

Senate Bill 40

Sponsored by Senator FINDLEY (at the request of Oregon Business and Industry) (Pre-session filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Requires agency to provide technical and legal documentation supporting statement of need required in notice of rulemaking.

Directs court reviewing agency order to set aside or remand order if court finds that agency action, findings or conclusions were arbitrary or capricious.

A BILL FOR AN ACT

1
2 Relating to administrative law; creating new provisions; and amending ORS 183.335, 183.482 and
3 183.484.

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

5 **SECTION 1.** ORS 183.335, as amended by section 6, chapter 97, Oregon Laws 2022, is amended
6 to read:

7 183.335. (1) Prior to the adoption, amendment or repeal of any rule, the agency shall give notice
8 of its intended action:

9 (a) In the manner established by rule adopted by the agency under ORS 183.341 (4), which pro-
10 vides a reasonable opportunity for interested persons to be notified of the agency's proposed action;

11 (b) In the bulletin referred to in ORS 183.360 at least 21 days prior to the effective date;

12 (c) At least 28 days before the effective date, to persons who have requested notice pursuant to
13 subsection (8) of this section; and

14 (d) Delivered only by electronic mail, at least 49 days before the effective date, to the persons
15 specified in subsection (15) of this section.

16 (2)(a) The notice required by subsection (1) of this section must include:

17 (A) A caption of not more than 15 words that reasonably identifies the subject matter of the
18 agency's intended action. The agency shall include the caption on each separate notice, statement,
19 certificate or other similar document related to the intended action.

20 (B) An objective, simple and understandable statement summarizing the subject matter and
21 purpose of the intended action in sufficient detail to inform a person that the person's interests may
22 be affected, and the time, place and manner in which interested persons may present their views on
23 the intended action.

24 (b) The agency shall include with the notice of intended action given under subsection (1) of this
25 section:

26 (A) A citation of the statutory or other legal authority relied upon and bearing upon the
27 promulgation of the rule;

28 (B) A citation of the statute or other law the rule is intended to implement;

29 (C) A statement of the need for the rule, [*and*] a statement of how the rule is intended to meet
30 the need **and technical and legal documentation supporting the statement of the need**;

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.
New sections are in **boldfaced** type.

1 (D) A list of the principal documents, reports or studies, if any, prepared by or relied upon by
2 the agency in considering the need for and in preparing the rule, and a statement of the location
3 at which those documents are available for public inspection. The list may be abbreviated if neces-
4 sary, and if so abbreviated there shall be identified the location of a complete list;

5 (E) A statement of fiscal impact identifying state agencies, units of local government and the
6 public that may be economically affected by the adoption, amendment or repeal of the rule and an
7 estimate of that economic impact on state agencies, units of local government and the public. In
8 considering the economic effect of the proposed action on the public, the agency shall utilize avail-
9 able information to project any significant economic effect of that action on businesses which shall
10 include a cost of compliance effect on small businesses affected. For an agency specified in ORS
11 183.530, the statement of fiscal impact shall also include a housing cost impact statement as de-
12 scribed in ORS 183.534;

13 (F) A statement identifying how adoption of the rule will affect racial equity in this state;

14 (G) If an advisory committee is not appointed under the provisions of ORS 183.333, an explana-
15 tion as to why no advisory committee was used to assist the agency in drafting the rule; and

16 (H) A request for public comment on whether other options should be considered for achieving
17 the rule's substantive goals while reducing the negative economic impact of the rule on business.

18 (c) The Secretary of State may omit the information submitted under paragraph (b) of this sub-
19 section from publication in the bulletin referred to in ORS 183.360.

20 (d) When providing notice of an intended action under subsection (1)(c) of this section, the
21 agency shall provide a copy of the rule that the agency proposes to adopt, amend or repeal, or an
22 explanation of how the person may acquire a copy of the rule. The copy of an amended rule shall
23 show all changes to the rule by striking through material to be deleted and underlining all new
24 material, or by any other method that clearly shows all new and deleted material.

25 (3)(a) When an agency proposes to adopt, amend or repeal a rule, it shall give interested persons
26 reasonable opportunity to submit data or views. Opportunity for oral hearing shall be granted upon
27 request received from 10 persons or from an association having not less than 10 members before the
28 earliest date that the rule could become effective after the giving of notice pursuant to subsection
29 (1) of this section. An agency holding a hearing upon a request made under this subsection shall give
30 notice of the hearing at least 21 days before the hearing to the person who has requested the
31 hearing, to persons who have requested notice pursuant to subsection (8) of this section and to the
32 persons specified in subsection (15) of this section. The agency shall publish notice of the hearing
33 in the bulletin referred to in ORS 183.360 at least 14 days before the hearing. The agency shall
34 consider fully any written or oral submission.

35 (b) If an agency is required to conduct an oral hearing under paragraph (a) of this subsection,
36 and the rule for which the hearing is to be conducted applies only to a limited geographical area
37 within this state, or affects only a limited geographical area within this state, the hearing shall be
38 conducted within the geographical area at the place most convenient for the majority of the resi-
39 dents within the geographical area. At least 14 days before a hearing conducted under this para-
40 graph, the agency shall publish notice of the hearing in the bulletin referred to in ORS 183.360 and
41 in a newspaper of general circulation published within the geographical area that is affected by the
42 rule or to which the rule applies. If a newspaper of general circulation is not published within the
43 geographical area that is affected by the rule or to which the rule applies, the publication shall be
44 made in the newspaper of general circulation published closest to the geographical area.

45 (c) Notwithstanding paragraph (a) of this subsection, the Department of Corrections and the

1 State Board of Parole and Post-Prison Supervision may adopt rules limiting participation by adults
2 in custody in the proposed adoption, amendment or repeal of any rule to written submissions.

3 (d) If requested by at least five persons before the earliest date that the rule could become ef-
4 fective after the agency gives notice pursuant to subsection (1) of this section, the agency shall
5 provide a statement that identifies the objective of the rule and a statement of how the agency will
6 subsequently determine whether the rule is in fact accomplishing that objective.

7 (e) An agency that receives data or views concerning proposed rules from interested persons
8 shall maintain a record of the data or views submitted. The record shall contain:

9 (A) All written materials submitted to an agency in response to a notice of intent to adopt,
10 amend or repeal a rule.

11 (B) A recording or summary of oral submissions received at hearings held for the purpose of
12 receiving those submissions.

13 (C) Any public comment received in response to the request made under subsection (2)(b)(H) of
14 this section and the agency's response to that comment.

15 (D) Any statements provided by the agency under paragraph (d) of this subsection.

16 (4) Upon request of an interested person received before the earliest date that the rule could
17 become effective after the giving of notice pursuant to subsection (1) of this section, the agency shall
18 postpone the date of its intended action no less than 21 nor more than 90 days in order to allow the
19 requesting person an opportunity to submit data, views or arguments concerning the proposed
20 action. Nothing in this subsection shall preclude an agency from adopting a temporary rule pursuant
21 to subsection (5) of this section.

22 (5) Notwithstanding subsections (1) to (4) of this section, an agency may adopt, amend or sus-
23 pend a rule without prior notice or hearing or upon any abbreviated notice and hearing that *[it]* **the**
24 **agency** finds practicable, if the agency prepares:

25 (a) A statement of its findings that its failure to act promptly will result in serious prejudice to
26 the public interest or the interest of the parties concerned and the specific reasons for its findings
27 of prejudice;

28 (b) A citation of the statutory or other legal authority relied upon and bearing upon the
29 promulgation of the rule;

30 (c) A statement of the need for the rule and a statement of how the rule is intended to meet the
31 need;

32 **(d) Technical and legal documentation supporting the statement of the need;**

33 *[(d)]* (e) A list of the principal documents, reports or studies, if any, prepared by or relied upon
34 by the agency in considering the need for and in preparing the rule, and a statement of the location
35 at which those documents are available for public inspection; and

36 *[(e)]* (f) For an agency specified in ORS 183.530, a housing cost impact statement as defined in
37 ORS 183.534.

38 (6)(a) A rule adopted, amended or suspended under subsection (5) of this section is temporary
39 and may be effective for a period of not longer than 180 days. The adoption of a rule under this
40 subsection does not preclude the subsequent adoption of an identical rule under subsections (1) to
41 (4) of this section.

42 (b) A rule temporarily suspended shall regain effectiveness upon expiration of the temporary
43 period of suspension unless the rule is repealed under subsections (1) to (4) of this section.

44 (7) Notwithstanding subsections (1) to (4) of this section, an agency may amend a rule without
45 prior notice or hearing if the amendment is solely for the purpose of:

- 1 (a) Changing the name of an agency by reason of a name change prescribed by law;
- 2 (b) Changing the name of a program, office or division within an agency as long as the change
3 in name does not have a substantive effect on the functions of the program, office or division;
- 4 (c) Correcting spelling;
- 5 (d) Correcting grammatical mistakes in a manner that does not alter the scope, application or
6 meaning of the rule;
- 7 (e) Correcting statutory or rule references;
- 8 (f) Correcting addresses or telephone numbers referred to in the rules; or
- 9 (g) Changing a term or phrase in order to conform with a change prescribed by law.
- 10 (8)(a) Any person may request in writing that an agency send to the person copies of the
11 agency's notices of intended action issued under subsection (1) of this section. The person must
12 provide an address where the person elects to receive notices. The address provided may be a postal
13 mailing address or, if the agency provides notice by electronic mail, may be an electronic mailing
14 address.
- 15 (b) A request under this subsection must indicate that the person requests one of the following:
- 16 (A) The person may request that the agency mail paper copies of the proposed rule and other
17 information required by subsection (2) of this section to the postal mailing address.
- 18 (B) If the agency posts notices of intended action on a website, the person may request that the
19 agency mail the information required by subsection (2)(a) of this section to the postal mailing ad-
20 dress with a reference to the website where electronic copies of the proposed rule and other infor-
21 mation required by subsection (2) of this section are posted.
- 22 (C) The person may request that the agency electronically mail the information required by
23 subsection (2)(a) of this section to the electronic mailing address, and either provide electronic
24 copies of the proposed rule and other information required by subsection (2) of this section or pro-
25 vide a reference to a website where electronic copies of the proposed rule and other information
26 required by subsection (2) of this section are posted.
- 27 (c) Upon receipt of any request under this subsection, the agency shall acknowledge the request,
28 establish a mailing list and maintain a record of all mailings made pursuant to the request. Agencies
29 may establish procedures for establishing the mailing lists and keeping the mailing lists current.
30 Agencies by rule may establish fees necessary to defray the costs of mailings and maintenance of
31 the lists.
- 32 (d) Members of the Legislative Assembly who receive notices under subsection (15) of this sec-
33 tion may request that an agency furnish paper copies of the notices.
- 34 (9) This section does not apply to rules establishing an effective date for a previously effective
35 rule or establishing a period during which a provision of a previously effective rule will apply.
- 36 (10) This section does not apply to ORS 279.835 to 279.855, 279A.140 to 279A.161, 279A.250 to
37 279A.290, 279A.990, 279B.050 to 279B.085, 279B.200 to 279B.240, 279B.270, 279B.275, 279B.280,
38 279C.360, 279C.365, 279C.370, 279C.375, 279C.380, 279C.385, 279C.500 to 279C.530, 279C.540, 279C.545,
39 279C.550 to 279C.570, 279C.580, 279C.585, 279C.590, 279C.600 to 279C.625, 279C.650 to 279C.670 and
40 279C.800 to 279C.870 relating to public contracts and purchasing.
- 41 (11)(a) Except as provided in paragraph (c) of this subsection, a rule is not valid unless adopted
42 in substantial compliance with the provisions of this section in effect on the date that the notice
43 required under subsection (1) of this section is delivered to the Secretary of State for the purpose
44 of publication in the bulletin referred to in ORS 183.360.
- 45 (b) In addition to all other requirements with which rule adoptions must comply, a rule other

1 than a rule amended for a purpose described in subsection (7) of this section is not valid if the rule
2 has not been submitted to the Legislative Counsel in the manner required by ORS 183.355 and
3 183.715.

4 (c) A rule is not subject to judicial review or other challenge by reason of failing to comply with
5 subsection (2)(a)(A) of this section.

6 (12)(a) Notwithstanding the provisions of subsection (11) of this section, but subject to paragraph
7 (b) of this subsection, an agency may correct its failure to substantially comply with the require-
8 ments of subsections (2) and (5) of this section in adoption of a rule by an amended filing, as long
9 as the noncompliance did not substantially prejudice the interests of persons to be affected by the
10 rule.

11 (b) An agency may use an amended filing to correct a failure to include a fiscal impact state-
12 ment in a notice of intended action, as required by subsection (2)(b)(E) of this section, or to correct
13 an inaccurate fiscal impact statement, only if the agency developed the fiscal impact statement with
14 the assistance of an advisory committee or fiscal impact advisory committee appointed under ORS
15 183.333.

16 (13) Unless otherwise provided by statute, the adoption, amendment or repeal of a rule by an
17 agency need not be based upon or supported by an evidentiary record.

18 (14) When an agency has established a deadline for comment on a proposed rule under the pro-
19 visions of subsection (3)(a) of this section, the agency may not extend that deadline for another
20 agency or person unless the extension applies equally to all interested agencies and persons. An
21 agency shall not consider any submission made by another agency after the final deadline has
22 passed.

23 (15) The notices required under subsections (1) and (3) of this section must be given by the
24 agency to the following persons:

25 (a) If the proposed adoption, amendment or repeal results from legislation that was passed
26 within two years before notice is given under subsection (1) of this section, notice shall be given to
27 the legislator who introduced the bill that subsequently was enacted into law, and to the chair or
28 cochairs of all committees that reported the bill out, except for those committees whose sole action
29 on the bill was referral to another committee.

30 (b) If the proposed adoption, amendment or repeal does not result from legislation that was
31 passed within two years before notice is given under subsection (1) of this section, notice shall be
32 given to the chair or cochairs of any interim or session committee with authority over the subject
33 matter of the rule.

34 (c) If notice cannot be given under paragraph (a) or (b) of this subsection, notice shall be given
35 to the Speaker of the House of Representatives and to the President of the Senate who are in office
36 on the date the notice is given.

37 (16)(a) Upon the request of a member of the Legislative Assembly or of a person who would be
38 affected by a proposed adoption, amendment or repeal, the committees receiving notice under sub-
39 section (15) of this section shall review the proposed adoption, amendment or repeal for compliance
40 with the legislation from which the proposed adoption, amendment or repeal results.

41 (b) The committees shall submit their comments on the proposed adoption, amendment or repeal
42 to the agency proposing the adoption, amendment or repeal.

43 **SECTION 2.** ORS 183.482 is amended to read:

44 183.482. (1) Jurisdiction for judicial review of contested cases is conferred upon the Court of
45 Appeals. Proceedings for review shall be instituted by filing a petition in the Court of Appeals. The

1 petition shall be filed within 60 days only following the date the order upon which the petition is
2 based is served unless otherwise provided by statute. If a petition for rehearing has been filed, then
3 the petition for review shall be filed within 60 days only following the date the order denying the
4 petition for rehearing is served. If the agency does not otherwise act, a petition for rehearing or
5 reconsideration shall be deemed denied the 60th day following the date the petition was filed, and
6 in such cases, petition for judicial review shall be filed within 60 days only following such date. Date
7 of service shall be the date on which the agency delivered or mailed its order in accordance with
8 ORS 183.470.

9 (2) The petition shall state the nature of the order the petitioner desires reviewed, and shall
10 state whether the petitioner was a party to the administrative proceeding, was denied status as a
11 party or is seeking judicial review as a person adversely affected or aggrieved by the agency order.
12 In the latter case, the petitioner shall, by supporting affidavit, state the facts showing how the
13 petitioner is adversely affected or aggrieved by the agency order. Before deciding the issues raised
14 by the petition for review, the Court of Appeals shall decide, from facts set forth in the affidavit,
15 whether or not the petitioner is entitled to petition as an adversely affected or an aggrieved person.
16 Copies of the petition shall be served by registered or certified mail upon the agency, and all other
17 parties of record in the agency proceeding.

18 (3)(a) The filing of the petition shall not stay enforcement of the agency order, but the agency
19 may do so upon a showing of:

20 (A) Irreparable injury to the petitioner; and

21 (B) A colorable claim of error in the order.

22 (b) When a petitioner makes the showing required by paragraph (a) of this subsection, the
23 agency shall grant the stay unless the agency determines that substantial public harm will result if
24 the order is stayed. If the agency denies the stay, the denial shall be in writing and shall specifically
25 state the substantial public harm that would result from the granting of the stay.

26 (c) When the agency grants a stay, the agency may impose such reasonable conditions as the
27 giving of a bond, irrevocable letter of credit or other undertaking and that the petitioner file all
28 documents necessary to bring the matter to issue before the Court of Appeals within specified rea-
29 sonable periods of time.

30 (d) Agency denial of a motion for stay is subject to review by the Court of Appeals under such
31 rules as the court may establish.

32 (4) Within 30 days after service of the petition, or within such further time as the court may
33 allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire
34 record of the proceeding under review, but, by stipulation of all parties to the review proceeding,
35 the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may
36 be taxed by the court for the additional costs. The court may require or permit subsequent cor-
37 rections or additions to the record when deemed desirable. Except as specifically provided in this
38 subsection, the cost of the record shall not be taxed to the petitioner or any intervening party.
39 However, the court may tax such costs and the cost of agency transcription of record to a party
40 filing a frivolous petition for review.

41 (5) If, on review of a contested case, before the date set for hearing, application is made to the
42 court for leave to present additional evidence, and it is shown to the satisfaction of the court that
43 the additional evidence is material and that there were good and substantial reasons for failure to
44 present it in the proceeding before the agency, the court may order that the additional evidence be
45 taken before the agency upon such conditions as the court deems proper. The agency may modify

1 its findings and order by reason of the additional evidence and shall, within a time to be fixed by
 2 the court, file with the reviewing court, to become a part of the record, the additional evidence,
 3 together with any modifications or new findings or orders, or its certificate that the agency elects
 4 to stand on its original findings and order, as the case may be.

5 (6) At any time subsequent to the filing of the petition for review and prior to the date set for
 6 hearing the agency may withdraw its order for purposes of reconsideration. If an agency withdraws
 7 an order for purposes of reconsideration, the agency shall, within such time as the court may allow,
 8 affirm, modify or reverse its order. If the petitioner is dissatisfied with the agency action after
 9 withdrawal for purposes of reconsideration, the petitioner may refile the petition for review and the
 10 review shall proceed upon the revised order. An amended petition for review shall not be required
 11 if the agency, on reconsideration, affirms the order or modifies the order with only minor
 12 changes. If an agency withdraws an order for purposes of reconsideration and modifies or reverses
 13 the order in favor of the petitioner, the court shall allow the petitioner costs, but not attorney fees,
 14 to be paid from funds available to the agency.

15 (7) Review of a contested case shall be confined to the record, and the court shall not substitute
 16 its judgment for that of the agency as to any issue of fact or agency discretion. In the case of dis-
 17 puted allegations of irregularities in procedure before the agency not shown in the record which, if
 18 proved, would warrant reversal or remand, the Court of Appeals may refer the allegations to a
 19 master appointed by the court to take evidence and make findings of fact upon them. The court shall
 20 remand the order for further agency action if the court finds that either the fairness of the pro-
 21 ceedings or the correctness of the action may have been impaired by a material error in procedure
 22 or a failure to follow prescribed procedure, including a failure by the presiding officer to comply
 23 with the requirements of ORS 183.417 (8).

24 (8)(a) The court may affirm, reverse or remand the order. If the court finds that the agency has
 25 erroneously interpreted a provision of law and that a correct interpretation compels a particular
 26 action, the court shall:

27 (A) Set aside or modify the order; or

28 (B) Remand the case to the agency for further action under a correct interpretation of the pro-
 29 vision of law.

30 (b) The court shall remand the order to the agency if the court finds the agency's exercise of
 31 discretion to be:

32 (A) Outside the range of discretion delegated to the agency by law;

33 (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency
 34 practice, if the inconsistency is not explained by the agency; or

35 (C) Otherwise in violation of a constitutional or statutory provision.

36 (c) The court shall set aside or remand the order if the court finds that the order is not sup-
 37 ported by substantial evidence in the record. Substantial evidence exists to support a finding of fact
 38 when the record, viewed as a whole, would permit a reasonable person to make that finding.

39 **(d) The court shall set aside or remand the order if the court finds that the agency action**
 40 **or the findings or conclusions supporting the order were arbitrary or capricious.**

41 **SECTION 3.** ORS 183.484 is amended to read:

42 183.484. (1) Jurisdiction for judicial review of orders other than contested cases is conferred
 43 upon the Circuit Court for Marion County and upon the circuit court for the county in which the
 44 petitioner resides or has a principal business office. Proceedings for review under this section shall
 45 be instituted by filing a petition in the Circuit Court for Marion County or the circuit court for the

1 county in which the petitioner resides or has a principal business office.

2 (2) Petitions for review shall be filed within 60 days only following the date the order is served,
 3 or if a petition for reconsideration or rehearing has been filed, then within 60 days only following
 4 the date the order denying such petition is served. If the agency does not otherwise act, a petition
 5 for rehearing or reconsideration shall be deemed denied the 60th day following the date the petition
 6 was filed, and in such case petition for judicial review shall be filed within 60 days only following
 7 such date. Date of service shall be the date on which the agency delivered or mailed its order in
 8 accordance with ORS 183.470.

9 (3) The petition shall state the nature of the petitioner’s interest, the facts showing how the
 10 petitioner is adversely affected or aggrieved by the agency order and the ground or grounds upon
 11 which the petitioner contends the order should be reversed or remanded. The review shall proceed
 12 and be conducted by the court without a jury.

13 (4) At any time subsequent to the filing of the petition for review and prior to the date set for
 14 hearing, the agency may withdraw its order for purposes of reconsideration. If an agency withdraws
 15 an order for purposes of reconsideration, it shall, within such time as the court may allow, affirm,
 16 modify or reverse its order. If the petitioner is dissatisfied with the agency action after withdrawal
 17 for purposes of reconsideration, the petitioner may refile the petition for review and the review shall
 18 proceed upon the revised order. An amended petition for review shall not be required if the agency,
 19 on reconsideration, affirms the order or modifies the order with only minor changes. If an agency
 20 withdraws an order for purposes of reconsideration and modifies or reverses the order in favor of
 21 the petitioner, the court shall allow the petitioner costs, but not attorney fees, to be paid from funds
 22 available to the agency.

23 (5)(a) The court may affirm, reverse or remand the order. If the court finds that the agency has
 24 erroneously interpreted a provision of law and that a correct interpretation compels a particular
 25 action, it shall:

26 (A) Set aside or modify the order; or

27 (B) Remand the case to the agency for further action under a correct interpretation of the pro-
 28 vision of law.

29 (b) The court shall remand the order to the agency if *[it]* **the court** finds the agency’s exercise
 30 of discretion to be:

31 (A) Outside the range of discretion delegated to the agency by law;

32 (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency
 33 practice, if the inconsistency is not explained by the agency; or

34 (C) Otherwise in violation of a constitutional or statutory provision.

35 (c) The court shall set aside or remand the order *[if]* **the court** it finds that the order is not
 36 supported by substantial evidence in the record. Substantial evidence exists to support a finding of
 37 fact when the record, viewed as a whole, would permit a reasonable person to make that finding.

38 **(d) The court shall set aside or remand the order if the court finds that the agency action**
 39 **or the findings or conclusions supporting the order were arbitrary or capricious.**

40 (6) In the case of reversal the court shall make special findings of fact based upon the evidence
 41 in the record and conclusions of law indicating clearly all aspects in which the agency’s order is
 42 erroneous.

43 **SECTION 4. The amendments to ORS 183.335 by section 1 of this 2023 Act apply to notices**
 44 **of intended action given on or after the effective date of this 2023 Act.**

45 **SECTION 5. The amendments to ORS 183.482 and 183.484 by sections 2 and 3 of this 2023**

1 **Act apply to orders served on or after the effective date of this 2023 Act.**

2
