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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 731
DEPARTMENT OF TRANSPORTATION

FILED

07/21/2022 9:55 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Administration of Oregon Transportation Infrastructure Bank

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 08/21/2022 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

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NEED FOR THE RULE(S)

Changes proposed provide greater flexibility for the Department to approve loans up to \$5 million without OTC approval, consistent with thresholds provided in the Statewide Transportation Improvement Program.

The changes are needed to maintain program effectiveness, and allow for efficient administration of the Oregon Transportation Infrastructure Bank.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

None

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

Adoption of the proposed changes will have no impact on racial equity in Oregon.

FISCAL AND ECONOMIC IMPACT:

See statements below.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) The changes proposed under this rulemaking bear no fiscal or economic impact on private industry, government entities, or other potential customers of the Oregon Transportation Infrastructure Bank.

(2)(a), (b) and (c) None

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

These rules do not impact small business and therefore small business was not involved in their development.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

This rulemaking includes minor administrative changes; input from an advisory committee was not needed.

RULES PROPOSED:

731-030-0030, 731-030-0050, 731-030-0100, 731-030-0110, 731-030-0120, 731-030-0130, 731-030-0150, 731-030-0170

AMEND: 731-030-0030

RULE SUMMARY: Amended definitions to reflect current program needs.

CHANGES TO RULE:

731-030-0030

Definitions ¶¶

For the purposes of OAR 731-030-0010 through 731-030-0170, the following definitions apply, unless the context clearly indicates otherwise:¶¶

- (1) "Applicant" means a Municipality or any other entity authorized by law to obtain an Infrastructure Loan or Infrastructure Assistance including an Agency or the Department.¶¶
- (2) "Application" means the form, prescribed by the Department, and all supplemental attachments, exhibits and other supporting papers that the Applicant completes and provides to the Department to request an Infrastructure Loan or Infrastructure Assistance through the Oregon Transportation Infrastructure Bank.¶¶
- (3) "Agency" has the meaning given in ORS 367.010(1).¶¶
- (4) "Agency Contract" means an inter-agency agreement between the Department and an Agency or intra-agency agreement between the Department and a Department Borrower, that is intended to be binding on the State of Oregon and the Agency or the Department Borrower, respectively, as provided in ORS 367.040.¶¶
- (5) "Agreement" means a legally binding contract between the Department and a Recipient that sets out the terms and conditions under which the Department is providing an Infrastructure Loan or Infrastructure Assistance.¶¶
- (6) "Bond" has the meaning given in ORS 367.010(2).¶¶
- (7) "Bond Counsel" means a law firm having knowledge and expertise in the field of municipal law and whose opinions are generally accepted by purchasers of municipal bonds.¶¶
- (8) "Bond Debt Service" has the meaning given in ORS 367.010(3).¶¶
- (9) ~~"Chief Financial Officer" means the fiscal officer designated under ORS 184.637, who is also the manager of ODOT Financial Services.~~ "OTIF Manager" means the Department employee designated by the Commission, through a delegation order, to administer the OTIB and OTIF.¶¶
- (10) "Collateral" means any real or personal property, including but not limited to intangibles, bonds, revenues or other money, that is or may be pledged, or subject to a lien or security interest to secure the repayment of an Infrastructure Loan, and includes any property included in the definition of collateral in ORS 79.0102(1).¶¶
- (11) "Commission" means the Oregon Transportation Commission.¶¶
- (12) "Credit Enhancement" has the meaning given in ORS 367.010(4).¶¶
- (13) "Debt Service Reserve" means any moneys reserved for debt service for, or used to secure payment of, Infrastructure Bonds. A Debt Service Reserve may be held in a segregated account in the Infrastructure Fund or by a trustee.¶¶
- (14) "Department" or "ODOT" means the Oregon Department of Transportation.¶¶
- (15) "Department Borrower" means a division or other organizational unit in the Department that applies for or receives an Infrastructure Loan or Infrastructure Assistance from the Oregon Transportation Infrastructure Fund.¶¶
- (16) "Director" means the director of the Department.¶¶
- (17) "Financial Advisor" means a consultant providing the Department with information and advice relative to the structure, timing, marketing, pricing, terms and bond ratings for the sale of Infrastructure Bonds.¶¶
- (18) "Infrastructure" means any construction project, facility, property or program that provides the foundation or basic framework by which an entity provides transportation services to the public.¶¶
- (19) "Infrastructure Assistance" has the meaning given in ORS 367.010(6).¶¶

(20) "Infrastructure Bonds" has the meaning given in ORS 367.010(7).¶

~~(21) "Infrastructure Fund" has the meaning given in ORS 367.010(8).¶~~

~~(22) "Infrastructure Loan" has the meaning given in ORS 367.010(9).¶~~

~~(23) "Municipality" has the meaning given in ORS 367.010(10).¶~~

(24) "Oregon Transportation Infrastructure Bank" or "OTIB" means the program authorized by Section 350 of the National Highway System Designation Act of 1995, 23 U.S.C. 101 note, Public Law 104-59, and a cooperative agreement between the U.S. Department of Transportation and the Department dated August 26, 1996.¶

~~(25) "Oregon Transportation Infrastructure Fund" or "OTIF" means the fund established in ORS 367.015.¶~~

~~(26) "Public Transit Division Administrator" means the administrative head of the Transit Division or his or her designee.¶~~

(27) "Private Entity" means a natural person capable of being legally bound, a sole proprietorship, a corporation, a partnership, a limited liability company or partnership, a limited partnership, a for-profit or non-profit unincorporated association, a business trust, or any other entity with legal capacity to contract which is not a Government, as defined by ORS 165.075, or a Local Government as defined by ORS 174.116.¶

(28) "Recipient" means an Applicant that has received an Infrastructure Loan or Infrastructure Assistance or a combination thereof.¶

(29) "Region" means one of the geographic areas established by the Department to administer transportation programs.¶

~~(30) "Region Manager" means the administrative head of a Region or his or her designee.¶~~

~~(31) "Staff" means Department employees assigned by the Chief Financial Officer to manage the day-to-day operations of the OTIB and the Infrastructure Fund and to evaluate the credit quality or financial feasibility of any Infrastructure Loan or Infrastructure Assistance.¶~~

~~(32) "Statewide Transportation Improvement Program" or "STIP" means the State's transportation preservation and capital improvement program and includes any project scheduling and funding documents related thereto their designee.¶~~

(33) "Transportation Project" has the meaning given in ORS 367.010(11).

Statutory/Other Authority: ORS ~~184.616~~, 184.619, 367.015, 367.020

Statutes/Other Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350

AMEND: 731-030-0050

RULE SUMMARY: Amendments made to conform with current program requirements.

CHANGES TO RULE:

731-030-0050

Administration of Funds ¶

~~(1) Authority for the day-to-day operations and management of the OTIB and the management of the Infrastructure Fund is delegated to the Chief Financial Officer and Staff administration of the OTIB and the OTIF may be delegated to the OTIF Manager by the Commission, by adoption of a delegation order.¶~~

(2) The Department may expend funds from the Infrastructure Fund for the purposes set forth in ORS 367.015.

Statutory/Other Authority: ~~ORS 184.616~~, 184.619, 367.015, 367.020

Statutes/Other Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350

RULE SUMMARY: Amendments made to conform to updated terminology, and remove erroneous language.

CHANGES TO RULE:

731-030-0100

Application Evaluation Procedures ¶¶

~~(1) Upon receipt of a complete Application, the Department will evaluate the Application to determine whether an Applicant is creditworthy. An Applicant is creditworthy if the Applicant has a satisfactory credit history and sufficient capacity to repay the Infrastructure Loan.¶¶~~

~~(2) While an Application is pending, the Department may require the Applicant to provide additional information with respect to, or clarification of, any matter pertaining to the Application, the Applicant, the proposed Transportation Project or the financing thereof as the Department determines in its sole discretion to be reasonably necessary, convenient or appropriate. Evaluation of an Application will include an examination of Application information to determine the extent to which an Applicant and the proposed Transportation Project meet the following criteria:¶¶~~

~~(a) The Transportation Project complies with the local transportation plan and with state land use laws and satisfies all appropriate federal, state and local planning and programming requirements.¶¶~~

~~(b) The Transportation Project meets any appropriate applicable design standards.¶¶~~

~~(c) The requested Infrastructure Loan or Infrastructure Assistance will result in the Transportation Project being constructed on a faster timeshorter schedule than conventional funding would allow, or the Infrastructure Loan or Infrastructure Assistance will complete the required project financing and allow the Transportation Project to proceed to construction.¶¶~~

~~(d) The Transportation Project will further the goal of safety in transportation.¶¶~~

~~(e) The Transportation Project will help manage traffic growth and improve livability.¶¶~~

~~(f) The Application identifies a revenue stream adequate to repay an Infrastructure Loan or meets the terms of any Infrastructure Assistance that is provided.¶¶~~

~~(g) The Application identifies Collateral adequate to secure repayment of the Infrastructure Loan.¶¶~~

~~(h) The Transportation Project will attract new or less conventional capital to Infrastructure funding.¶¶~~

~~(i) The Infrastructure Loan, if any, has a term acceptable to the Department. A Transportation Project financed with a shorter term Infrastructure Loan will score higher than one financed with a longer term Infrastructure Loan.¶¶~~

~~(j) The Transportation Project will support the community's economic development.¶¶~~

~~(k) The Transportation Project will enhance the quality of life in the community.¶¶~~

~~(L) Unless the Chief Financial OfficerDepartment finds that financial factors warrant otherwise, if the Applicant is a Private Entity:¶¶~~

~~(Aa) The Applicant for an Infrastructure Loan or Infrastructure Assistance must provide adequate security;¶¶~~

~~(Bb) An Infrastructure Loan or Infrastructure Assistance will be for no more than limited to fifty percent (50%) of the fair market value of the real property Collateral on which the Department has a first lien or twenty-five percent (25%) of the fair market value of the real property Collateral if the Department has a junior lien;¶¶~~

~~(Cc) The Applicant must have made a profit after taxes for at least the two minimum of two consecutive fiscal years immediately preceding the Application;¶¶~~

~~(Dd) The Applicant must have had a positive cash flow from operating activities (earnings before interest and taxes plus depreciation less taxes) for at least minimum of two of the last three fiscal years immediately preceding the Application; and¶¶~~

~~(Ee) The Applicant must have a ratio of current assets to current liabilities of at least 1.75 to 1, a ratio of current assets less inventories to current liabilities of at least 1 to 1, and a ratio of total debt to owner's equity of no more than 2 to 1 for at least two of the last three years immediately preceding the Application.¶¶~~

~~(2) The Department will assign the Application to a Region, the Department's Public Transit Division or their designee as appropriate for evaluation of technical, engineering and planning criteria. The designated assignee will:¶¶~~

~~(a) Evaluate a Transportation Project or Application according to the Application evaluation criteria established by the Department in OAR 731-030-0100(1); and¶¶~~

~~(b) Recommend approval or disapproval of the Transportation Project or Application.¶¶~~

~~(3) The Region Manager, the Public Transit Division Administrator or their designee will notify staff of the results of the evaluation of the Transportation Project and the Application.¶¶~~

~~(4) Staff will evaluate the economic, financial and creditworthiness criteria and seek assistance from other experts where appropriate minimum of two of the last three fiscal years immediately preceding the Application.~~

Statutory/Other Authority: ORS ~~184.616~~, 184.619, 367.015, 367.020
Statutes/Other Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350

AMEND: 731-030-0110

RULE SUMMARY: Amendments made to reflect desired practices, streamline program processes, and remove erroneous language. Approval of loans under \$5 million delegated to the Department (OTC retains sole authority to approved loans over \$5 million).

CHANGES TO RULE:

731-030-0110

Approval Procedures ¶

- ~~(1) Staff will combine the results of the evaluation completed under OAR 731-030-0100 into a combined score.¶~~
~~(2) Upon completion of its evaluation and scoring, Staff will forward the Application to the Chief Financial Officer. The Department will evaluate the application for conformity with all applicable laws, rules, and regulations; as well as the established criteria under OAR 731-030-0100(1), and appropriate technical, engineering, and planning criteria. While an Application is pending or under review, the Department may require the Applicant to provide additional information with a recommendation for action based on an analysis of such factors as those listed in OAR 731-030-0110(3), the availability of funds, and OTIB cash flow. A recommendation, or any related approval, may include proposed modifications to, or clarification of, any matter pertaining to the Application, the Applicant, the proposed Transportation Project, or the financing thereof as the Department determines in its sole discretions to the terms of the financial assistance requested by Applicant.¶~~
~~(3) To make a recommendation for approval, staff must find that be reasonably necessary or appropriate.¶~~
~~(2) To either approve an Application under Section 3(a) of this Rule or recommend approval of an Application to the Commission under Section 3(b) of this Rule, the Department must find all of the following:¶~~
~~(a) The Applicant and the Transportation Project qualify for assistance from the Infrastructure Fund according to the criteria established under OAR 731-030-0100(1).¶~~
~~(b) The proposed Transportation Project is feasible and a reasonable risk from practical and economic standpoints, and the proposed Infrastructure Loan has a reasonable prospect of repayment according to its terms.¶~~
~~(c) The Applicant's financial resources and management capability appear to be adequate to assure the successful completion and operation of the Transportation Project.¶~~
~~(d) As reflected by the Applicant's credit history and capacity to repay the Infrastructure Loan, the Applicant is creditworthy.¶~~
~~(e) The Applicant can provide good and sufficient Collateral when appropriate necessary to mitigate risk to the Infrastructure Fund.¶~~
~~(4) After review and consideration of the Staff recommendation, and subject to the availability of moneys in the Infrastructure Fund, the Chief Financial Officer/Department may:¶~~
~~(a) For an Application for an Infrastructure Loan or Infrastructure Assistance for less than \$1 million that will finance a Transportation Project that has been included in the STIP an amount less than or equal to \$5 million:¶~~
~~(A) Approve the request;¶~~
~~(B) Deny the request; or¶~~
~~(C) Forward a recommendation for action to the Commission.¶~~
~~(b) For any other Application greater than \$5 million:¶~~
~~(A) Deny the request; or¶~~
~~(B) Forward a recommendation for action to the Commission.¶~~
~~(5) The Commission will consider the recommendation by the Chief Financial Officer on any Application forwarded to it for action. Department on any Application forwarded to it for action and may:¶~~
~~(a) Approve the request; or¶~~
~~(b) Deny the request.¶~~
~~(5) Upon approval of an Application, the Department will present the Applicant with a commitment letter detailing:¶~~
~~(a) The amount and type of financing to award.¶~~
~~(b) The interest rate (if applicable). In determining the interest rate for an Infrastructure Loan, the Department may set the rate to reflect the evaluation of the Transportation Project, the effect of the rate upon the Applicant's ability to finance the Transportation Project, the term of the Infrastructure Loan, creditworthiness of the Applicant, the financial need of the Applicant, and the special circumstances of the Transportation Project.¶~~
~~(6) Upon receipt of the commitment letter, the Applicant may:¶~~
~~(a) Approve the request; or¶~~
~~(b) Deny the request except the terms of the commitment letter;¶~~
~~(b) Request that the Department engage in negotiations to reach terms different than those proposed in the~~

commitment letter; or

(c) Reject the terms of the commitment letter, and cancel the Application.

(7) If the Applicant requests that the Department engage in negotiations under Section 6(b), and the parties fail to agree to terms within 30 days of the Applicant's request, the Department may in its sole discretion terminate the negotiations and the Application.

(8) The Department may suspend or alter any requirements under this rule for Applications to refinance existing debt by an Applicant the Department has deemed creditworthy as part of the Applicant's original financing award.

Statutory/Other Authority: ORS ~~184.616~~, 184.619, 367.015, 367.020

Statutes/Other Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350

AMEND: 731-030-0120

RULE SUMMARY: Amendments made to reflect updates to other OTIB-related rules.

CHANGES TO RULE:

731-030-0120

Project Agreements, Interest Rates and Charges ¶

(1) For an Application approved under OAR 731-030-0110, and for which a commitment letter has been accepted under OAR 731-030-0110(6)(a), the Department will make an Infrastructure Loan or provide Infrastructure Assistance from the Infrastructure Fund by entering into an Agreement with the Recipient.¶

(2) ~~Notwithstanding any provisions of a Staff recommendation under OAR 731-030-0110(2), the Chief Financial Officer will make~~ An agreement for an Infrastructure Loan or Infrastructure Assistance will include the final determination of the amount and type of financing awarded, interest rate (if applicable), value and types of Collateral, and schedule of payments, and may impose such further provisions as are necessary or appropriate to insure expenditure of the funds for the purposes set forth in the approved Application and as needed to protect the Infrastructure Fund. Such determination shall not be contrary to any provisions of an approval under OAR 731-030-0110(5)(a). In most cases, the interest rate will approximate the rate for similar obligations. In determining the interest rate for an Infrastructure Loan, the Chief Financial Officer may set the rate to reflect the evaluation of the Transportation Project, the effect of the rate upon the Applicant's ability to finance the Transportation Project, the financial need of the Applicant, and the special circumstances of the Transportation Project.¶

(3) ~~The Agreement (if required), and schedule of payments. All Agreements must include the financed amount, any fees or charges, and any other provisions that the Department enters into with a Recipient regarding an Infrastructure Loan or Infrastructure Assistance will specify any fees or charges.~~ requires in its sole discretion.¶

(4) ~~The Chief Financial Officer~~ Department will consider the financial status of the Infrastructure Fund and may delay final award of funds to any Recipient until sufficient funds are available in the Infrastructure Fund. The Department reserves the right to investigate and may recommend other sources of funds for all or part of a proposed Transportation Project.¶

(5) Eligible uses of moneys obtained from or through the assistance of the Infrastructure Fund include, but are not limited to, the cost of acquiring, designing, building and installing any Transportation Project.¶

(6) A Recipient may request a modification or amendment to an executed Agreement. The request must be made in writing to the Chief Financial Officer for consideration by the Department. The Recipient will be responsible for all costs related to any modification or amendment of the Agreement.

Statutory/Other Authority: ORS ~~184.616~~, 184.619, 367.015, 367.020

Statutes/Other Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350

AMEND: 731-030-0130

RULE SUMMARY: Removed erroneous language concerning audit requirements.

CHANGES TO RULE:

731-030-0130

Accounting, Reporting and Auditing Requirements ¶¶

(1) The Department will maintain an accounting system for the Infrastructure Fund that complies with generally accepted accounting principles and practices.¶¶

(2) A Recipient must separately account for all moneys received from the Infrastructure Fund in project accounts in accordance with generally accepted accounting standards. The Department reserves the right to audit, monitor or otherwise review all project records.¶¶

(3) The Department will compile an annual report on the OTIB and make it available to Recipients no later than 90 days after the end of the federal fiscal year. The report will identify that year's Recipients, the amounts, terms and conditions of the Infrastructure Loans and Infrastructure Assistance awarded and project categories.¶¶

~~(4) The Department, in cooperation with the Secretary of State, will conduct or cause to be conducted an annual independent financial and compliance audit of the OTIB's operations. This audit may be conducted in accordance with the Single Audit Act of 1984. This audit will be completed within one year of the end of the state fiscal year.¶¶~~

(5) A Recipient must observe the requirements of state law, if applicable, for retaining and disposing of records.

Statutory/Other Authority: ORS ~~184.616~~, 184.619, 367.015, 367.020

Statutes/Other Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350

REPEAL: 731-030-0150

RULE SUMMARY: Repealed.

CHANGES TO RULE:

~~731-030-0150~~

~~Waivers~~

~~The Chief Financial Officer may waive non-statutory requirement of OAR 731-030-0010 to 731-030-0160 if such a waiver would serve to further the goals and objectives of the OTIB or the Infrastructure Fund.~~

~~Statutory/Other Authority: ORS 184.616, 184.619, 367.015, 367.020~~

~~Statutes/Other Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350~~

AMEND: 731-030-0170

RULE SUMMARY: Amended to remove erroneous language.

CHANGES TO RULE:

731-030-0170

Interagency and Intra-agency Loans ¶¶

(1) For purposes of OAR 731-030-0170, capitalized terms shall have the respective meanings given in ORS Chapter 367 and OAR 731-030-0030, unless the context clearly indicates otherwise.¶¶

(2) An Agency may apply for an Infrastructure Loan or Infrastructure Assistance by following the same procedures as an Applicant and submitting an Application as set forth in 731-030-0090. The Department will evaluate the Agency's Application in the same manner provided in OAR 731-030-0100 and 731-030-0110; ~~as well as giving due consideration, however, to differences in funding sources; and available Collateral and mission between an Agency and an Applicant that is a Municipality or Private Entity.~~¶¶

(3) A Department Borrower may request an Infrastructure Loan or Infrastructure Assistance by submitting an Application ~~to the Chief Financial Officer or Staff.~~ Staff as described under OAR 731-030-0090. The Department will evaluate the Application in the same manner provided in OAR 731-030-0100 and 731-030-0110, giving due consideration, ~~however, to differences in funding sources; and available Collateral and mission between the Department Borrower and an Applicant that is an Agency, Municipality or Private Entity.~~¶¶

(4) For an Application approved under this OAR 731-030-0170, the Department will enter into an Agency Contract setting forth the amount of the Infrastructure Loan or Infrastructure Assistance and such additional terms and conditions as the ~~Chief Financial Officer or Staff~~ Department considers necessary including, but not limited to:¶¶

(a) For an Infrastructure Loan, the interest rate, installment payment amount and schedule, maturity date, and any revenues or other moneys pledged or dedicated to repayment of the Infrastructure Loan; and¶¶

(b) For an Infrastructure Loan or Infrastructure Assistance, the allowable purposes on which the moneys provided may be spent and the remedies available to the Department in the event the moneys are misspent.¶¶

(5) The Department may charge an Agency or Department Borrower for costs to review, process, and service an Application or the Infrastructure Loan or Infrastructure Assistance. ~~An Agency or Department Borrower will pay~~ Charges described under this section include, but are not limited to:¶¶

(a) A loan fee of one percent of the amount of the Infrastructure Loan upon disbursement of Infrastructure Loan proceeds;¶¶

(b) Charges for credit reports, expert advice, legal fees, construction inspections, disbursement fees, loan servicing fees, Uniform Commercial Code-1 fees and appraisals; and¶¶

(c) ~~Any other~~ charges specified in the Agreement executed by the Agency or Department Borrower and the Department.

Statutory/Other Authority: ORS ~~184.616~~, 184.619, 367.015, 367.020

Statutes/Other Implemented: ORS 367.010-367.060 & US Code, PL 104-59, Sect. 350