To: Government Ethics Work Group and Interested Persons  
Re: Staff Analysis and Sub-Work Group Recommendations on LC 592  
Organization Structure, Rulemaking and Advisory Opinions  
From: Jerry Watson, Special Counsel, Oregon Law Commission  
Date: September 29, 2006

LC 592 would make changes to the organization and structure of the ethics governing entity, and to procedures for rulemaking and advisory opinions.

Oregon Law Commission staff has reviewed the text of draft statutory provisions in LC 592. Staff finds that the statutory draft appropriately reflects the decisions and recommendations made by the Administration of Government Ethics Sub-Work Group (Group #2).¹ Group #2 now forwards the draft to the full Government Ethics Work Group for consideration and action.

Organization Structure: The Sub-Work Group agreed to make the following recommendations at its meetings on February 2, 2006, February 28, 2006, March 30, 2006, May 2, 2006 and September 21, 2006. The draft statutory provisions concerning rulemaking are generally found in Sections 1-2 and 17 of LC 592.

1. Commissioners should be limited to one four-year term plus the unexpired portion of any term to which they are initially appointed.² (See Section 1 of LC 592 amending ORS 244.250)

2. The ethics governing entity, when deciding whether to proceed with an investigation or impose sanctions, should be required to consider the public interest and both prior and future sanctions applied in other government proceedings resulting from the same underlying action. (See Section 2 of LC 592 amending ORS 244.390 by adding a new Subsection 2 at lines 24-31 of LC 592 (page 3))

¹ Statutory changes in LC 592, except as specifically discussed in this memorandum, are generally technical changes to conform to Legislative Counsel’s form and style. Those technical changes are self-explanatory. Sections 18 and 19 of LC 592 contain technical changes necessary to make other statutory provisions not otherwise amended conform to the changes made by Sections 1-17.

² Except as noted above, the sub-work group determined that the organizational structure of the ethics governing entity set forth in existing ORS 244.250 and ORS 244.310 should remain substantially unchanged. (See Section 1 of LC 592 amending ORS 244.250 and Section 17 of LC 592 at ORS 244.310(1))
Rulemaking: The Sub-Work Group agreed to make the following recommendations at its meetings on May 2, 2006, May 25, 2006 and September 21, 2006. The draft statutory provisions concerning rulemaking are generally found in Sections 3-12 of LC 592.

3. The ethics governing entity shall consider adopting rules through the formal administrative rulemaking process of Oregon’s Administrative Procedures Act (ORS Chapter 183) on ethical matters of broad interest or ethical matters that are raised as an issue of concern on a recurring basis. (See Section 3 of LC 592 amending ORS 244.290 by adding a new section (4)(a))

4. The ethics governing entity should conduct an annual review of existing rules and the need for additional rules to address matters of broad or recurring interest. (See Section 3 of LC 592 amending ORS 244.290 by adding a new section (4)(b))

5. State agencies and state-wide membership organizations of local government and/or special districts (“state-wide associations”) shall be allowed to submit ethics “policies” applicable to that state agency or to each member entity of the state-wide association that adopts those policies, for review and approval by the ethics governing agency. Any ethics “policy” approved must be consistent with applicable state law. The ethics governing agency will not impose sanctions for conduct that would violate state ethics laws, if that conduct was permitted under an ethics governing agency approved “policy” prior to the conduct occurring. (See Section 5 of LC 592 adding new provisions (subsections 1-3))

6. The ethics governing entity shall have statutory authority to adopt rules necessary to carry out all its duties. (See generally Section 3 of LC 592 at proposed ORS 244.290 (2). See also Subsection (4)(a) and (b))

7. The ethics governing entity should not be allowed to exempt any kind of “gift” from statutory coverage by rulemaking, unless there is a defined cap on the amount of any such exemption. The existing statutory exemption through rulemaking for “any gift of food and beverage” should be eliminated. (See Section 6 of LC 592 amending ORS 244.100 by deleting subsections 1 and 2. Note: Subsection 1 was moved to Section 3 at proposed ORS 244.290(3)(b))

8. Other statutory provisions of current law that specify specific situations where the ethics governing entity is to enact rules should continue to be a part of Oregon’s government ethics laws. Moreover, such specific situations where the ethics governing entity is required or allowed to adopt administrative rules should be consolidated into one
statutory section to the fullest extent possible.  (See Section 3 of LC 592 amending ORS 244.290 at subsection (3) (a), (c) and (d))

Advisory Opinions: The Sub-Work Group agreed to make the following recommendations at its meetings on May 25, 2006, June 23, 2006 and September 21, 2006. The draft statutory provisions concerning advisory opinions are generally found in Sections 13-16 of LC 592.

9. Upon written request for a Commission Advisory Opinion, from any person, the Commission shall either issue a written Commission Advisory Opinion about the application of any of the ethics laws to the person in regard to a specified real or hypothetical factual situation or issue a written denial of the request, explaining the reason for the denial. The Commission may request further information to enable it to issue a Commission Advisory Opinion.  (See comment following Recommendation 11)

10. On its own initiative, the Commission may issue a written Commission Advisory Opinion about the application of government ethics law if a majority of the Commission determines that an opinion would be in the public interest or in the interest of persons under the jurisdiction of the Commission.  (See comment following Recommendation 11)

11. Approval of a written Commission Advisory Opinion requires a majority of Commissioners at a regular meeting of the Commission.  (With regard to Recommendations 9-11 above, see particularly Section 13 of LC 592 amending ORS 244.280 (1) and deleted subsection (2) of ORS 244.280)

12. The Commission shall respond to requests for a Commission Advisory Opinion not later than the 60th day after the date the Commission receives the request. The Commission by vote may extend the time available by 30 days. The Commission may not grant more than two extensions (for a total of 120 days).  (See Section 13 of LC 592 at proposed ORS 244.280 (2))

13. Commission Advisory Opinions shall be subject to review by legal counsel to the Commission prior to approval by the commission.  (See Section 13 of LC 592 amending ORS 244.280 (1))

14. Until and unless amended or revoked, the requestor (unless material facts were omitted or misstated) or persons similarly situated who act in good faith based upon a written Commission Advisory Opinion shall not be sanctioned by the Commission for

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The indicated subsections were moved respectively from ORS 244.020(14)[See Section 8], ORS 244.130[See Section 9] and ORS 244.080[See Section 12].

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actions that would be allowed under a written Commission Advisory Opinion. (See Section 13 of LC 592 at proposed ORS 244.280 (3) and deleted subsection (3))

15. Upon written request from any public official or any candidate for public office, the Commission staff shall either issue a written Staff Advisory Opinion about the application of any of the ethics laws to the person in regard to a specified real or hypothetical factual situation or issue a written denial of the request, explaining the reason for the denial. The staff may request further information to enable it to issue a Staff Advisory Opinion. Staff Advisory Opinions shall be designated as such. (See Section 15 of LC 592 at subsection (1))

16. The Commission staff shall respond to requests for Staff Advisory Opinions not later than the 30th day after the date the Commission receives the request. The Staff may extend the time available by 30 days (for a total of 60 days). (See Section 15 of LC 592 at subsection (2))

17. Good faith reliance upon a Written Staff Advisory Opinion by the Requestor, unless material facts were omitted or misstated, shall be taken into account by the Commission in determining sanction. (See Section 15 of LC 592 at subsection (3))

18. All written Staff Advisory Opinions shall be reported to the Commission and the Commission on its own motion may thereafter issue a Commission Advisory Opinion. (See Section 15 of LC 592 at subsection (4))

19. Advice may be provided by Commission staff and rendered orally or in writing (including email). All written staff opinions that are not designated as a “staff advisory opinion” will be considered “staff advice.” (See Section 16 of LC 592 at subsection (1))

20. Staff advice provided to a requestor by Commission staff does not provide immunity from sanctions by the Commission but may be considered by the Commission when imposing sanctions. (See Section 16 of LC 592 at subsection (2))

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4Good faith reliance on a staff advisory opinion must be taken into consideration by the Commission when determining sanctions. This creates a “three-tier” system of advisory opinions (i.e. no sanctions for reliance on a formal advisory opinions and the reliance on an informal staff advisory opinion may be taken into consideration when determining sanctions).