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City Club of Portland (Portland, Or.)

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# Oregon State Ballot Measure 27: Legislative Approval of All State Administrative Rules

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**CITY  
CLUB**  
OF PORTLAND

**Your committee found:** Measure 27 is a blunt, badly conceived effort to limit the scope of governmental regulation. This constitutional amendment would significantly alter the balance of power in state government in favor of whichever party controls the legislature. A small group of legislators, not representative of the electorate as a whole, could kill or hobble governmental programs by nullifying the administrative rules that implement them. These actions could be taken without a vote by the full Legislative Assembly and without being subject to a veto by the Governor or to a referendum vote by the People. Administrative rules are already subject to correction by the courts or can be nullified or amended by the legislature through additional legislation. The sweeping changes that would be instituted by Measure 27 are unnecessary and contrary to good government. Your committee unanimously recommends a "No" vote on Measure 27.

The City Club membership will vote on this report on Friday, September 20, 1996. Until the membership vote, the City Club of Portland does not have an official position on this report. The outcome of this vote will be reported in the City Club *BULLETIN* dated October 11, 1996.

# I. INTRODUCTION

**Ballot Measure 27 will appear on the ballot as follows:**

**Caption:** Amends Constitution: Grants Legislature New Power over Both New, Existing Administrative Rules.

**Result of "Yes" Vote:** With "yes" vote, new administrative rules expire unless legislature approves; committee may veto existing rules.

**Result of "No" Vote:** "No" vote retains current system, allowing administrative rules to stay in effect without legislative approval.

**Summary:** Amends constitution. State agency rules now may be adopted and stay in effect without legislative approval. Legislature may require agency to change rules by adopting new statutes, subject to governor's veto. Measure would require agencies to file new rules with legislative committee. Rules would expire after legislature adjourns unless legislature approves rule by joint resolution. Upon qualified request, committee may review any new or existing rule and, upon review, must take public testimony. If committee rejects rule, rule expires unless legislature approves by joint resolution.

(The language of the caption, question, and summary was prepared by the Attorney General of Oregon.)

Measure 27 was referred to the voters by the 1995 Legislature as Senate Joint Resolution (SJR) 12 and was selected for study by the City Club from among the 23 measures to be voted on at the November 1996 General Election. The City Club chose to study this measure because of its potential impact on state government, and because it deals with matters on which most voters are not well informed. A committee was selected from among City Club members who had volunteered to participate in ballot measure studies. The Club screened committee members to ensure that no member had an economic interest in the outcome of the study or had taken a public position on the subject of the measure. Committee members met for three weeks, interviewed proponents and opponents of the measure and other interested persons, and reviewed relevant articles, reports, and other materials, as listed in the Appendices.

## II. BACKGROUND

### A. The Existing State Agency Rule-Making Process

The state legislature creates administrative agencies by passing laws that establish an agency's overall goals, policies, authority, function and

power. These laws are also known as an agency's "enabling legislation." Given this broad direction, an agency develops and adopts more detailed rules to guide the agency's implementation of its legislative charge and the implementation of any subsequent directives from the legislature.

For example, the legislature could pass statutes directing the Child Care Division to adopt rules to ensure the safety, health, and appropriate supervision of children in family day care homes. The Division would then draft rules comparable to those in effect for child care centers, taking into consideration the differences in scale of the two types of operations. It would hold public hearings to obtain input from operators of family day care homes, from parents who use day care facilities, and from child development experts. The Division would then adopt rules to carry out the intent of the legislation, setting deadlines for compliance and establishing penalties for violations of the standards.

An agency thus: (1) adopts rules establishing programs and standards that the legislature has directed or permitted; (2) adopts procedural rules to guide the establishment of rules, conduct of contested cases and citizen interaction with the agency; and (3) enforces its own rules and terms of its enabling legislation. An agency may also adopt rules that explain how it interprets statutory requirements that it implements or enforces.

When an agency decides or is directed by the legislature to adopt a rule, it ordinarily must follow certain procedures. The agency must give proper notice to interested persons and those making a written request for notice. The agency gives interested persons an opportunity to submit data or their views and, upon request, the agency will schedule a public hearing. Generally, a certified copy of each rule adopted must be submitted to the Secretary of State to be valid or effective. Each agency must then submit a copy of the adopted rule to the legislature's legal counsel, the Legislative Counsel (Counsel). In many agencies (e.g., Department of Environmental Quality, and Land Conservation and Development Commission), rules are adopted by appointed citizen commissions. These commissioners generally rely on the technical knowledge and experience of agency staff, in addition to public input, when taking action on a rule.

Review of a rule by Counsel can be initiated in a number of different ways. Counsel may choose to review an adopted or proposed rule. The Legislative Counsel Committee, staffed by the Counsel, can require Counsel to review rules. Committee members include the speaker of the House and the president of the Senate who each appoint additional members to the committee. Counsel may review an adopted rule upon written request of any member of the Legislative Assembly or any person affected by the rule.

In reviewing a rule, Counsel must determine whether the rule appears to be within the intent and scope of the enabling legislation and whether the rule raises any constitutional issues. Neither Counsel or the

committee may invalidate an agency rule. The Legislative Counsel Committee must report to the Legislative Assembly at each regular session on the review of agency rules by Counsel and the Legislative Counsel Committee. It must include determinations made by Counsel and the Legislative Counsel Committee and any recommendations made to state agencies and any recommendations for legislation. The legislature, after receiving comments from Counsel, can then amend the statute to establish legislative intent, change it, or make it more specific.

Agency rules are also subject to review in the courts which determine whether the agency followed proper rule making procedures, whether the agency exceeded the statutory authority delegated to it in its enabling legislation, and the constitutionality of rules.

## **B. Administrative Rule Review in Other States**

Several states have amended their administrative rule review procedures for reasons similar to those advanced by the proponents of Measure 27. In most cases where states have enacted legislative veto provisions by statute the courts have held the provisions to be unconstitutional under state constitutions. In response, many states have provided legislative review and veto power through state constitutional amendments. A review of other states conducted by the National Conference of State Legislatures found the following: Forty-one states have some form of legislative review of administrative rules with provisions for veto by statute or resolution. Ten of those states have review by both the legislative and executive branches.

Measure 27 goes beyond the review and veto provisions most other states have established: it would enable the legislature to negate rules by inaction, rather than by voting to veto specific rules. In the day-care example mentioned above, for instance, the legislature could nullify standards for family day-care homes by failing to approve them, without formally voting to veto them. A vote to veto specific rules identifies the legislators opposing the rules. Taking no action permits those responsible to remain invisible.

## **C. How Measure 27 Would Work**

Measure 27 is portrayed by its supporters as an effort to curb the growth of government and force administrative agencies to comply with statutory authority and legislative intent. The measure would amend the state constitution to require the legislature to approve all agency rules adopted after the effective date of the amendment and, at the request of a legislator or affected person, those rules adopted prior to the amendment. Any rules not approved would be void.

Measure 27 would establish a joint committee of the Oregon Legislature to review administrative rules. The committee membership would include the president of the Senate and the speaker of the House and an unspecified number of other members of both houses appointed by the president and the speaker. The committee could review any

administrative rule, without regard to when the rule was adopted, upon the request of any member of the legislature or any person affected by the rule. If the committee failed to approve the rule it would become invalid, unless the legislature subsequently adopted a joint resolution approving it. Any administrative rule adopted after the effective date of the measure would become void upon the final adjournment of the next legislative session after the rule's adoption unless the legislature approved it by joint resolution.

### III. ARGUMENTS PRO AND CON

#### A. Arguments Advanced in Favor of the Measure

- Legislative review of rules will help restore trust in government by shifting regulatory power from appointed administrators to popularly elected legislators.
- Legislative review of rules will restore the balance of power between the legislative and executive branches of government.
- State government generates too many rules and regulations; this measure will lessen the number of rules.
- Quality of regulations will be improved if administrators face the possibility of defending them before a legislative committee.
- There will be no significant additional burden on the legislature, since the bulk of rules will receive blanket approval; only problematic ones will be reviewed individually.
- Legislative oversight is necessary to ensure that rules do not exceed legislative intent.

#### B. Arguments Advanced Against the Measure

- There is no clear problem that the measure will solve: rules that exceed statutory intent are already subject to correction by the courts or by passing more specific legislation.
- The measure violates the principle of separation of powers.
- The measure would allow a committee which might not be representative of the full legislature to suspend agency rules and the programs they implement for up to two years.
- The legislature lacks the time and expertise to review the thousands of rules adopted each biennium; the required review could either extend the length of legislative sessions and require agencies to devote staff resources to explaining rules that have already been through a public hearings process, or substitute quick political decisions for administrative expertise.
- Decreasing the number of rules adopted could result in more arbitrary actions by agencies and potentially increase the likelihood of their violating legislative intent.

- The measure's broad definition of "administrative rule" could include agency actions not ordinarily thought of as rules, leading to litigation and possible inadvertent invalidation of less controversial but necessary actions.
- The measure will create uncertainty for persons affected by rules that could be invalidated by the next legislature.

## IV. DISCUSSION

Measure 27 appears to have been born out of frustration with what its backers see as the spreading power of state bureaucrats. The supporters say that Oregonians have to cope with too many rules made by state agencies. They say that too many of those rules fail to comply with the legislature's intent when it passed the law on which the rules are supposed to be based. Some of them object to a particular rule.

The number of new rules formally adopted by Oregon state agencies has increased enormously over the past 20 years, from 445 rules in the 1974-1975 biennium to 11,966 in the biennium of 1994-1995.

If the people's representatives, the members of the legislature, find something wrong with a rule they can pass a law to amend or repeal it. But proponents of Measure 27 note that the legislature meets in regular session for only about seven months every two years, and during the session a proposed rule change has to compete for attention with several thousand other legislative issues. Also, any bill changing or abolishing a rule is subject to the governor's veto and to the possibility of a referendum.

Under existing Oregon law every administrative rule goes to the legislature's Legislative Counsel Committee for review of whether it is constitutional and within the authority of law. Supporters of Measure 27 point out, however, that even if the committee finds something wrong with a rule, its opinion is only advisory. Furthermore, proponents charge, the committee usually looks only at the language of the rule and the underlying law and fails to find out what the legislators had in mind when they passed that law.

While a citizen may ask a state agency to amend its rules, the decision on that request rests with the agency that adopted those rules in the first place. However, no witness offered examples of agencies that were unresponsive to citizens' input, despite the committee's requests for specific examples of problems that would be corrected by Measure 27.

Oregon courts can invalidate an administrative rule if a court decides that the rule is unconstitutional or beyond the authority of law, or that the agency that adopted it failed to follow procedures required by the state Administrative Procedures Act. But critics of the present system point to the time and cost required to take a case through the courts.

Meanwhile, the measure's proponents point out, until there is action by the agency, the legislature, or the courts, an administrative rule remains in effect no matter how faulty (in the opinion of its critics) it has turned out to be. Measure 27 would restore the balance of powers, they argue, by giving the legislature as well as the executive branch and the courts a voice in the adoption of administrative rules.

The possibility that agency administrators might have to appear before a legislative committee to defend their rules might make them less prolific in adopting rules in the first place and more attentive to legislative intent in those they do adopt, say some supporters of the measure. Furthermore, the legislature itself, when drafting a law, would have to become more precise in explaining its intent and specifying how it wants the law to be administered. In the words of one proponent of Measure 27, lawmakers would have to stop "mumbling" and become more accountable for the way their laws are applied.

One proponent acknowledged that some conservative political factions support Measure 27 as part of a general effort to tie up the functioning of agencies such as the Department of Environmental Quality, the Land Conservation and Development Department, and the Bureau of Labor and Industries, which these groups see as having too much power. These outcomes, proponents say, would help bolster the public's trust in government.

Finally, to those who question the constitutionality of Measure 27, supporters reply that it would itself become part of the Oregon Constitution and therefore could not be found unconstitutional under the state constitution. Critics of the measure, on the other hand, object to it on both constitutional and practical grounds.

#### **A. Constitutional and policy issues**

Opponents say, Measure 27 is objectionable because it violates the fundamental American governmental principle of separation of powers. The legislature should not set up a committee to decide whether a rule complies with existing law because the interpretation of laws is the job of the judiciary. Furthermore, the measure would interfere with the governor's constitutional duty to "take care that the laws shall be faithfully executed" by the agencies in the executive branch.

Critics also find fault with the fact that the measure would allow a rule to be suspended or vetoed by a committee consisting of only a few members of the legislature. Since not every district of the state would be represented in the decision, such an action would violate the principle of one person, one vote, they argue.

Opponents also point out that, under Measure 27, the speaker of the House and the president of the Senate not only would serve on the joint committee on administrative rules but also would appoint all the other members—and could remove a fellow representative or senator from the committee at any time.



At the federal level, the U.S. Supreme Court invalidated the legislative veto by one house of Congress in 1983. (*Immigration and Naturalization Service v. Chadha*, 462 U.S. 919.) The Chadha case did not relate directly to state legislatures' veto power. Several of the state supreme court rulings that have found the legislative veto unconstitutional have been heavily influenced, however, by the Chadha case's finding that when a legislative body provides for administrative rule making it delegates part of its lawmaking authority and that therefore, to be constitutional, the legislature's veto of rules must be accomplished by passage of a new law by both houses and its acceptance by the governor, taking that authority back.

Giving the legislature the power to negate an administrative rule by taking no action would deprive the governor of his power to decide whether to accept or veto legislation. It also would deprive the people of their right to override both legislature and governor by referring a legislative veto to a public vote.

## **B. Practical Effects**

Besides the constitutional objections, critics of Measure 27 present several practical ones:

- Far from simplifying and clarifying government, the measure's provisions would make it more confusing, unstable and uncertain. If the joint committee vetoed a rule, the public would lack guidance on what the law permits and requires, and the administrative agencies might even find more rather than less scope for arbitrary action in the absence of a rule. One witness commented that the governor's ability to control executive agencies, already relatively weak in Oregon, would be made weaker. The measure is silent on whether agency actions taken under a rule between the time it was adopted and the time it was vetoed would be valid—no one could be sure whether an administrative rule would take permanent effect until the adjournment of the next session of the legislature.
- The legislature lacks the time and knowledge needed to establish the detailed policies and standards that it now relies on the administrative agencies to adopt. Without detailed review by the agencies, decisions would be based on political pressure and lobbying. Opponents of the measure point out that formal or informal administrative rules now establish a myriad of regulatory details, from technical to trivial, such as water quality standards, state college tuition rates and student conduct, and photocopying fees for public records. The legislature would have to increase its staff in order to gain expertise in such matters. Hearings by the legislative committee proposed under Measure 27 would duplicate the public rule making hearings the administrative agencies already usually hold. The legislature could not simply allow a rule to take effect, as it does now; it would be forced to act on every one of them or the rule would become invalid. Oregon's law limiting the terms of legislators adds to the difficulty legislators would have in

accumulating adequate knowledge and experience with which to judge administrative rules.

- Measure 27's definition of "administrative rule" would include any state agency "directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy or describes the procedures or practices of a state agency." This broad definition would include many state agency statements or policies not ordinarily thought of as administrative rules, e.g., college admission standards and signs in state parks or buildings governing the conduct of the public, subject to legislative approval. Because they are not ordinarily thought of as rules, agencies may not think to present them to the legislature, and they will become invalid at the end of the next legislative session. This, in turn, is likely to lead to substantial litigation over what is and is not a "rule."
- The legislative veto would undercut policy-making by the citizen boards and commissions that advise and govern many state agencies. It thus would weaken rather than strengthen citizen influence over state administrative decisions.
- Preparing the required record for legislative hearings on rules would add to the staff burden and costs of state administrative agencies.
- Measure 27 leaves unclear the legislature's authority over the rules of non-state agencies such as school districts and community college districts that perform state-mandated functions, for instance, community colleges that set the requirements for college credit transferable to state colleges and universities. Similarly it brings into question the rules state agencies sometimes must adopt to conform to federal law, the directives of federal agencies, or new decisions of the courts.
- Because Measure 27 is a constitutional amendment, any defects that might be found in it after it was adopted could only be corrected by another vote of the people.

Opponents of the measure point out that means exist now to challenge or correct faulty rules in the courts, the legislature, or the rule making agencies themselves. Supporters of Measure 27 have failed to explain, their critics say, why those existing safeguards are inadequate.

## V. CONCLUSIONS

The legislature already has the power, under the present system, to override any agency rule by passing a statute in a subsequent legislature session. Therefore, your committee sees no need for Measure 27.

The committee's understanding of the respective powers of the legislative and executive branches of government is that the legislature is responsible for making laws, with whatever degree of specificity it deems appropriate and necessary, and the executive branch is

responsible for implementing those laws. Proponents of the measure did not present convincing evidence of an inappropriate imbalance of power in the existing system. While proponents did present figures showing that the number of administrative rules has increased substantially in recent years in proportion to the number of statutes passed by the legislature, no witness presented a standard by which to judge what would be an appropriate number of rules if the current number is considered excessive. The proponents' assumption appeared to be, the fewer rules the better. The committee noted, however, that rules are often of value in ensuring consistency in agencies' actions and that cutting down on the number of rules might therefore lessen the public's trust in government rather than increasing it.

Although the Oregon Senate and House of Representatives represent the Oregon electorate, opponents of the measure pointed out that the committee empowered by the measure to take action on administrative rules between legislative sessions would be chosen by the party in power in each house at that time, rather than by Oregon voters. Actions of such a highly political body would not necessarily represent the will of the people of Oregon. Yet this body would have power to nullify agency rules that have been in effect for decades without the full legislature ever taking action.

The rules that govern a number of Oregon's administrative agencies are adopted either by agency specialists or by unpaid citizen boards and commissions that hold public hearings and make decisions without regard to the effect of those decisions on re-election prospects or future job security. By giving the legislature the power to override these decisions by failing to approve them, Measure 27 undercuts citizen participation in two ways: it takes away the authority of the citizen boards that adopt the rules, and it ignores the testimony of citizens who appear at agency hearings—testimony that provides these boards and commissions with a basis for their rule-making decisions. Under the present system, interested persons receive notice whenever rule changes are being considered. Measure 27 offers no mechanism to assure that interested citizens would have an opportunity to testify on rules that would be negated by the legislature not acting to approve them.

If most rules receive legislative approval without being considered individually, then legislative approval is a meaningless, wasteful exercise. On the other hand, if the legislature, through the inaction of a single house, can nullify a rule by failing to approve it, then important checks and balances in the existing Oregon system will have been eliminated. Under Measure 27, both houses of the legislature need not affirmatively act to disapprove a rule—indeed, legislators need not publicly state their position on the invalidation of the rule—the Governor has no opportunity to veto the invalidation of the rule, and the people cannot use the referendum to reject the invalidation of the rule.

Measure 27 also appears to have been drafted without giving much thought to practical consequences. In addition to the problem of having

the legislature approve each and every new rule, Measure 27 will likely create other, probably unintended problems. For example, because every new rule will become invalid if not approved by the next legislature, citizens would be uncertain about the long-term validity of a rule, and especially of controversial rules, for a period of up to two years. In addition, the broad definition of "administrative rule" in the measure would subject to legislative approval many agency statements and actions that are not ordinarily thought of as administrative rules. Will the state college student who is expelled for violating a student conduct rule argue for reinstatement because no one thought to have the legislature approve the rule of conduct that was violated? Will the person who exceeds the speed limit on a state highway argue that the legislature never approved the speed limit on that stretch of highway? It is not hard to imagine such arguments, and the legislature would have no ability to resolve any such problems in the future because the measure is a constitutional amendment that can only be amended by another constitutional amendment.

Measure 27 is a blunt, badly conceived effort to limit the scope of governmental regulation. If the current scope of government regulation is too broad, the people's representatives—the Legislative Assembly and the Governor—or the people themselves, through the initiative and referendum, can limit the scope of that regulation. Although specifically asked by your committee, no proponent of Measure 27 provided a single example of a governmental regulation that "went too far" and that the existing system was not able to correct. Rather, Measure 27 appears to be designed to thwart governmental programs and regulations that have sufficient support to resist repeal in the ordinary manner. It would do this by creating a process that would allow administrative rules to vanish into a black hole of politically maneuvered legislative inaction.

## VI. RECOMMENDATION

Your committee unanimously recommends a NO vote on Measure 27.

Respectfully submitted,  
Victor Allen  
Deneen Aubertin  
Michael Campbell  
Jeffrey Chicoine  
Paula Coppel  
Nancy Rangila  
Donald Sterling  
Courtney Wilton  
B. J. Seymour, chair

Cory Streisinger, research advisor  
Paul Leistner, research director

## VII. APPENDICES

### A. Witness List

*Brady Adams*, state senator

*Ron Cease*, state senator

*John Glascock*, chair, State Legislative Committee, American Association of Retired Persons (AARP)

*Kate Kelly*, Idaho assistant attorney general

*Greg Leo*, director of governmental affairs, Oregon Farm Bureau

*Marge Martin*, Michigan Legislative Service Bureau

*Fred Miller*, executive, Portland General Corporation; former state agency director

*Mary Renstrom*, National Conference of State Legislatures

*Steven R. Schell*, attorney; member, Oregon Energy Facilities Siting Council

*Gary Underwood*, Capital City Task Force Coordinator, AARP

### B. RESOURCE MATERIALS

*Linde, Honorable Hans A.*, retired justice, Oregon Supreme Court, letter concerning Measure 27, August 2, 1996.

AARP materials related to Measure 27:

- Position Statement
- Memo from AARP National Counsel

Oregon Farm Bureau Testimony and Letters to Legislators on SJR 12

Oregon Optometric Association Statement on Measure 27

Oregon Secretary of State's Office, Measure 27 Fiscal Impact Statement

Oregon Senate, Minutes of Hearings on SJR 12

Oregon Voters' Pamphlet, Measure 27 Explanatory Statement

North Dakota Statute on Legislative Review of Rules

*Rhyme, Nancy*. *Legislative Review of Administrative Rules and Regulations*, National Conference of State Legislatures, 1990.