: Rules that Measure 2 Opponents Identify as Potential Targets

The opponents of Measure 2 vociferously state that the mischief of Measure 2 is not limited to state rules affecting the environment and natural resources. Indeed, they have identified a wide spectrum of rules that could be affected by Measure 2, including:

- C Environmental and Natural Resources
Rules protecting fish and wildlife, parks, trails, open space, forests, wetlands, scenic areas, beach access, air and water quality, drinking water, rules governing toxic waste cleanup, as well as land use goals and regulations

- C Worker Protection
Rules affecting worker health and safety, worker's insurance such as worker's compensation and unemployment insurance, minimum wage and anti-discrimination enforcement, employer/employee relations

- C Health
Rules implementing the Oregon Health Plan, communicable disease control, privacy of medical records, nursing home licensing and standards, restaurant and foodcart health inspections, ambulance availability and standards

- C Consumer Protection
Rules regarding utility rates and billing, renter and senior mobile parks, building safety codes, nursing home resident rights, food growing and packaging standards

- C Crime
Rules providing crime victim compensation, sentencing guidelines, sex offender registration, standards for employing law enforcement officers

- C Education
State curriculum standards and teacher licensing rules

Most of these areas do not appear to be the immediate targets of Measure 2 supporters. However, Measure 2 opponents have accurately identified key areas of state government that currently use administrative rules to provide critical elements of state programs. While these areas of government are not the most immediate targets of Measure 2 petitions, Measure 2 opponents highlight areas where a small group of citizens could fund a Measure 2 petition and potentially impair significant state programs unless the Legislature and Governor acted to approve the administrative rules supporting those programs. Thus, these areas cannot be regarded as likely targets of Measure 2 in the near term, but rather as potential long-term targets of Measure 2.

Question 4: What is the Potential Impact of Measure 2 on Oregon's Land Use Planning Laws?

I. A Brief Description of Oregon's Land Use Planning System

A complete description of Oregon's land use planning system is far beyond the scope of this report. However, to understand the potential impact of Measure 2 on Oregon's land use planning laws, it is necessary to understand a bit about how that system operates.⁹⁶

In 1973, the Legislature established the Land Conservation and Development Commission (LCDC)⁹⁷ and the Department of Land Conservation and Development (DLCD).⁹⁸ The DLCD is actually comprised of the seven-member, governor-appointed LCDC,⁹⁹ the Director of the DLCD and their subordinate officers and employees.¹⁰⁰ The Legislature created these administrative bodies because it found that "the promotion of coordinated statewide land conservation and development requires the creation of a statewide planning agency to prescribe planning goals and objectives to be applied by state agencies, cities, counties and special districts throughout the state."¹⁰¹ The Legislature established a two-tier administrative system because, with the exception of adoption and enforcement of statewide planning goals and objectives, cities and counties remain as "the agencies to consider, promote and manage the local aspects of land conservation and development for the best interests of the people within their jurisdictions."¹⁰²

This two-tier state-local system relies on the establishment of statewide goals and local comprehensive plans and land use regulations. The DLCD must prepare and the LCDC must adopt "goals and guidelines for use by state agencies, local governments and special districts in preparing, adopting, amending and implementing existing and future comprehensive plans."¹⁰³ The 19 statewide goals currently in place run the gamut of land use conservation and development concerns, including: citizen involvement and land use planning (Goals 1 and 2),¹⁰⁴ farm (Goal 3)¹⁰⁵ and forest lands (Goal 4),¹⁰⁶ urbanization (Goal 14),¹⁰⁷ environmental quality (Goal 6),¹⁰⁸ and coastal shorelands (Goal 17).¹⁰⁹ These goals express the state's policies as "mandatory statewide planning standards."¹¹⁰ "Guidelines" are, in comparison, "suggested approaches designed to aid cities and counties in preparation, adoption and implementation of comprehensive plans in compliance with goals."¹¹¹ As such, guidelines are "advisory and [do] not limit state agencies, cities, counties and special districts to a single approach."¹¹²

The DLCD must "acknowledge" a local government's comprehensive plan if that plan is in compliance with the goals.¹¹³ In turn, all comprehensive plans and land use regulations adopted by a local government to carry out those comprehensive plans must be in compliance with the goals within a year after the LCDC approves a goal.¹¹⁴ These comprehensive plans are "a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands."¹¹⁵ Finally, comprehensive plans are "the basis for more specific rules and land use regulations that implement the policies expressed through the comprehensive plans."¹¹⁶ If a land use action taken by a city or county is not consistent with an acknowledged comprehensive land use plan, then the city or county must separately justify the action as consistent with statewide land use goals.¹¹⁷ Comprehensive plans are subject to periodic review. State agency projects and permit decisions must also be consistent with statewide planning goals or an acknowledged local plan.¹¹⁸

The DCLD has also adopted detailed administrative rules implementing state land use goals, which state and local agencies must follow. DCLD has adopted rules that provide detailed substantive requirements regarding statewide planning goals.¹¹⁹ DCLD has also adopted important procedural rules to guide the land use planning process.¹²⁰

II How are Land Use Rules Formulated in Oregon?

The most significant land use rules, the statewide planning goals, are adopted or amended using a process that requires an unusual amount of public input.

DLCD is required to hold at least 10 public hearings throughout the state, including at least 2 in each congressional district, regarding goals and guidelines.¹²¹ It is also required to implement any other provision for public involvement developed by the State Citizen Involvement Advisory Committee and approved by DLCD.¹²² DLCD is then required to submit the proposed goals and guidelines or proposed amendments to the LCDC, the Local Officials Advisory Committee, the State Citizen Involvement Advisory Committee, and the Joint Legislative Committee on Land Use for review.¹²³ LCDC is then required to consider the comments of the two advisory committees and the Joint Legislative Committee in adopting or amending goals and guidelines.¹²⁴

Prior to adopting the proposed goals and guidelines, LCDC must hold a further public hearing on the proposed goals and guidelines or amendments.¹²⁵ Copies of the proposed goals and guidelines, or amendments, must be provided to the Governor, the Joint Legislative Committee on Land Use, affected state agencies and special districts and to each local government.¹²⁶ Obviously, this process is far more substantial than the typical OAPA notice, comment, and opportunity for hearing process for ordinary administrative rules.

State rules implementing the statewide planning goals have been the focus of much controversy. Unlike the goals and guidelines, these implementing regulations are only subject to the standard notice, comment and opportunity for hearing process. In reality, though, LCDC has sought far more public input than that required by the OAPA. For example, where a rule implementing a state land use goal is being proposed, DLCD typically makes both the proposed amendment of the goal and the proposed rule available for comment at the 10 regional public hearings and additionally scheduled community workshops. DLCD may also schedule multiple state-wide public hearings and work sessions to allow adequate time for consideration of complex or controversial matters.¹²⁷

III. What are the Existing Processes Available to Review Oregon Land Use Rules?

As indicated above, there are a number of different processes available to obtain review of administrative rules and prevent state agencies from acting outside of their authority or contrary to legislative intent. This section discusses how these processes operate in the land use context. It also identifies additional processes that are available to review Oregon land use rules in particular and assure that the DLCD is acting appropriately.

A. Legislative Review of Land Use Rules

The DLCD must adopt by rule in accordance with the Oregon APA or by goal under ORS chapters 195, 196 and 197 (Oregon statutes concerning land use) any statewide land use policies that it considers necessary to carry out ORS chapters 195, 196 and 197.¹²⁸ As a state agency, DLCD must submit copies of all adopted administrative rules to the Legislative Counsel.¹²⁹ Obviously the rules DLCD adopts as statewide land use policies necessary to carry out ORS chapters 195, 196 and 197 are rules that DLCD submits to the Legislative Counsel for review.¹³⁰ The Oregon Supreme Court has also determined that goals – though only referenced by title in the Oregon Administrative Regulations¹³¹ and specifically mentioned apart from rules in the land use statutes¹³² – are rules subject to the Oregon APA.¹³³ Therefore, the DLCD also submits, and the Legislative Counsel reviews, statewide planning goals.¹³⁴

It should be noted that DLCD's acknowledgment of a comprehensive plan is an adjudicatory matter, not a rule subject to Legislative Counsel review.¹³⁵

B. Legislative Action to Disapprove Land Use Rules

The second mechanism for invalidating administrative rules is for the Legislature to force an agency to change its administrative rules by changing the agency's authority to adopt rules or imposing different or additional statutory requirements. The Legislature has indeed controlled the DLCD's adoption of land use rules in Oregon by this method. For example, since the 1973 establishment of the LCDC, the Legislature has limited its rulemaking authority by requiring it to:

- C allow for the diverse administrative and planning capabilities of local governments;
- C assess what economic and property interests will be, or are likely to be, affected by the proposed rule;
- C assess the likely degree of economic impact on identified property and economic interest; and
- C assess whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.¹³⁶

These economic considerations restrict DLCDs ability to promulgate rules by determining which rules it must conclude are "necessary." Additionally, the Legislature enacted Senate Bill 3661 in 1993, which greatly affected how farm and forest lands are protected.¹³⁷ Finally, by DLCD's own account, the Legislature has considered more than seventy bills in the 1995 and 1997 sessions that would have weakened the program.¹³⁸

C. Control of DLCD Through the Budgetary Process

DLCD, like any other state agency, is subject to legislative and gubernatorial control through the budgetary process.

D. Voter Initiatives to Enact Legislation Disapproving State Land Use Rules

Rules adopted by DLCD appear to be potentially as affected by the initiative process as any other administrative agency. In fact, three different initiatives to eliminate state oversight of local land use plans have been proposed and defeated; these, if enacted, would have taken away DLCD's statutory purpose.¹³⁹ Additionally, the Oregon Court of Appeals recently addressed the potential effects of initiatives on administrative land use matters, namely the siting of correction facilities.¹⁴⁰ The court reiterated that "a local initiative may deal only with legislative decisions—laws of general applicability and permanent nature—not with administrative decisions, which involve the details of implementing established policy."¹⁴¹ The court approved the initiative because it did "not attempt to change a specific siting decision of the county but, rather, to change the framework within which the county makes siting decisions."¹⁴² It specifically noted "the motives of the sponsors of the initiative, including their apparent desire to overturn a specific siting decision, are not relevant to whether the initiative that they sponsored is administrative or legislative."¹⁴³ Similarly, it did not find the fact that the proposed initiative would conflict with state land use laws particularly relevant.¹⁴⁴ This case would suggest that nothing would prevent consideration of an initiative that would have sweeping effects on state land use law if the initiative was legislative in character.

E. Petition for DLCD to Amend or Repeal Land Use Rules

As mentioned above, DLCD must adopt rules "in accordance with the provisions of ORS 183.310 to 183.550" (the Oregon APA).¹⁴⁵ Rules adopted by DLCD appear to be subject to the petition process under the Oregon APA. However, this process is not frequently used.

F. Judicial Review of the Facial Validity of Land Use Rules

A person that is not a party to an order or a contested case may seek a judicial review of the validity of a state land use rule from the Court of Appeals.¹⁴⁶ This review is limited to an examination of the rule under review, the statutory provisions authorizing the rule, and copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures.¹⁴⁷ Additionally, the court must declare the rule invalid only if it finds that the rule violates constitutional provisions, exceeds the statutory authority of the agency or was adopted without compliance with applicable rulemaking procedures.¹⁴⁸

The courts, however, have been willing to rein in DLCD rules when they exceed the agency's statutory authority.¹⁴⁹

Courts have upheld state land use rules when challenged because DLCD enjoys broad statutory authority. DLCD has authority to adopt rules "that it considers necessary to carry out ORS chapters 195, 196 and 197" – essentially the entire collection of the state's land use laws.¹⁵⁰ The only substantive limitations on its general authority are the requirements to allow for "diverse administrative and planning capabilities" among the local governments and to consider costs and alternatives to proposed rules.¹⁵¹

The unsuccessful challenges have been conflicts in the specialized area of limited uses of high value farmland in exclusive farming use (EFU) zones.¹⁵² In these cases, DLCD has interpreted its goals to limit

uses on certain land that the county would otherwise be able to allow; the courts have found that this has been within DLCD's statutory authority.¹⁵³

G. Administrative Review of Land Use Decisions Applying State Land Use Rules to an Individual

DLCD is responsible for acknowledging comprehensive plans and amendments as complying with state land use goals and rules. Certainly, in the course of determining compliance with the state land use goals and rules, DLCD could decide that a goal or rule was unconstitutional, otherwise unlawful, or poor public policy. If it did, DLCD would enjoy the same power as other agencies not to commit unlawful or unconstitutional acts. On those two grounds, DLCD could decide to acknowledge the comprehensive plan or amendment despite its non-compliance with a state land use goal or rule, and then set about amending the goal or rule in question. If DLCD concluded that a goal or rule was simply poor policy, it would need to amend the goal or rule in question before acting to acknowledge the plan.

Similarly, DLCD reviews some agency orders,¹⁵⁴ such as acknowledgment orders,¹⁵⁵ orders to discontinue a prohibited use,¹⁵⁶ siting decisions for destination resorts,¹⁵⁷ and orders to require a local government to undergo a periodic review.¹⁵⁸ If it concluded that a state land use goal or rule was unconstitutional or otherwise unlawful during that review, it presumably could decline to use that goal or rule as the basis for its decision on such orders.

DLCD is not responsible for approving local land use decisions, state projects, or state permit decisions. Because it does not administratively review land use decisions, DLCD does not have occasion to decide that state land use goals or rules are contrary to statute or unconstitutional in the course of administrative review.

H. Judicial Review of Agency Actions that Apply an Administrative Rule to an Individual

With few exceptions,¹⁵⁹ the Land Use Board of Appeals (LUBA) has exclusive jurisdiction to review any land use decision of a local government, special district or a state agency.¹⁶⁰ LUBA, rather than DLCD, is responsible for reviewing the compliance of land use decisions with state land use goals and rules. DLCD, however, may participate in LUBA review of a land use decision "involving the goals, acknowledged comprehensive plan or land use regulation or other matter within the statutory authority of the department or commission."¹⁶¹ DLCD may also seek LUBA review of such land use decisions.¹⁶²

LUBA has authority to review only application of land use decisions and limited land use decisions.¹⁶³ Arguably, if LUBA finds that administrative rule on which a land use decision was based is invalid, it only has authority to declare that decision unenforceable and cannot invalidate that administrative rule outright.¹⁶⁴ However, LCDC is required to review decisions by LUBA and the Court of Appeals to determine if rules need to be amended or repealed.¹⁶⁵

IV. Additional Avenues for Review -- Direct Citizen Involvement

Unlike some state agencies, LCDC was specifically required to appoint a State Citizen Involvement Advisory Committee to develop a program for the commission that promotes and enhances public participation in the adoption and amendment of the goals and guidelines.¹⁶⁶ Notably, the State Citizen Involvement Advisory Committee “is limited to an advisory role to the commission” and “has no express or implied authority over any local government or state agency.”¹⁶⁷ Despite this limitation, this Committee is charged with making sure each city and county governing body has a program for citizen involvement in preparing, adopting and amending local comprehensive plans and land use regulations.¹⁶⁸ Thus, this Committee has substantial influence over the extent of opportunities for public involvement in land use matters.

J. Additional Avenues for Review – the Joint Legislative Committee on Land Use

The Joint Legislative Committee on Land Use (Joint Committee) exercises certain influence over DLCD’s administrative rules by being required to advise the DLCD on all matters under the jurisdiction of the department, and to review and make recommendations to the Legislature on goals and guidelines approved by the DLCD and any other matter relating to land use planning in Oregon.¹⁶⁹ While such an indirect influence will not determine any rulemaking action by DLCD, arguably DLCD must take into account the Joint Committee’s advice. Finally, DLCD’s biennial reporting requirement to the Legislature and its annual reporting requirement to the Joint Committee ensures that both legislative bodies are aware of DLCD rulemaking.

IV. What could be the Potential Impact of Measure 2 on Oregon Land Use Planning Rules?

A. What Land Use Rules would be Subject to Challenge under Measure 2?

As indicated above, the supporters of Measure 2 appear likely to mount a broad scale attack on the rules supporting the Oregon land use planning program. First, Measure 2 petitions could be filed to challenge the statewide planning goals formulated by DLCD, the keystone to Oregon’s land use planning program.¹⁷⁰ While the Legislature can and does amend the statewide planning goals, it has never explicitly adopted the goals by statute and the goals remain administrative rules¹⁷¹ subject to challenge by a Measure 2 petition. If the Legislature failed to approve, significantly amended, or disapproved a challenged goal, the effects would be far-reaching. Local governing bodies and state agencies must construct comprehensive plans, which are the basis for land use regulations such as ordinances, to comply with the goals.¹⁷² The alteration of these goals, would affect the continued validity of comprehensive plans and land use regulations. When the DLCD amends existing goals or adopts new goals, absent a compelling reason, a comprehensive plan, land use regulation, or land use decision must only be consistent with that goal one year after the date of adoption.¹⁷³ Alteration of existing goals through a Measure 2 process would perhaps be subject to the same period for adjustment. However, the disapproval of (or failure to act on) a challenged goal might arguably invalidate comprehensive plans at the time of disapproval. Regardless, a change in goals could mean significant changes in the entire land use system.

LCDC has also promulgated substantive rules that would be subject to Measure 2 that apply to specific types of uses, such as forest lands,¹⁷⁴ metropolitan housing,¹⁷⁵ public facilities,¹⁷⁶ transportation¹⁷⁷ and airports.¹⁷⁸ Also subject to Measure 2 are rules that apply to certain types of areas, including estuaries,¹⁷⁹ urban reserve areas,¹⁸⁰ agricultural lands¹⁸¹ and parks.¹⁸² Finally, LCDC has promulgated rules that apply to specific goals that would be subject to Measure 2, including rules that specify how to comply with Goal 4, dealing with Forest Lands;¹⁸³ Goal 10, Housing;¹⁸⁴ Goal 5, Natural Resources, Scenic and Historic Areas, and Open Spaces;¹⁸⁵ and Goal 17, Shorelands;¹⁸⁶ as well defining the exceptions to Goals 3-19.¹⁸⁷ Additionally, LCDC's and DLCD's procedural rules would be subject to Measure 2, such as those that govern acknowledgment of a comprehensive plan,¹⁸⁸ amendments to plans and ordinances,¹⁸⁹ and the periodic review of comprehensive plans process.¹⁹⁰

Measure 2's definition of a state agency appears to prevent challenges to local government's comprehensive plans and land use regulations under Measure 2, except through the indirect application as discussed above.¹⁹¹ However, any administrative rule promulgated by a state agency as a comprehensive plan or land use regulation would appear to fall under Measure 2's scope.

In sum, virtually the entirety of the state land use planning program could be challenged through a single Measure 2 petition, leaving the Legislature with a massive job of reviewing and revising rules developed over more than a quarter century.

B. Would Land Use Rules be at a Significantly Greater Risk of being Challenged under Measure 2 than under the Existing Processes?

Land use goals and rules would be at a significantly greater risk of being killed by Measure 2 petitions than through existing legal processes.

The existing process for making administrative rules assures that the determination of whether the rule constitutes good public policy is made with the input of many different segments of the public. The existing processes for reviewing administrative rules once they have been adopted either involve (1) a collective judgment with input from many different segments of the public that the rules do or do not represent good public policy or (2) expert judgment about the constitutionality and consistency of the rules with legislative mandates. When goals and other LCDC rules are challenged in the Oregon Court of Appeals,¹⁹² the rule remains valid unless the court finds that the rule violates a constitutional provision, exceeds statutory authority of the agency or was adopted without compliance with applicable rulemaking procedures.¹⁹³ Therefore, one is unlikely to seek judicial review of a rule without a well-supported argument that it fails one of these three factors.

However, under Measure 2, a challenge to a rule is not required to be based upon anything beyond a petition for legislative review.¹⁹⁴ Since land use rules often impact large populations in ways that appear to detrimentally affect property rights and values, the requirement of 10,000 voters for such a petition will not offer significant protection to land use rules that limit uses and values of property of various groups of voters. In addition, if the experience with initiative petitions is indicative, sufficient signatures could be collected with respect to virtually any topic.

The review process proposed by Measure 2 would allow a single person with \$5,000 to \$10,000 to secure sufficient signatures to file a Measure 2 petition.¹⁹⁵ At that point, the press of other business or an intentional decision by a single powerful lawmaker could readily lead to legislative inaction on a bill approving a rule challenged by a Measure 2 petition. Finally, as discussed below, the chances for a DLCD rule being invalidated through disapproval or inaction under Measure 2 is much greater than under judicial review.

Measure 2 appears to pose a “clear and present danger” to the Oregon land use planning system because the supporters of Measure 2 certainly have resources to file Measure 2 petitions seeking to disrupt that system and might well be able to secure legislative assistance to prevent enactment of a bill approving state land use rules, even though they have been unable to secure sufficient legislative support for bills that fundamentally weaken the land use rules.

C. Does the Possible Impact of Measure 2 on Land Use Rules Differ from Other Substantive Areas of Oregon Administrative Law because of the Degree of Legislative Rulemaking Power given to the Land Conservation and Development Commission by the Legislature?

The Oregon land use planning system would be somewhat disproportionately affected by Measure 2 because the Legislature has given the DLCD broad legislative rulemaking power with relatively few constraints on the content of state land use goals and rules. However, while the Legislature has given DLCD broad legislative rulemaking power, the delegation of rulemaking power is not unique or even particularly unusual. Many state agencies have considerable legislative rulemaking authority. For example, the statutes controlling water pollution, air pollution, and hazardous wastes primarily facilitate the adoption of detailed regulatory schemes and specific environmental standards by the Environmental Quality Commission. Similarly, the Department of Education enjoys great discretion to specify the standards that must be met by public schools, career schools, and registered private schools in the state.

What does distinguish state land use rules from other substantive areas of Oregon administrative law is the virtual certainty that Measure 2 petitions will be used to attack the land use planning system. If a Measure 2 petition is filed to invalidate some or all of Oregon’s state land use goals and rules, there is a substantial risk that legislators will avoid taking a position on the merits of those rules and simply allow the rule approval bill to die through procedural maneuvers on the Senate floor or in committee in the House. One of the keys of Oregon’s land use planning program’s success has been the slight insulation of the Legislature from direct votes on these sensitive and controversial policy decisions, which often detrimentally affect well-defined groups with substantial financial resources. This has allowed the state land use planning system to provide widely dispersed benefits to the whole present and future population of the state despite the impacts on various special interest groups. Given the legislative tendency to avoid votes on sensitive and controversial policy decisions, opponents of the Oregon land use planning system would utilize Measure 2 to kill, selectively or on a wholesale basis, state land use goals and rules.

CONCLUSION

Supporters of Measure 2 tout it as a device to ensure control of unruly state agencies and assure legislative and agency accountability for the content of state rules. Opponents of Measure 2 predict that Measure 2 will inevitably wreak havoc with the entirety of state government.

A more accurate assessment of Measure 2 is that it is wholly unnecessary to control and otherwise hold state agencies accountable because numerous processes already in place provide effective control of state agencies and review of administrative rules. Measure 2 is also an ineffective mechanism to assure legislative accountability because it does not ensure that each legislator will be forced to vote on the merits of bills approving challenged rules.

Opponents of Measure 2 are correct that Measure 2 is clearly designed in such a way to allow any group objecting to a rule to file a Measure 2 petition to invalidate the rule unless the Legislature affirmatively approves the rule. However, whether those Measure 2 petitions will wreak havoc on state government depends on how the Secretary of State, the Legislature and the courts respond to Measure 2 petitions and to the incredible numbers of gaps and ambiguities in Measure 2. If all of those entities respond in a hostile manner to attempts to overturn administrative rules through Measure 2 petitions, the impact may be diminished because the gaps and ambiguities in Measure 2 provide opportunities for minimizing its effects. Otherwise, the potential harm to the effective functioning of state government in Oregon is enormous.

NOTES

Notes to Discussion of Question 1:

1. ORS 183.025(2).
2. ORS 183.335(2)(b)(F).
3. ORS 183.335(1)(b).
4. ORS 183.335(1)(c).
5. ORS 183.335(1)(c).
6. ORS 183.335(2)(b)(C).
7. ORS 183.335(2)(b)(D).
8. ORS 183.335(2)(b)(F). The fiscal impact statement for some agencies must include a housing cost impact statement. ORS 183.335(2)(b)(E); ORS 183.534(2); ORS 183.530. The AG model rules and the courts have provided guidance to agencies about what is required in fiscal impact statements. *Oregon Funeral Directors v. Mortuary & Cemetary Bd.*, 132 Or App 318 (1995)(must be sufficient to notify persons who might be economically affected); *Troutlodge v. Department of Fish and Wildlife*, 113 Or App 123 (1992)(must use available information); *Assn of Oregon Loggers v. Department of Insurance & Finance*, 130 Or App 594 (1994)(estimates based on historical trends and averages adequate in light of uncertainty); *Don't Waste Oregon Committee v. Energy Facility Siting Council*, 320 Or 132 (1994)(only need to disclose fiscal impact of any change in status quo); *Fremont Lumber Co. v. Energy Facility Siting Council*, 325 Or 256 (1997)(must disclose impact of rule requirements that are more expansive than statutory requirements). The Attorney General's model rules also transform the fiscal impact statement into a substantive requirement because they require that an agency determine on the basis of the fiscal impact analysis and comments whether the proposed rule has a "significant adverse impact" on business. OAR 137-001-0018. If it does, the model rules require that the agency modify its rule to reduce adverse effects to the extent consistent with the public health and safety purposes of the rule. The courts have not yet confronted an attempt to utilize the model rule to invalidate an otherwise procedurally proper rule. However, despite the reliance of the Attorney General on ORS 183.540 and ORS 183.545, there appears to be no statutory authority for the intrusion of the Attorney General into the substantive content of rules through the device of model rules of procedure.
9. ORS 183.335(3)(a).
10. ORS 183.335(3)(a).
11. ORS 183.336(14)(a).
12. ORS 183.336(14)(b).
13. ORS 183.336(14)(c).
14. ORS 183.336(15)(a).
15. ORS 183.336(15)(b).
16. Interview with Henry C. Lazenby, General Counsel, Office of the Governor (September 2000).
17. *Id.*
18. *Id.*

19. Those questions are best understood by a review of Question 1, IV.A. - D., which details how Measure 2 would operate. A quick understanding of those questions may be garnered by reviewing Table 1: Significant Uncertainties About the Operation of Measure 2.
20. The Measure 2 definition of “rule” fails to exclude such rules, which are currently explicitly excluded from the definition of “rule” in ORS 183.310(8)(f). In addition, Measure 2 defines “state agency” to include “institution,” such as state correctional institutions.
21. Measure 2’s proposed § 34(7)(a)(B) appears to only exclude from the definition of “rules” the policies that are currently excluded under ORS 183.310(8)(a) and not those excluded under ORS 183.310(8)(b).
22. Measure 2’s proposed § 34(7)(a)(B) does not appear to exclude memoranda excluded under ORS 183.310(8)(d).
23. Measure 2’s proposed § 34(7)(a)(B) does not appear to exclude declaratory rulings excluded under ORS 183.310(8)(c).
24. Proposed Section 34, subsection (2).
25. Measure 2 does not specify the meaning of the phrase “qualified voters.” However, Measure 2 would likely be read in light of Article II, Section 2, which specifies the qualifications required to vote elections and Article IV, Section 1, which uses the term “qualified voter” in describing the persons who may sign initiative and referendum petitions. To be a qualified voter under Article II, Section 2, a person must be: (1) citizen of the United States, (2) 18 years of age or older, (3) a state resident for six months immediately preceding the election, and (4) be registered to vote for 20 days preceding the election.
26. The lack of detail in Measure 2 on the content of the petition and the absence of a provision providing either legislative or executive power to specify those details differs somewhat from the approach of the Oregon Constitution with respect to initiative and referendum petitions. For example, Article IV, Section 1, subsection (2)(d), requires that an initiative or referendum petition contain the full text of the proposed law or constitutional amendment. Additionally, Article IV, Section 1, subsection 4(b) provides the legislature with power to specify additional requirements on initiative and referendum measures not inconsistent with Section 1.
27. Proposed Section 34, subsection (3).
28. Article IV, Section 1, subsection 4(b).
29. Article IV, Section 1, subsection (6) requires that initiative and referendum signature gatherers be registered Oregon voters. Article IV, Section 1b permits the Legislature to regulate payments for signature gathering on initiative and referendum petitions. Article IV, Section 25 requires disclosure of contributions received and expenditures made by chief petitioners on initiative and referendum petitions. Article IV, Section 25 also requires that all entities receiving contributions or making expenditures file an organizational statement with the Secretary of State, form a petition political committee, and disclose contributions received and expenditures made in influencing collection of signatures on initiative and referendum petitions. Article IV, Section 26 provides for the Secretary of State to license organization hiring paid signature gatherers. Article IV, Section 28 provides that paid political advertising must disclose the sponsor of political advertising concerning initiatives or referenda. Article IV, Section 30 forbids payment to voters for signatures on initiative or referenda petitions.
30. Proposed Section 34, subsection (3).
31. Proposed Section 34, subsection (2).

32. The silence of Measure 2 concerning the signature gathering process contrasts sharply with the regulation of the signature gathering process for initiative and referendum petitions. The Oregon Constitution reflects deep concern for preserving the integrity of the signature gathering process for initiative and referendum petitions. Signature gathering for those petitions is either regulated by the Constitution itself, or the Constitution empowers the Legislature or the Secretary of State to regulate the signature gathering process in particular respects. As indicated in note 3 above, the existing constitutional provisions regarding initiative and referendum petitions require that initiative and referendum signature gatherers be registered Oregon voters, permit the Legislature to regulate payments for signature gathering on initiative and referendum petitions, require disclosure of contributions received and expenditures made by chief petitioners or sponsors on initiative and referendum petitions, require that entities receiving contributions or making expenditures file an organizational statement with the Secretary of State, form a petition political committee, and disclose contributions received and expenditures made in influencing collection of signatures on initiative and referendum petitions, provide for licensing of organizations hiring paid signature gatherers, mandate that paid political advertising disclose the sponsor of political advertising concerning initiatives or referenda and forbid payment to voters for signatures on initiative or referenda petitions. None of the provisions mentioned above apply to Measure 2 petitions challenging administrative rules. Thus, there is no mechanism in either the existing Oregon Constitution or Measure 2 to assure the integrity of the signature gathering process for petitions challenging administrative rules under Measure 2.

33. Although the process for verifying voter petitions under Measure 2 remains somewhat murky, it does appear that the Secretary of State would review the petition for compliance with the one subject requirement, as the Secretary does for initiative and referendum petitions.

The Measure 2 one subject requirement parallels the Article IV, Section 1 requirement that laws and Constitutional amendments proposed by initiative address just one subject and the Article IV, Section 20 requirement that laws enacted by the Legislature deal with a single subject. The single-subject requirement of Measure 2 would probably be interpreted consistently with the case law interpreting other constitutional single-subject limitations.

The Oregon Supreme Court has noted that the central purpose of the single-subject requirement was to prevent "log-rolling" -- the practice of inserting two or more unrelated provisions into a single bill -- so that legislators favoring one provision would be compelled to vote for the bill despite their opposition to the other provisions. If log-rolling were not prohibited, several provisions could become law that, standing alone, could not have succeeded on their own merits. However, a law "does not violate the one-subject provisions of Article IV merely by including a wide range of connected matters intended to accomplish the goal of that single subject." Rather, the court must examine the body of the measure to determine whether the proposed law or amendment contains "a unifying principle logically connecting all provisions in the act [or amendment], such that it can be said that the measure embraces one subject only." If the provisions of the enactment at issue facilitate a single goal and are pertinent and germane to one overall subject, the law does not violate the single-subject limitation.

Measure 2 petitioners would likely identify the subject addressed by the petition and articulate the goals of the petition in broad terms so that the Secretary of State and any reviewing court would conclude that the petition addressed a single subject.

34. The ambiguity about whether the Secretary of State can verify the compliance of the petition with Measure 2 requirements and the absence of any detail concerning the verification process diverge from the approach of the existing Oregon Constitution with respect to initiative and referendum petitions. Article IV, Section 1, subsection (4)(a) provides the Legislature with power to prescribe the manner in which the Secretary of State shall determine whether an initiative or referendum petition contains the required number of signatures of qualified voters. In addition, it specifies that the verification process for initiative and referendum petitions be completed within 15 days after the last day on which the petition could be filed before the election.

35. As a practical matter, judicial review of the Secretary's decision might complicate the legislative review process contemplated by Measure 2. Judicial review of the Secretary of State's decision to give notice would not necessarily interfere with orderly legislative consideration of a bill to approve the challenged administrative rules, but it might lead to uncertainty about the significance of legislative review. If the legislature approved the challenged rules, that approval would moot the issue on judicial review. If the legislature failed to act, however, those subject to the challenged rules would have to await the results of judicial review to determine whether the challenged rules were in effect. Judicial review of the Secretary of State's decision not to give notice might allow petitioners to force legislative consideration of a bill to approve the challenged administrative rules. However, such consideration would be delayed unless and until the case was resolved in favor of petitioners.

36. ORS Chapter 183.

37. ORS 183.310(1)(defining agency to include any state officer authorized by law to make rules or issue orders other than those in the legislative and judicial branches).

38. The decision would likely be considered a final order because it would be expressed in writing (the notice) as provided in ORS 183.310(5)(b), it would not be tentative or preliminary, it would not precede further agency action, and it would effectively preclude further agency consideration of the matter because the Legislative duty to review challenged administrative rules is triggered by the notice.

39. Whether the decision not to give notice was a final order would depend upon whether the Secretary's decision was expressed in writing, whether it was tentative or preliminary, and whether it precluded further agency action. If it took the form of a final order, even though the Secretary's decision was negative in form, it would be subject to judicial review.

40. ORS 183.490 (allowing court to compel agency to act where it has unlawfully refused to act or make a decision or unreasonably delayed taking action or making a decision).

41. Proposed Section 34, subsection (3)(a).

42. Proposed Section 34, subsection (3)(c).

43. Proposed Section 34, subsection (3)(b).

44. Although the legislature would probably make the minimum number of changes in the legislative process possible, Measure 2 nonetheless changes the legislative process in an unprecedented manner. It requires that the bill approving the rules receive at least one hearing and be submitted for a vote in the Senate before the end of the legislative session. Ordinarily, the chair of the committee to which a bill assigned could kill the bill by refusing to schedule a public hearing on the bill. In addition, ordinarily, if a bill did receive a public hearing, the chair could kill the bill by not scheduling a vote on the bill after the public hearing. Further, ordinarily, the committee could kill the bill by voting not to pass the bill. Although the Senate rules provide mechanisms for resurrecting bills that the committee chair or the committee choose to kill, they are seldom utilized. Because of the great power given to committee

chairs and committees, ordinarily the Senate President may essentially kill a bill by the President's decision as to which committee will consider the bill. Measure 2 reduces the power of the Senate President, the committee chair, and the committee by forcing a floor vote on the bill.

45. Proposed Section 34, subsection (3)(c).

46. Measure 2 contemplates a Senate floor vote on the merits of a challenged rule. Yet, a committee opposed to the challenged administrative rules might defeat a bill by simply adding objectionable amendments. Since that result would be inconsistent with the apparent intent of the floor vote requirement, it is probable that the Senate would need to vote on the bill as introduced. If the committee bill amended the introduced bill, it is unclear how the Senate would handle the need to consider both the bill as introduced and the committee bill.

47. Proposed Section 34, subsection (3)(c).

48. This analysis assumes that the current rules of the Senate and House remain in place.

Obviously, since Measure 2 alters the Senate rules to some extent, the Senate and the House could choose to treat bills regarding challenged administrative rules differently from other legislative proposals.

49. Proposed Section 34, subsection (3)(c).

50. Proposed Section 34, subsection (3)(b).

51. Proposed Section 34, subsection (4)(a).

52. Proposed Section 34, subsection (4)(a).

48. Proposed Section 34, subsection (4)(a).

54. Proposed Section 34, subsection (4)(b).

55. See *infra* II.C.3.

Notes to Discussion of Question 2

56. Interview with Greg Chainlove, Office of Legislative Counsel (September 2000).

57. The Secretary of State could not provide a figure on the number of administrative rules adopted by state agencies since 1990. It is almost impossible to meaningfully count the number of administrative rules adopted by state agencies -- since one person could count each individual subsection of administrative rules as a rule and another person could count entire submissions of unrelated rules by a agency to the Secretary of State as a rule. The number here is an estimate of the number of rule packages that would have been submitted to the Legislative Counsel under the requirement that agencies submit their administrative rules. This number is projected from the filing rate experienced between June 1998 to December 1999 of 1.84 rules per day. Between 1990 and October 1, 2000, there were approximately 3926 days. At that rate, roughly 7224 rules were adopted during that period.

58. A computerized search of Oregon judicial opinions published from January 1, 1990 to October 1, 2000 revealed 41 administrative rules that were challenged. Of those rules, 5 were challenged entirely on compliance with rulemaking procedures and 2 were challenged entirely on constitutional issues. The remaining 34 included at least one challenge on the grounds that the rule was contrary to statute. Reliance on published judicial opinions does understate the number of challenges to some, likely small, degree. Rules can be challenged when they are applied to individuals. Most legal challenges to rules that substantially affect individuals will be in the nature of judicial review of orders contested cases, which fall within the jurisdiction of the Oregon Court of Appeals and result in published judicial opinions. However, some legal challenges to rules will be in the nature of judicial review of orders in other than a contested case, which typically fall within the jurisdiction of the circuit courts and result in a published judicial opinion only if the matter is significant to be appealed to the Court of Appeals.

59. Additionally, the Governor and the Legislature control state agencies through the power of appointment and confirmation of the citizen members of many state Commissions as well as the professional Directors of state agencies. Once appointed and confirmed, many of these Commissioners and Directors serve at the pleasure of the Governor. The public can and does request that the Governor's office informally intervene in any matter within the Executive Branch, such as adoption of administrative rules or application of administrative rules in particular matters. The Governor's office, through the Governor's staff, including ombudsmen, professional program staff, and the General Counsel, does indeed intervene in a number of such matters each year.

60. ORS 183.715(1).

61. ORS 173.191(1).

62. See, e.g. ORS 173.240(prohibiting the Legislative Counsel or staff to oppose, urge, or attempt to influence legislation).

63. ORS 183.720(1).

64. ORS 183.720(2).

65. ORS 183.720(1).

66. ORS 183.720(2).

67. See information on administrative rule review provided by the Office of the Legislative Counsel (<http://www.lc.state.or.us/arrs.htm>).

68. ORS 183.720(3).

69. See information on administrative rule review provided by the Office of the Legislative Counsel (<http://www.lc.state.or.us/arrs.htm>).
70. ORS 183.720(6).
71. See summary reports posted by the Office of the Legislative Counsel (<http://www.lc.state.or.us/arrs.htm>). At least some full reports detailing problems found during administrative rule review are also available by Internet. ([http://www.lc.state.or.us/arrs\[insert administrative rule review number for the specific rule\].pdf](http://www.lc.state.or.us/arrs[insert administrative rule review number for the specific rule].pdf)).
72. ORS 183.722(1).
73. ORS 183.722(2).
74. ORS 183.720(6).
75. The Legislative Counsel raised questions about the constitutionality of two rules on medicare supplement insurance and one rule on schedules for retention of university records.
76. For example, the Legislative Counsel report on the rules setting forth policies and procedures for administering the 21st Century Schools Program (also known as the School Improvement and Professional Development Program) noted two problems with the rules that appeared to be typographical errors. ARR 16324. Another minor error was using the term “Oregon University System” to describe the “State System of Higher Education.” ARR 16390.
77. For example, a rule gave school boards control over the selection process for parents on the 21st Century School Councils, while the statute specified that parent members of the councils were to be selected by parents of students attending the school. ARR 16390. Another example of a substantive problem is a rule that added exemptions to the statutory list of exemptions from private security service licensing and added language limiting some of the statutory exemptions. ARR 16819.
78. No hard numbers are readily available for the frequency of legislative changes to state programs or implementing rules. The process is so common that no one bothers to count.
79. The observations made here on the impact of the budgetary process are drawn from the author’s experience as the citizen Chair of the Oregon Dispute Resolution Commission from 1994 to 1998. The significance of the budgetary process as a source of control over state agencies was also identified in an interview with David Schuman, Deputy Attorney General, Oregon Department of Justice (September 2000).
80. Article IV, § 1.
81. The 2000 State Initiative and Referendum Manual, available from the Secretary of State, details the procedures for placing an initiative on the ballot.
82. ORS 183.390. The uniform rule is OAR 137-001-0070.
83. OAR 137-001-0070. A sample petition to amend can be found in the Oregon Attorney General’s Administrative Law Manual at A-17 (2000).
84. ORS 183.390.
85. Interview with David Schuman, Deputy Attorney General (September 2000).
86. *Schultz v. Springfield Forest Products*, 151 Or. App. 727 (1997). As the court stated: The Supreme Court held in *Nutbrown v. Munn*, 311 Or. 328, 346, 811 P.2d 131 (1991), cert. den. 502 U.S. 1030, 112 S.Ct. 867, 116 L.Ed.2d 773 (1992), that “[a]lthough it is an authority to be exercised infrequently, and always with care, Oregon administrative agencies have the power to declare statutes and rules unconstitutional.” While the issue here is not a constitutional question, the reason for the court’s holding in *Nutbrown* applies equally in

this context. Administrative agencies, including those with quasi-judicial power, are required to follow the law. If the agency concludes that an administrative rule that it must apply is not in accordance with a statute or is unconstitutional it must follow the superior rather than the subordinate law. It would be an unnecessary limitation of the agency's role for it blindly to apply a rule that is inconsistent with a statute or constitutional provision. See *Hadley v. Cody Hindman Logging*, 144 Or.App. 157, 160, 925 P.2d 158 (1996) (so long as the director prescribed a method that is within the delegation by the legislature, neither we nor the Board may substitute our own judgment regarding the method of computation); cf. *Shubert v. Blue Chips*, 151 Or.App. 710, 951 P.2d 172 (1997) (the Board may not substitute its judgment for that of the director of the Department of Consumer and Business Services regarding temporary disability standards) (emphasis supplied). Additionally, "[i]t would be pointless to reverse an agency for correctly deciding a legal question on the ground that the agency should have waited for the reviewing court to decide the question." *Cooper v. Eugene School Dist. No. 4J*, 301 Or. 358, 364, 723 P.2d 298 (1986), appeal dismissed 480 U.S. 942, 107 S.Ct. 1597, 94 L.Ed.2d 784 (1987).

See also *Realty Group, Inc. v. Department of Revenue*, 299 Or. 377 (1985) (distinguishing the agency's power regarding interpretive rules from its more limited power with respect to legislative rules).

87. In general, judicial review of orders will occur under the Oregon Administrative Procedure Act, ORS § 183.

88. Of the 41 challenges resulting in a published judicial opinion between 1990 and October 1, 2000, 28 were facial challenges and 13 were as applied challenges. Constitutional claims and procedural claims are typically raised as facial challenges to rules. For example, of the seven such challenges between 1990 and 2000, six were facial and one was as applied. Claims that rules are invalid because they are contrary to statute tend to be made somewhat more frequently as applied challenges. For example, 22 such claims were made as facial challenges and 12 claims were as applied challenges.

Notes to the Discussion of Question 3

89. The chief petitioners on Measure 2 are David Hunnicutt, Lawrence George, and Jason Williams. Hunnicutt is Director of Legal Affairs for Oregonians in Action, and George is affiliated with Citizens for Accountability in Administrative Rules, which in turn is connected to Oregonians in Action. Williams is Executive Director of Taxpayer Association of Oregon. Hunnicutt, George, and Williams are also the Committee Directors of Oregon Family Farm PAC. The voter pamphlet statements of Oregonians in Action and Citizens for Accountability in Administrative Rules are devoid of specific examples of rules that should be reviewed.

(<http://www.sos.state.or.us/elections.nov72000/guide/mea/m2/2fa.htm>).

However, the statement by Oregon Family Farm PAC in favor of Measure 2 identifies the exclusive farm use rules as a target. Furthermore, the Oregonian in Action website states “Major targets of the rule review measure are some of LCDC’s land use rules, such as the rule requiring \$ 100,000 gross farm income to qualify for a farm dwelling, the rules defining “farm” and “forest” land for zoning purposes, and rules mandating high densities in urban areas.”

(<http://www.oia.org/pages/news011.html>). Taxpayer Association of Oregon does not target specific subjects, but indicates that Measure 2 would affect “bad” rules of the LCDC among others.

(<http://www.oregonwatchdog.com/mission.html>).

90. The Oregonians in Action website cites DEQs temperature rule as an example of objectionable administrative rules. Id. Taxpayer Association of Oregon does not target specific subjects, but indicates that Measure 2 would affect “bad” rules of DEQ among others.

91. The voters pamphlet statement by Taxpayer Association of Oregon in favor of Measure 2 identifies “arbitrarily large fees” and “severe penalties” as a target. The Oregonians in Action website also cites administrative fines and fees as an example of objectionable rules.

92. See the Oregon Association of Realtors website copy of the OAR draft 2000/2001 legislative policy statements on land use, water rights, and environment/natural resources. These policies are due to be presented to the Board of Directors in October 2000, presumably at the October 11-12, 2000 OAR conference. (<http://or.realtorplace.com/Legislative/INDEX.HTM>).

93. See the Oregon Cattlemen’s Association website – 2000 policy (<http://www.or.beef.org/oca2000policy.htm>).

94. See the Oregon Cattlemen’s Association website regarding the Camp Creek Case, in which the OCA avoided the need for the state to certify under CWA 401 that cattle operations conducted under federal grazing permits meet state water quality standards.

(<http://www.or.beef.org/ocacampcreek.htm>).

95. See the Oregon State Grange’s website, which contains the annual address of the Master, i.e. organizational head, of the Oregon State Grange

(<http://www.grange.org/Oregon/oregonstuff/ormanual.html>).

Notes to the Discussion of Question 4

96. For those unfamiliar with Oregon land use laws, begin by consulting the information from the Oregon Department of Land Conservation and Development (see <http://www.lcd.state.or.us/programb.html>). Among the most useful basic sources cited by DLCD are the Fast Facts Bulletin, the Oregon Statewide Planning Program Brochure, and outstanding independent publications and evaluations. In addition, a recent symposium issue of the Oregon Law Review contains several articles that introduce the land use planning laws and identify practical problems associated with their implementation. A particularly significant contribution to that symposium issue is Edward J. Sullivan, Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100, 77 Or. L. Rev. 813 (1998).
97. ORS 197.030(1).
98. ORS 197.075.
99. ORS 197.030.
100. ORS 197.075.
101. ORS 197.005(4).
102. ORS 197.005(3).
103. ORS 197.225.
104. OAR 660-015-0000(1); 660-015-0000(2). The goals are merely referenced by title in the Oregon Administrative Regulations, the text of the goals may be found at <http://www.lcd.state.or.us/goalhtml/goals.html>.
105. OAR 660-015-0000(3).
106. OAR 660-015-0000(4).
107. OAR 660-015-0000(14).
108. OAR 660-015-0000(6).
109. OAR 660-015-0010(2).
110. ORS 197.015(8).
111. ORS 197.015(9).
112. Id.
113. ORS 197.251.
114. ORS 197.250.
115. ORS 197.015(5).
116. ORS 197.010(1)(c).
117. ORS 197.175(c) and (e).
118. ORS 197.180, ORS 197.250, and OAR 660-031-0030.
119. The most significant substantive implementing rules are Division 6 - 14 (implementing goals 3 - 14), Divisions 16 and 23 (implementing goal 5), Division 17 (implementing goal 16), Division 20 (implementing goal 15), Division 21 (implementing goal 14), Division 33 (implementing goal 3), Division 24 (implementing goal 8), and Division 37 (implementing goal 17). Coastal and ocean resources within the state's direct regulatory control are subject to rules and state plans specified in Divisions 35 and 36 - 120. These are found in Division 3 (governing post-acknowledgment planning actions), Division 25 (periodic review), Divisions 30 and 31 (implementing the requirement that state actions and state permit decisions be consistent with statewide planning goals) and Division 45 (citizen enforcement).

121. ORS 197.235(1)(a).
122. ORS 197.235(1)(b).
123. ORS 197.235(2).
124. ORS 197.235(3).
125. ORS 197.240(1).
126. ORS 197.240(1).
127. See Proposed Amendments to Goal 14 and new rules regarding urban growth boundaries and development inside UGBs, Upcoming Goal 7 Proposed Amendments, and Proposed Amendments to the Oregon Territorial Sea Plan Chance to Comment and Draft Rule (available at <http://www.lcd.state.or.us/goalhtml/rules.html>).
128. ORS 197.040(1)(c)(A).
129. ORS 183.715(1).
130. See 197.040(c).
131. See OAR 660-015-0000.
132. See ORS 197.040(1)(c).
133. See *1000 Friends v. LCDC*, 292 Or. 735, 737 n.1 (1982) (noting that “the goals are clearly rules within the meaning of ORS 183.310[(8)]”).
134. See ARR No. 16446 (referenced at <http://www.lc.state.or.us/16401.pdf>).
135. See *City of Happy Valley v. LCDC*, 66 Or. App. 795, 797 (1984) (seeking judicial review of denial of acknowledgment of comprehensive plan as a contested case review of an order).
136. Compare ORS 197.040(b) with 1973 c.80 §§ 9, 11.
137. See 1993 c.792 (amending ORS 197.010, 197.030, 197.040, 197.045, 197.065, 197.175, 197.625 and repealing 197.247).
138. See *Statewide Land Use Planning Program History, Oregon DLCD*, available at <http://www.lcd.state.or.us/history.html>.
139. *Id.*
140. *State v. Ervin*, 158 Or. App. 253 (1999).
141. *Id.* at 255.
142. *Id.* at 257.
143. *Id.*
144. *Id.*
145. ORS 197.040(b), (c).
146. ORS 197.040; 183.400(1).
147. ORS 183.400(3).
148. ORS 183.400(4).
149. See, e.g., *Willamette University v. LCDC and City of Eugene*, 45 Or. App. 355 (1980) (holding invalid a DLDC rule that automatically urbanized lands within city limits for purposes of establishing urban growth boundaries).
150. ORS 197.040.
151. ORS 197.040(b).
152. *Lane County v. LCDC*, 325 Or. 569 (1997); *Nichols v. Clackamas County*, 146 Or. App. 25 (1997).
153. *Id.*

154. *See* ORS 197.825(2)(c).
155. ORS 197.251.
156. ORS 197.430.
157. ORS 197.450.
158. ORS 197.628.
159. ORS 197.825(2).
160. ORS 197.825(1).
161. ORS 197.090(2)(a).
162. *Id.*
163. *Id.*
164. *See* ORS 197.835.
165. ORS 197.040(1)(c)(C).
166. ORS 197.160(1).
167. ORS 197.160(2).
168. ORS 197.160(1).
169. ORS 197.135.
170. Measure 2, ¶ 1, §§ 34(1), (7).
171. *See* 1000 Friends v. LCDC, 292 Or. 735, 737 n.1 (1982) (noting that “the goals are clearly rules within the meaning of ORS 183.310[(8)]”).
172. ORS 197.250.
173. ORS 197.245; 197.250 .
174. OAR ch. 660, div. 6.
175. OAR ch. 660, div. 7.
176. OAR ch. 660, div. 11.
177. OAR ch. 660, div. 12.
178. OAR ch. 660, div. 13.
179. OAR ch. 660, div. 17.
180. OAR ch. 660, div. 21.
181. OAR ch. 660, div. 33.
182. OAR ch. 660, div. 34.
183. OAR ch. 660, div. 6.
184. OAR ch. 660, div. 8.
185. OAR ch. 660, divs. 16, 23.
186. OAR ch. 660, div. 37.
187. OAR ch. 660, div. 4.
188. OAR ch. 660, div. 3.
189. OAR ch. 660, div. 18.
190. OAR ch. 660, div. 25.
191. *See* Measure 2, ¶ 1, § 34(7).
192. ORS 183.400.
193. ORS 183.400(3).
194. Measure 2, ¶ 1, § 34(2).

195. Initiative and referendum petition signatures currently cost between 50 cents to \$ 1 per signature, unless the petition circulation has been delayed. In that case, signatures may cost as much as \$ 2 per signature due to time constraints. The circulation of Measure 2 petitions likely could occur over an unlimited period of time. Therefore, the best estimate of cost would be 50 cents to \$ 1 per signature. Costs may be less because Measure 2 petition circulators might secure signatures more readily than initiative or referendum signatures due to the lesser dignity given by voters to administrative rules and the likely lack of regulation of the contents of Measure 2 petitions.