



Proposed Program Review Model

Revised August 14, 2003

In 2002 the Executive Team approved a Strategic Initiative to “design a model and process for assessing the status of all DCBS program areas that will result in strategic decisions as to whether to keep, eliminate or modify current programs and services.” On April 22, 2003 Director Cory Streisinger modified the charge by deleting the requirement to develop a process (policy and procedure). Therefore, within the framework of this model, administrators and their employees are free to select the tools and processes they deem most appropriate.

This narrative provides a detailed discussion of the assumptions, principles and key elements of program review. The attached Program Review Model and Administrative Rule Review Models set forth the steps in the form of a decision tree for evaluating the programs, rules, services and activities in which we engage. Just as one of the objectives of regulatory reform is to avoid prescribing every process in great detail in favor of an emphasis on results, this model does not prescribe every activity or tool that a review team may choose to employ. Program Review team member must employ critical thought, select resources, obtain information and use whatever analytical and process tools they deem necessary to reach conclusions and make recommendations.

The complexity and duration of any specific review will depend upon the scale and scope of the program; the level of political visibility or controversy; the number and competing interests of stakeholders; and, numerous other variables.

Program Review Initiative Team.

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Assumptions. This model rests on several assumptions about how public agencies should operate in order to ensure that the programs they administer add value to lives of citizens:

1. Government agencies cannot be effective unless they regularly examine the public policies that drive their actions and the work processes by which they carry them out.
2. Agencies cannot determine the value or effectiveness of programs, services and activities without measuring performance and regularly seeking public and stakeholder feedback.
3. No program, service or activity is sacred. Nothing should be exempt from review.
4. Program review must be an integral part of the agency’s way of doing business.
5. The cost of compliance and services paid for by assessments should not exceed the benefits derived by those the regulations or services are intended to protect and serve.

6. Regulation should impose no constraint upon the conduct of business beyond that which is essential to ensure that the intended outcomes of the law are obtained.
7. Laws and rules must be clearly written, fair and enforceable.
8. Effective regulation focuses on desired outcomes rather than prescriptive minutiae.
9. Compliance, not punishment, is the goal of regulation; therefore, DCBS must make as easy as possible for those we regulate to comply with the law, and as hard as possible for them to violate the law.
10. Government should not be in the business of delivering services that are commonly and more effectively provided by the private sector.

Discussion. Our regulatory practices and the avenues by which citizens avail themselves of our services are often viewed as imposing burdens greater than the value of the program or services we are trying to deliver. Similarly, some workers and consumers view us as inadequately protecting their interests. A number of factors account for these perceptions, among them:

- Administrative rules are many and complex, as are the laws that give rise to them and the case law that interprets them. Such complexity trips up the well-informed and well-intended, as well as the inattentive and the recalcitrant.
- Inspections, examinations and audits are intrusive. The objectives of adequate oversight and minimal intrusiveness are in tension, and the balance between them tips back and forth in response to legislative action; changing expectations of stakeholders; changes in political and agency leadership; and, our responses to changes in the practices of those we regulate.
- Enforcement can impose significant costs on persons and businesses; close businesses; deprive individuals of their livelihoods; and, send people to jail.
- Some of the laws we administer and enforce fall short of providing the level of protection or redress that consumers and workers assume the department can, or should, provide.
- Licensees and businesses sometimes abuse consumers, exploit workers and otherwise harm the public. At the same time, the vast majority of those we regulate want to comply with the law, but sometimes feel that the State sometimes assumes that they are suspect by definition.

Systematic program evaluation is predicated on asking common questions and variants about the regulations we impose, the programs we administer and the services we provide:

1. Is the purpose of the regulation, program or service correctly and clearly defined? Is it clear what public interest is at issue? Is it clear what outcome is desired?
2. Will workers or consumers be harmed if a regulation is eliminated, changed or remains as is? If so, what is the probability and degree of such harm?
3. Is government intervention required, or is there a place for the regulated industry to self-police all or part of the regulated activity?

4. If government intervention is required, is DCBS the appropriate agency to do so? If so, does the director have adequate authority to achieve the purpose of the program?
5. Is regulation the best form of intervention, or can the goal be better achieved through the operation of market forces, self-regulation or education, or some combination thereof?
6. Who benefits, and how? Does the program or service benefit workers or consumers, or does it protect the economic interests of certain groups at the expense of others?
7. Are there significant unintended consequences that need to be addressed?
8. How is the cost of regulation borne, and by whom? Do the costs exceed the benefits?
9. Is the program accessible or regulation clear and understandable? Can it be accessed equally, or applied consistently?
10. Are the views of the affected parties regularly sought and genuinely taken into account?
11. How will compliance and other intended outcomes be consistently achieved?

The Model. Our model is adapted from a process developed by the City of Indianapolis in its pioneering administrative reforms of the 1990s, including deregulating the taxi market; reforming business and occupational licensing; and, reforming building and construction permitting. It enlarges upon the Indianapolis process and can be applied to broad or narrow statutory regulatory schemes, services and programs, administrative rules (see the variant model) and discretionary activities established under the director's broad statutory authority.

DEFINITION

“Program” means any administrative, regulatory, supervisory or enforcement function, activity or service; in any combination; whether established by law, rule or administrative practice.

PROTOCOLS

Screening: When is it Used?

1. When required by the director, board chair or administrator. The director, board chair or an administrator may require a program review at any time, such as but not limited to:
 - a. Addressing a high degree of customer, stakeholder, legislative or inter-agency dissatisfaction;
 - b. A change in governors requires a shift in the department's role or priorities; and
 - c. When developing a legislative agenda.
2. When a program has not been reviewed or changed for a long time. Some functions are so embedded, complex or controversial that we avoid taking a hard look at the outcomes being obtained. This may be fueled by a history of failed attempts to make changes; fear that

employees may lose their jobs; or, unwillingness to anger powerful constituencies. These are not good reasons to avoid conducting a review. No program should be off-limits to being reviewed to determine whether it delivers value to Oregonians.

3. When a program fails to produce desired results. Strong support of a program by a customer or stakeholder group does not necessarily translate into value. For example, a program intended to reduce injuries through the reimbursement of employers' costs may enjoy strong support because employers like the reimbursement, even though there is no measurable reduction in the number of injuries. Key indicators that a review may be in order include the frequency and nature of customer and stakeholder complaints; results of satisfaction surveys; repeated legislative inquiries or antagonism; and, poor performance, any of which may reveal gaps between what is intended and what is delivered.

Review Team Composition

1. As determined by the director, administrators or designees. The director, administrator or their designees may decide a review is in order based on their own judgment as to whether a program is adding value, in response to external forces, or both. In such instances the director, administrator or designee may determine that certain perspectives and skill sets are essential to assure the credibility of the conclusions reached and recommendations made. As a general rule, diversity of perspectives and thinking skills is highly desirable.

2. One or more members from outside the section or division in which the program is administered. Teams must be composed of people who are invested in an *objective process*, not a pre-determined result. Even when striving to be objective about our own programs we can be swayed by our investment in its creation; how it is administered; the staff who do the work; customers and stakeholders. Including knowledgeable and insightful thinkers from outside the work unit in which the program is administered makes it less likely that the team will get trapped in "group-think" and consensual validation ("we agree, so it must be right").

3. Public members at the discretion of the director or administrator. Public members can be exceptionally valuable for the reasons outlined above. However, selection of public members must be managed carefully. Many programs have strong support from certain stakeholders. The wrong choices can result in a team in which the public members are first and foremost going to protect their interests and unwilling or unable to honestly consider unconventional perspectives, thwarting the purpose of the review.

Documentation and Reports

1. Written reports to the director and the DCBS Executive Team. The outcome of a program review must be documented and communicated to the director and the DCBS Executive Team. Program review can only become an integral part of the way we manage and plan if we know that it is being widely used, and the results obtained.

2. A summary of each major review shall be provided to the Governor's Office. It is vital that the Governor and key policy advisors understand that the largest regulatory agency is routinely examining its programs to determine their value to Oregonians. This is especially important given that DCBS has the mission of protecting workers and consumers, and supporting a positive business climate.

3. A summary of key program reviews performed shall be included in the Governor's Recommended Budget for the following biennium. The legislature must also be informed of the results of program review at the time it is determining the budget limitation it will approve for the following biennium. Reporting program review results, resultant administrative changes and legislative actions we propose sends a clear signal that we are actively working to ensure that what we do adds value to the lives of Oregonians.

4. A summary of completed reviews would be prominently posted on the DCBS internal and external web sites with a link to the full reports. Employees and stakeholders must have access to the results. We must inform them as we carry out an obligation to ensure that what we do has value; that we will modify what we do and how we do it where a review indicates that is required; and, that we will exercise leadership by proposing statutory changes when we believe a change in policy is in the interest of workers, consumers and businesses.

NOTE: There are risks to be managed with such an open process: employees will be anxious if a review suggests that the program they administer be significantly changed, privatized or eliminated. Consumers, workers, stakeholders and sympathetic legislators may also be upset if programs they prize appear threatened.

STEP 1

Is there a clear and well-defined public purpose for the program, service, regulation or activity?

Many bodies of law contain an explicit "preamble" which sets forth the purpose of the chapter or section of the statute. For example, the Workers' Compensation Law provides an excellent example of a clear statement of purpose for a major body of social legislation:

656.012(2) . . . the objectives of the Workers' Compensation Law are declared to be as follows:

- (a) To provide, regardless of fault, sure, prompt and complete medical treatment for injured workers and fair, adequate and reasonable income benefits to injured workers and their dependents;
- (b) To provide a fair and just administrative system for delivery of medical and financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceedings, to the greatest extent practicable;
- (c) To restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable;
- (d) To encourage maximum employer implementation of accident study, analysis and prevention programs to reduce the economic loss and human suffering caused by industrial accidents; and
- (e) To provide the sole and exclusive source and means by which subject workers, their beneficiaries and anyone otherwise entitled to receive benefits on account of injuries or diseases arising out of and in the course of employment shall seek and qualify for remedies for such conditions.

In other instances the purpose must be inferred or determined by examining the legislative record or calling on institutional memory. For example, the statutes establishing certification of an association of "sellers of travel" provides no statement of purpose. It is only by knowing from recent history that certain misbehavior occurred on a chartered flight of students, on which the child of a

citizen who was subsequently elected to the legislature was a passenger, gave rise to statutes intended to encourage the industry to establish standards to discourage such conduct.

Some programs have been administered for so long and are so embedded in the organization that the original purpose of the program no longer exists. When a program origins lie in administrative rule or practices, historical documents and institutional memory will be primary sources by which the review team may determine the original purpose. When a review of these records, institutional memory and the current operating environment fails to disclose a clear purpose, the program is ripe for change or abolition.

STEP 2

[If there is a clear and well-defined public purpose] is there a social or economic benefit to workers or consumers, and are the burdens imposed on Oregon businesses reasonable and proportionate to that benefit?

This goes to the heart of DCBS' mission to protect and serve consumers and workers while supporting a positive business environment. It highlights the importance of data collection and analysis, the need for performance measures to assess progress towards achieving strategic goals and the tension inherent in striving to meet the competing needs of customers and stakeholders.

In some instances, our data and performance measures will quickly give us what we need. For example, we can easily establish whether injuries are declining or increasing; whether state-chartered financial institutions are sound; and, whether the number of Oregonians with health insurance coverage is increasing or declining. But, the benefits of other programs may be less apparent. For example, we may not be able to demonstrate a causal relationship between providing toll-free hotlines for workers and an increase or decrease in the amount of litigation. Yet, from the volume of calls we receive and customer satisfaction survey data we may reasonably conclude whether workers or consumers feel they are getting their problems resolved, and further conclude that a subset of those workers and consumers did not need to retain legal counsel to obtain help in resolving their problems. When DCBS lacks good data, it will be necessary to provide a means for customers and stakeholders to assist us. Focus groups, surveys and literature review are among the means that may help the team answer this question.

This also requires us to weigh the value of benefits and services against the fees and assessments we impose upon businesses. This balancing test is not easy because many factors affect reaching an answer, among them the team members' views about the role of government; whether members believe that the benefit of the doubt should be given to those who need the service, or to those who bear the cost; and, whether members believe that costs should be shared with the users of the services or borne solely by the regulated businesses.

In the above example regarding hotlines for injured workers, an analysis of the number and type of cases resolved by telephone; the number and type resolved by the Workers' Compensation Board; the number of cases per FTE; and, the compensation paid for administrative law judges and benefits consultation specialists, can produce some hypotheses what the cost might be if all cases had to be litigated. Though it may be difficult to precisely establish the amounts of the costs that are avoided by the existence of a program, reasonable conclusions can be reached so long as assumptions are clearly identified and inferences adequately supported

At the end of this step, the review team will either recommend legislation, rule amendments or changes in practices so as to eliminate the program or activity; or, will have concluded the benefits outweigh the costs.

STEP 3

[If the benefits outweigh the costs] does the need for public accountability, equity and fairness require that the program, service or activity be regulated or administered by government?

Certain regulatory activities in which government engages can be provided by the private sector or quasi-public entities such as, professional licensing; certification; administering examinations; continuing education; and, self-policing to ensure adherence to ethical standards. When a private entity can take any of these responsibilities from government and produce a similar outcome it reduces the cost of government and promotes self-governance. In this arrangement, government moves to the background to observe, audit to *ensure* that the privatized function is being carried out in accordance with the law.

Members of the review team must be aware that some governmental powers cannot be delegated without running afoul of constitutional problems, or diminishing public accountability. The Drafting Manual of the Oregon Legislative Counsel notes that:

. . . the Legislative Assembly may authorize others to do certain things that it might properly do, but cannot advantageously undertake. There is no invalid delegation of power *so long as a bill determines the policy of the law and prescribes a method for its application or prescribes procedures to protect the public* Drafting Manual, 8.13. Emphasis added.

One measure, therefore, of whether or not it is essential for the state to administer a program, service or activity, is whether privatization can be accomplished within these constraints. That is easier to achieve with a non-profit group or association or quasi-public body, than with a profit-making entity in which there is the inherent risk of the public good being subordinated to the need to generate a profit for owners or return for shareholders.

STEP 4

[If it is not essential that government administer the program,]
is a non-governmental alternative readily available
that would likely produce a similar outcome?

A conclusion that it is not essential for government carry out a program is not sufficient to reach the decision to privatize it. If there is no readily available non-governmental entity willing and able to assume such responsibility, DCBS must continue to discharge the responsibility unless further review leads to another recommendation. Non-governmental entities that might be readily available to provide self-regulation or allow for privatization include well-respected occupational and professional associations, licensing commissions and trade associations such as exist in the insurance industry, securities industry, medical professions, legal profession, construction trades, mortgage lending and others.

STEP 5

[If it is essential that government administer the program,] is DCBS the logical agency to administer, regulate or enforce the program, service or activity?

The “touchstone” for reaching an answer is DCBS’ mission. The review team must address whether the program protects or serves workers or consumers, or supports a positive business climate. It does not need to do all of these things, but it must do at least one of them. If the program seems worthwhile but does not help DCBS achieve its mission, the team should determine whether there is another agency where the program would logically fit.

If the program doesn’t logically fit in another agency, the mere fact that it doesn’t help us carry out our mission may not be sufficient to overcome other reasons why the program came to be housed in DCBS. The legislature may elect to house a program DCBS because the legislature has confidence in DCBS as a well-managed agency, economies of scale, etc.

In other cases, analysis may show that the connection between the program and our mission is a polite fiction to provide justification for a diversion of resources that would otherwise not be countenanced by those who pay the fees and assessments that fund the program.

Regardless, the review team must look beyond the apparent reason to determine whether the program ought to be housed here. If the team concludes that the program should not be housed in DCBS, it should propose transfer of the director’s authority to the appropriate agency, together with it’s rationale for doing so.

STEP 6

[If DCBS is the right agency . . .] can the program, service, activity or regulation be continued or modified so as to:

- (1) Deliver a significant benefit to workers, consumers or businesses
- (2) not duplicate or conflict with other programs
- (3) be clearly written and consistently administered
- (4) be outcome-based rather than prescriptive; and
- (5) reasonably minimize intrusion into the lives or workers or consumers and the operations of business without losing the intended benefits?

1. Deliver a significant benefit to workers, consumers or businesses. The significant of a benefit is something we can assess reasonably accurately only with a variety of information. While data gleaned from reports filed and analyzed in the department are very valuable – especially when countering widely held but erroneous assumptions – data obtained by surveying those the program, service or activity is intended to benefit is crucial to determining the ultimate benefit. In determining whether the program can be modified to deliver a significant benefit, we must talk with customers and stakeholders before determining what that benefit would be.

2. Not duplicate or conflict with other programs or regulations. Whether gathered by survey, or by including stakeholders and other DCBS agency personnel on the review team, it is important that the team not answer this question based solely on their assumptions. For example, the team may believe that a quarterly reporting requirement is reasonable and not realize that businesses has multiple reporting requirements at varying intervals that create a significant “hassle” factor.

A perfect example of an inherent public policy conflict is that Oregon gives a tax credit to purchasers of gas-electric hybrid vehicles, but has doubled the license fee for those same vehicles based on the premise that by consuming less gas their owners pay less than they should in taxes for highway and bridge construction and maintenance. Compounding the absurdity is that conventional gas-powered vehicles with comparable gas mileage are not treated the same way, even though they consume like amounts of gasoline as do the hybrids.

Duplication or conflict in the law occurs between statutes which fail to fully comport with each other, or between previously well understood statutes and new case law. In these instances, what needs to be done is usually clear. Many of the department's legislative concepts over the years have addressed these issues.

3. Clearly written and consistently administered. Few things are more frustrating to consumers, workers and stakeholders than laws, rules and practices that are confusing and inconsistently administered: people do not know what is expected of them; agency interpretations and actions are erratic; and, the answer a consumer, worker or business gets from the agency is dependent on who answers the phone or responds in writing. Such lack of consistency significantly erodes public confidence and reinforces the perception that government is inept, unfair and inefficient.

Clarity in written communications does not mean that all laws and rules must or should be written at a 6th or 8th grade reading level, a common but erroneous conclusion. Rules and publications for which the principal audience is attorneys or other skilled professionals will most certainly employ a more complex vocabulary than a pamphlet directed to workers or consumers. However complex the law, we must take pains to write rules and provide information in a form that is accessible to those who need it.

3. Outcome-based rather than prescriptive. Many programs are rife with prescriptive minutiae in enabling statutes, administrative rules, administrative practices and "helpful" bulletins and publications. To the public, it often seems that the legislature and government agencies have lost sight of their purpose. Much of the impetus for what is variously called regulatory streamlining, reinventing government, regulatory reform, administrative reform and common sense governing is animated by a belief that government too often puts process ahead of results, for example:

When it is more important that a form be filled out properly by an applicant than it is that the agency help the individual and promptly issue a permit.

When filing a report timely and accurately is judged as important as paying a benefit timely and accurately.

When we spend as much or more time prescribing *how* something is to be done in order to prevent every possible misstep, or ensure we get every scrap of information we *might* need, than we do ensuring that regulated entities actually do what the law requires.

Statutes are often the culprits, growing inexorably as the courts interpret the law, abuses occur, and the legislature responds to the forces and pressures from various interests. The growth in the complexity of the Workers' Compensation Law from 1987 through 1995 is a prime example of the evolution of highly prescriptive statute. Nevertheless, DCBS retains broad authority and we have,

from time to time, elevated form over substance and process over results. It is in those areas where the director's discretion is most broad that we can make the greatest impact.

Sometimes we become so focused on trying to capture or respond to every possible behavioral variance, abuse or misstep, or on trying to define every step of a process, that we spend too little time determining how we are going to obtain the proper result. Getting something perfect in every detail at the expense of making progress in getting results is a common problem. Team members must be absolutely willing to actively challenge one another as to what a more results-based program might look like. The role of unconventional thinkers is especially important when trying to break away from the tendency of government to over-prescribe.

4. Reasonably minimize intrusion into the lives of workers and consumers and the operations of business. Protecting consumers and workers means intruding into the operations of businesses. Obtaining the desired results without disproportionately disrupting business operations requires not only a focus on desired outcomes, but a focus on rewarding compliance with a lessening of the bureaucratic burden.

We can provide incentives for regulated entities to want to comply with the law and make it easier for them to do so if we reconsider current practices. For example, perhaps we can modify an audit or examination program so that complying businesses will be rewarded for meeting performance standards by reducing their reporting burdens; perform fewer disruptive on-site examinations and audits; replace on-site examinations with a periodic report; or, adjust fees and assessments based on performance and the degree of oversight we must exercise in order to obtain compliance

By considering ways to tie the intensity of regulatory over-sight to the actual performance and levels of compliance, we can achieve the larger purpose with fewer burdens on businesses; use fewer agency resources; and, reduce the cost to business and government simultaneously.

STEP 7

[If the program can be continued or modified such as to satisfy the above criteria] does the director have sufficient authority in order to act effectively?

Many of the alternatives generated in Step 6 above will be stymied if the director's authority is constrained by prescriptive statutory language or inadequate rule-making authority. If the team concludes that the program can be continued or modified to obtain the best results only if the director's authority is amended, then legislation must be proposed to accomplish that end.

STEP 8

[If the director has sufficient authority] is the intended outcome being consistently achieved?

If the director has the necessary authority and all of the analyses undertaken in prior steps have been addressed, and the team finds the program is incapable (and will likely remain incapable) of consistently achieving the intended outcomes, the law, administrative rules or department's practices must be changed. Conversely, if the team finds the desired outcome *is* being consistently achieved, our analysis will demonstrate that the program genuinely adds value by protecting workers or consumers and supporting a positive business climate.

Once the value of the program has been affirmed, the work of the review team is complete. It falls to the program division (with help from Information Management Division) to periodically survey customers and stakeholders to determine levels of satisfaction; and, propose legislation, amend rules, change regulatory practices, improve work processes, shift resources, or otherwise make changes as needed to ensure that intended outcomes are achieved.

INTEGRATION OF PROGRAM REVIEW

Program review is effective only if fully integrated into the way we lead and manage DCBS, just as is the case with measuring performance, succession planning or providing excellent customer service. As dire and unwelcome as the current budget climate or public attitudes about government may be, they provide a powerful goad for us to think unconventionally and creatively about better ways to go about our business. The most effective way to weave this process into the fabric of our management of DCBS is to tie it to the budget and legislative cycle, and to our annual performance evaluations.