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DIVISION 1

MODEL RULES FOR RULEMAKING

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For the purposes of OAR 137-001-0005 to 137-005-0070, unless otherwise defined therein, the words and phrases used in these rules have the same meaning as given to them in ORS 183.310 and:	

(1) "Consensus" means unanimous concurrence among the participants in a dispute resolution process, unless the participants agree otherwise;

(2) "Convenor" means a person who aids in identifying appropriate issues and members for a negotiated rulemaking committee to develop a proposed rule, or who aids in identifying issues and participants for a collaborative dispute resolution process;

(3) "Collaborative dispute resolution process" or "collaborative DR process" means any process by which a collaborative dispute resolution provider assists the participants in working together to develop a mutually acceptable resolution to an issue in controversy. A collaborative DR process does not include:

(a) Contested case hearings;

(b) Meetings, outside of a negotiated rulemaking process, in which a facilitator is used solely to lead an orderly meeting, manage an agenda or assist the group in accomplishing tasks and the facilitator is not attempting to resolve a controversy by developing consensus among the participants;

(c) A process in which an agency employee negotiates, facilitates or mediates between the disputants solely through telephone or other electronic communication; or

(d) A process in which the resolution of the controversy is accomplished informally, without a written agreement between the disputants or an agency order.

(4) "Collaborative dispute resolution provider" or "collaborative DR provider" means an individual who assists the participants in a dispute resolution process to work together to develop a mutually acceptable resolution to an issue in controversy. The collaborative DR provider may function as a mediator, facilitator, convenor, neutral fact-finder or other neutral. Arbitrators, investigators, customer service representatives and ombudspersons are not considered collaborative dispute resolution providers.

(5) "Disputants" means agencies, persons or entities, or their representatives, who have a direct interest in a controversy and does not include a collaborative DR provider or person involved only as a witness.

(6) "Facilitation" means a process in which a collaborative DR provider encourages and fosters discussions and negotiations to assist in reaching consensus.

(7) "Mediation" means a process in which a collaborative DR provider assists two or more disputants in reaching a mutually acceptable resolution of the controversy.

(8) "Neutral fact-finder" means a third party who assists with the resolution of a controversy by conducting an investigation of critical facts and rendering non-binding, advisory findings.

(9) "Participants" means agencies, persons or entities involved in a dispute resolution proceeding, other than a collaborative DR provider or witness.

(10) "Agreement to collaborate" means the agreement specified in OAR 137-005-0030.

Stat. Auth.: ORS 183.341 & ORS 183.502

Stats. Implemented: ORS 183.310 & ORS 183.502

Hist.: 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 1-1997, f. 3-28-97, cert. ef. 4-1-97; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-001-0007

Public Input Prior to Rulemaking

(1) The agency may seek public input before giving notice of intent to adopt, amend or repeal a rule. Depending upon the type of rulemaking anticipated, the agency may appoint an advisory committee, solicit the views of persons on the agency's mailing list maintained pursuant to ORS 183.335(7) and those legislators designated in ORS 183.335(14), or use any other means to obtain public views to assist the agency.

(2) If the agency appoints an advisory committee, the agency shall make a good faith effort to ensure that the committee's members represent the interests of persons likely to be affected by the rule. The meetings of the advisory committee shall be open to the public. Notice of committee meetings shall be provided to persons on the agency's mailing list maintained pursuant to ORS

183.335(7) and to those legislators designated in ORS 183.335(14).

(3) Written minutes shall be taken at all advisory committee meetings. The minutes must reflect all of the matters discussed and the views expressed by the participants. The agency's rules coordinator shall maintain copies of the minutes of any meetings of advisory committees appointed pursuant to this rule and any written input received by such committee or the agency concerning the anticipated rulemaking.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.025(2) & ORS 183.330(2)

Hist.: JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; JD 6-1995, f. 8-25-95, cert. ef. 9-9-95; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-001-0008

Assessment for Collaborative Dispute Resolution in Rulemaking

(1) In lieu of, or in addition to, a rulemaking advisory committee appointed under ORS 183.025(2), the agency may, in its discretion, establish a negotiated rulemaking committee to develop and seek agreement on a proposed rulemaking action. In making a decision to use a negotiated rulemaking process, the agency may consider any factors the agency considers to be relevant, including whether:

(a) There is a need for a rulemaking action;

(b) There are a limited number of identifiable interests that will be significantly affected by the rulemaking action, and the representatives of such interests have sufficient expertise and resources to participate effectively in the negotiation process;

(c) There is a reasonable likelihood that a committee can be convened which is composed of persons who can adequately represent the interests identified under paragraph (b) and who are willing to negotiate in good faith to reach a consensus on the proposed rulemaking action;

(d) There is a reasonable likelihood that a committee will reach a consensus on the proposed rulemaking action within an appropriate period of time to avoid unreasonable delay in the agency's final rulemaking;

(e) The interest of the agency is in joint problem-solving, agreement or consensus which could best be met through negotiated rulemaking, and not solely in obtaining public comment, consultation or feedback, which may be addressed through an advisory committee;

(f) The agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and

(g) The agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rulemaking action as the basis for a notice of intended adoption, amendment or repeal of a rule pursuant to ORS 183.335.

(2) The agency may use the services of a convenor to assist the agency in identifying persons, interest groups or entities who will be significantly affected by a proposed rulemaking action and the issues of concern to them, and in ascertaining whether a negotiated rulemaking committee is feasible and appropriate for the particular rulemaking action. Upon request of the agency, the convenor may ascertain the names of persons who are willing and qualified to represent interests that will be significantly affected by the proposed rule.

(3) Upon request of the agency, the convenor shall report findings in writing and may make recommendations to the agency. Any written report and recommendations of the convenor shall be made available to the public upon request.

Stat. Auth.: ORS 183.341 & ORS 183.502

Stats. Implemented: ORS 183.502

Hist.: JD 1-1997, f. 3-28-97, cert. ef. 4-1-97

137-001-0009

Use of Collaborative Dispute Resolution in Rulemaking

(1) If, after consideration of the factors set out in OAR 137-001-0008, the agency chooses to establish a negotiated rulemaking committee, the agency shall inform persons on the agen-

cy's mailing list maintained pursuant to ORS 183.335(7) and those legislators designated in ORS 183.335(14) of the subject and scope of the proposed rulemaking action. This notice may include:

(a) The interests that are likely to be significantly affected by the rulemaking action;

(b) A proposed agenda and schedule for completing the work of the committee, including a target date for publication by the agency of its intended rulemaking action pursuant to ORS 183.335; and

(c) The membership of the rulemaking committee.

(2) The agency may limit membership on a negotiated rulemaking committee to ensure proper functioning of the committee or to achieve balanced membership. The committee shall include at least one person representing the agency.

(3) The person or persons participating on behalf of the agency on a negotiated rulemaking committee may participate in the deliberations and activities of the committee with the same status as other members of the committee. Such person or persons shall be authorized to speak for the agency in the discussions and negotiations of the committee and shall inform the committee of the decision making process within the agency that will be necessary to bind the agency to any consensus reached by the committee.

(4) A negotiated rulemaking committee established under this rule shall consider the matter proposed by the agency and attempt to reach a consensus concerning a proposed rulemaking action with respect to such matter and any other matter the committee determines is relevant to the proposed rulemaking action.

(5) The agency may nominate an agency employee or anyone else to serve as a facilitator for the negotiations of the committee, subject to the approval of the committee by consensus. In submitting the nominee for approval, the agency may state any financial or other limitations that may affect the choice of a facilitator. If the committee does not approve the agency's nominee for facilitator, the agency may submit a substitute nomination or allow the committee to select by consensus a person to serve as facilitator. A person designated to represent the agency in substantive issues may not serve as a facilitator or otherwise chair the committee.

(6) A facilitator approved or selected by a negotiated rulemaking committee shall chair the meetings of the committee in an impartial manner, impartially assist the members of the committee in conducting discussions and negotiations, and manage the keeping of minutes and records.

(7) For purposes of a negotiated rulemaking, both convenors and facilitators are considered dispute resolution providers, except that the agency's personal services contract for convenors need not contain the elements listed in OAR 137-005-0040(6)(b).

(8) A negotiated rulemaking committee established under this rule may adopt procedures for the operation of the committee. If the committee reaches a consensus on a proposed rulemaking action, the committee shall transmit to the agency a report containing the proposed rulemaking action. The committee may include in its report any other information, recommendations or materials that the committee considers appropriate. If the committee does not reach a consensus on a proposed rulemaking action, the committee may transmit to the agency a report specifying any areas in which the committee did reach a consensus and any other information the committee wishes to transmit to the agency.

(9) If the agency chooses to proceed with a rulemaking action after receiving the report of the committee, the agency shall comply with the rulemaking procedures in ORS 183.325 to ORS 183.355.

(10) The agency may request the committee to reconvene after a notice of proposed rulemaking action required by ORS 183.335(1) in order to consider any public comments received by the agency related to the rule. If the agency wishes to receive input from the committee after the deadline for comment on the proposed rulemaking action, the agency shall extend the comment deadline in order to receive such recommendations from the committee. The agency shall provide notice of the extended deadline to persons on the agency's mailing list maintained pursuant to ORS 183.335(7), to those legislators designated in ORS

183.335(14) and to persons identified in its notice rule adopted under ORS 183.341(4).

(11) The negotiated rulemaking committee shall terminate upon the agency's adoption, amendment or repeal of the final rule under consideration, unless the committee specifies an earlier termination date. The agency may terminate the negotiated rulemaking committee at any time.

(12) The members of a negotiated rulemaking committee are responsible for their own expenses of participation in the committee. If authorized by law, the agency may pay a member's reasonable travel and per diem expenses and other expenses as the agency deems appropriate.

Stat. Auth.: ORS 183.341 & ORS 183.502

Stats. Implemented: ORS 183.502

Hist.: JD 1-1997, f. 3-28-97, cert. ef. 4-1-97; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-001-0011

Rulemaking Format

When the agency proposes to amend an existing rule, the agency shall set forth the rule in full with matter proposed to be deleted enclosed in brackets and proposed additions shown by bold face.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.355(2)

Hist.: JD 1-1988, f. & cert. ef. 3-3-88; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-001-0018

Limitation of Economic Effect on Businesses

(1) Based upon its economic effect analysis under ORS 183.335(2)(b)(D) or upon comments made in response to its rulemaking notice, the agency shall, before adoption of a rule, determine whether the economic effect upon small business is significantly adverse; and

(2) If the agency determines there is a significant adverse effect on a business or businesses, it shall, modify the rule to reduce the rule's adverse economic impact on those businesses to the extent consistent with the public health and safety purposes of the rule.

(3) Modification to reduce the rule's adverse economic impact on small business shall be as provided in ORS 183.540.

Stat. Auth.: ORS 183

Stats. Implemented: ORS 183.341(1) & ORS 183.540

Hist.: 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86

137-001-0030

Conduct of Rulemaking Hearings

(1) The hearing to consider a rule shall be conducted by and shall be under the control of the presiding officer. The presiding officer may be the chief administrative officer of the agency, a member of its governing body, or any other person designated by the agency.

(2) At the beginning of the hearing, any person wishing to be heard shall provide name, address and affiliation to the presiding officer. The presiding officer may also require that the person complete a form showing any other information the presiding officer deems appropriate. Additional persons may be heard at the discretion of the presiding officer.

(3) At the beginning of the hearing, the presiding officer may summarize the content of the notice given under ORS 183.335, unless requested by a person present to read the notice in full.

(4) Subject to the discretion of the presiding officer, the order of the presentation shall be:

(a) Statements of proponents;

(b) Statements of opponents; and

(c) Statements of other witnesses present and wishing to be heard.

(5) The presiding officer or any member of the agency may question any witness making a statement at the hearing. The presiding officer may permit other persons to question witnesses.

(6) There shall be no additional statement given by any witness unless requested or permitted by the presiding officer.

(7) The hearing may be continued with recesses as determined by the presiding officer until all listed witnesses have had an opportunity to testify.

(8) The presiding officer shall, when practicable, receive all physical and documentary evidence presented by witnesses. Exhibits shall be marked and shall identify the witness offering the exhibit. Any written exhibits shall be preserved by the agency pursuant to any applicable retention schedule for public records under ORS 192.001 et seq.

(9) The presiding officer may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious, or immaterial matter.

(10) The presiding officer shall make a record of the proceeding, by audio or video tape recording, stenographic reporting or minutes.

Stat. Auth.: ORS 183.341 & ORS 183.390

Stats. Implemented: ORS 183.335(3) & ORS 183.341(1)

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 4-1979, f. & ef. 12-3-79; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91

137-001-0040

Rulemaking Record

(1) The agency shall maintain a record of any data or views it receives in response to a notice of intent to adopt, amend or repeal a rule.

(2) If a hearing is held, the agency may require the presiding officer, within a reasonable time after the hearing, to provide the agency a written summary of statements given and exhibits received and a report of the officer's observations of physical experiments, demonstrations, or exhibits. The presiding officer may make recommendations but such recommendations are not binding upon the agency. The rulemaking record shall contain the presiding officer's summary, or a recording of oral submissions received at the hearing, and the presiding officer's recommendation, if any.

(3) The rulemaking record shall be maintained by the rules coordinator. The agency shall make the rulemaking record available to members of the public upon request.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.335(3), ORS 183.341(1) & OL 1993, 729, §14

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; JD 7-1995, f. 8-25-95, cert. ef. 1-1-96

137-001-0050

Agency Rulemaking Action

At the conclusion of the hearing, or after receipt of the presiding officer's requested report and recommendation, if any, the agency may adopt, amend, or repeal rules covered by the notice of intended action. The agency shall fully consider all written and oral submissions.

Stat. Auth.: ORS 183

Stats. Implemented: ORS 183.335(3)

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86

137-001-0060

Secretary of State Rule Filing

(1) The agency shall file in the office of the Secretary of State a certified copy of each adopted or amended rule and each order repealing an agency rule.

(2) The rule or order shall be effective upon filing with the Secretary of State unless a different effective date is required by statute or a later effective date is specified in the rule or order.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341(1) & ORS 183.355

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 17, f. & ef. 11-25-77; 1AG 4-1979, f. & ef. 12-3-79; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-001-0070

Petition to Promulgate, Amend, or Repeal Rule

(OAR 137-001-0070 was adopted by the Attorney General as required by ORS 183.390. Agencies must apply this rule without further adoption or amendment.)

(1) An interested person may petition an agency to adopt, amend, or repeal a rule. The petition shall state the name and address of the petitioner and any other person known to the petitioner to be interested in the rule. The petition shall be legible, signed by or on behalf of the petitioner, and shall contain a detailed statement of:

(a) The rule petitioner requests the agency to adopt, amend, or repeal. When a new rule is proposed, the petition shall set forth the proposed language in full. When an amendment of an existing rule is proposed, the rule shall be set forth in the petition in full with matter proposed to be deleted enclosed in brackets and proposed additions shown by boldface;

(b) Facts or arguments in sufficient detail to show the reasons for and effects of adoption, amendment, or repeal of the rule;

(c) All propositions of law to be asserted by petitioner.

(2) The agency:

(a) May provide a copy of the petition, together with a copy of the applicable rules of practice, to all persons named in the petition;

(b) May schedule oral presentations;

(c) Shall, in writing, within 30 days after receipt of the petition, either deny the petition or initiate rulemaking proceedings

Stat. Auth.: ORS 183.390

Stats. Implemented: ORS 183.341(1) & ORS 183.390

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 1-1981, f. & ef. 11-17-81; JD 6-1983, f. 9-23-83, ef. 9-26-83; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1995, f. 8-25-95, cert. ef. 9-9-95

137-001-0080

Temporary Rulemaking Requirements

(1) If no notice has been provided before adoption of a temporary rule, the agency shall give notice of its temporary rulemaking to persons, entities, and media specified under ORS 183.335(1) by mailing or personally delivering to each of them a copy of the rule or rules as adopted and a copy of the statements required under ORS 183.335(5). If a temporary rule or rules are over ten pages in length, the agency may provide a summary and state how and where a copy of the rule or rules may be obtained. Failure to give this notice shall not affect the validity of any rule.

(2) The agency shall file with the Secretary of State a certified copy of the temporary rule and a copy of the statement required by ORS 183.335(5).

(3) A temporary rule is effective for 180 days, unless a shorter period is specified in the temporary rule.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.335(5), ORS 183.341(1), ORS 183.355 & OL 1993, 729 §6

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 17, f. & ef. 11-25-77; 1AG 4-1979, f. & ef. 12-3-79; 1AG 1-1981, f. & ef. 11-17-81; JD 6-1983, f. 9-23-83, ef. 9-26-83; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; JD 7-1995, f. 8-25-95, cert. ef. 1-1-96

137-001-0085

Periodic Rule Review

(1) Pursuant to ORS 183.545, the agency shall review and analyze all of its rules at least once every three years, including rules reviewed during prior reviews and rules adopted after the last review.

(2) As part of the review the agency shall invite public comment upon the rules and shall give notice of the review in accordance with ORS 183.335(1).

(3) The notice shall identify the rules under review by rule or division number and subject matter. It shall state that the agency invites written comments concerning the continued need for the rule; the complexity of the rule; the extent to which the rule duplicates, overlaps, or conflicts with other state rules, federal regulations, and local government regulations; the degree to which technology, economic conditions, or other factors have changed in the

subject area affected by the rule; the rule's potential for enhancement of job-producing enterprises; and the legal basis for the rule.

(4) The notice shall state the date by which written comments must be received by the agency and the address to which the comments should be sent.

(5) If the agency provides a public hearing to receive oral comments on the rules, the notice shall include the time and place of the hearing.

Stat. Auth.: ORS 183.341 & ORS 183.390

Stats. Implemented: ORS 183.341(1), ORS 183.545, ORS 183.550, OL 1992, 15 & OL 1995, 535

Hist.: 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91

DIVISION 2

MODEL RULES FOR AGENCY DECLARATORY RULINGS

[ED. NOTE: OAR 137-002-0010 to 137-002-0060 were adopted by the Attorney General as required by ORS 183.410. Agencies must apply these rules without further adoption or amendment.]

137-002-0010

Petition for Declaratory Ruling

The petition to initiate proceedings for declaratory rulings shall contain:

(1) The rule or statute that may apply to the person, property, or state of facts;

(2) A detailed statement of the relevant facts; including sufficient facts to show petitioner's interest;

(3) All propositions of law or contentions asserted by petitioner;

(4) The questions presented;

(5) The specific relief requested; and

(6) The name and address of petitioner and of any other person known by petitioner to be interested in the requested declaratory ruling.

Stat. Auth.: ORS 183

Stats. Implemented: ORS 183.410

Hist.: 1AG 14, f. & ef. 10-22-75; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89

137-002-0020

Service of Declaratory Ruling Petition

(1) The petition shall be deemed filed when received by the agency.

(2) Within 60 days after the petition is filed the agency shall notify the petitioner in writing whether it will issue a ruling. If the agency decides to issue a ruling, it shall serve all persons named in the petition by mailing:

(a) A copy of the petition together with a copy of the agency's rules of practice; and

(b) Notice of any proceeding including the hearing at which the petition will be considered. (See OAR 137-002-0030 for contents of notice.)

(3) Notwithstanding section (2) of this rule, the agency may decide at any time that it will not issue a declaratory ruling in any specific instance. The agency shall notify the petitioner in writing when the agency decides not to issue a declaratory ruling.

Stat. Auth.: ORS 183

Stats. Implemented: ORS 183.410

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 17, f. & ef. 11-25-77; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89

137-002-0025

Intervention in Declaratory Rulings

(1) Any person or entity may petition the agency for permission to participate in the proceeding as a party.

(2) The petition for intervention shall be in writing and shall contain:

(a) The rule or statute that may apply to the person, property, or state of facts;

(b) A statement of facts sufficient to show the intervenor's interest;

(c) A statement that the intervenor accepts the petitioner's statement of facts for purposes of the declaratory ruling;

(d) All propositions of law or contentions asserted by the intervenor;

(e) A statement that the intervenor accepts the petitioner's statement of the questions presented or a statement of the questions presented by the intervenor;

(f) A statement of the specific relief requested.

(3) The agency may, in its discretion, invite any person or entity to file a petition for intervention.

(4) The agency, in its discretion, may grant or deny any petition for intervention. If a petition for intervention is granted, the status of the intervenor(s) shall be the same as that of an original petitioner, i.e. the declaratory ruling, if any, issued by the agency shall be binding between the intervenor and the agency on the facts stated in the petition, subject to review as provided in ORS 183.410

(5) The decision to grant or deny a petition for intervention shall be in writing and shall be served on all parties.

Stat. Auth.: ORS 183.410

Stats. Implemented: ORS 183.410

Hist.: JD 5-1989, f. 10-5-89, cert. ef. 10-15-89; JD 6-1995, f. 8-25-95, cert. ef. 9-9-95

137-002-0030

Notice of Declaratory Ruling Hearing

The notice of hearing for a declaratory ruling shall:

(1) Be accompanied by a copy of the petition requesting the declaratory ruling and by a copy of any petition for intervention if copies of these petitions have not previously been served on the party;

(2) Set forth the time and place of the proceeding; and

(3) Identify the presiding officer.

Stat. Auth.: ORS 183

Stats. Implemented: ORS 183.410

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89

137-002-0040

Declaratory Ruling Procedure

(1) The proceeding shall be conducted by and shall be under the control of the presiding officer. The presiding officer may be the chief administrative officer of the agency, a member of its governing body or any other person designated by the agency.

(2) No testimony or other evidence shall be accepted at the hearing. The petition will be decided on the facts stated in the petition, except that the presiding officer may agree to accept, for consideration by the agency, a statement of alternative facts if such a statement has been stipulated to in writing by all parties to the proceeding, including any intervening parties.

(3) The parties and agency staff shall have the right to present oral argument. The presiding officer may impose reasonable time limits on the time allowed for oral argument. The parties and agency staff may file briefs in support of their respective positions. The presiding officer shall fix the time and order of filing briefs and may direct that the briefs be submitted prior to oral argument. The presiding officer may permit the filing of memoranda following the hearing.

(4) The proceeding may be conducted in person or by telephone.

(5) As used in this rule, "telephone" means any two-way electronic communication device.

Stat. Auth.: ORS 183.410

Stats. Implemented: ORS 183.410

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; JD 6-1995, f. 8-25-95, cert. ef. 9-9-95

137-002-0050

Presiding Officer's Proposed Declaratory Ruling

(1) Except when the presiding officer is the decision maker, the presiding officer shall prepare a proposed declaratory ruling in

accordance with OAR 137-002-0060 for consideration by the decision maker.

(2) When a proposed declaratory ruling is considered by the decision maker, the parties and agency staff shall have the right to present oral argument to the decision maker.

Stat. Auth.: ORS 183

Stats. Implemented: ORS 183.410

Hist.: 1AG 14, f. & ef. 10-22-75; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89

137-002-0060

Issuance of Declaratory Ruling

(1) The agency shall issue its declaratory ruling within 60 days of the close of the record.

(2) The ruling shall be in writing and shall include:

(a) The facts upon which the ruling is based;

(b) The statute or rule in issue;

(c) The agency's conclusion as to the applicability of the statute or rule to those facts;

(d) The agency's conclusion as to the legal effect or result of applying the statute or rule to those facts;

(e) The reasons relied upon by the agency to support its conclusions;

(f) A statement that under ORS 183.480 the parties may obtain judicial review by filing a petition with the Court of Appeals within 60 days from the date the declaratory ruling is served.

(3) The ruling shall be served by mailing a copy to the parties.

Stat. Auth.: ORS 183

Stats. Implemented: ORS 183.410

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89

DIVISION 3

MODEL RULES OF PROCEDURE FOR CONTESTED CASES

137-003-0001

Contested Case Notice

(1) In addition to the requirement of ORS 183.415(2), a contested case notice may include either or both of the following:

(a) A statement that the record of the proceeding to date, including information in the agency file or files on the subject of the contested case, automatically become part of the contested case record upon default for the purpose of proving a prima facie case;

(b) A statement that a collaborative dispute resolution process is available as an alternative to a contested case hearing, if requested within the time period stated in the notice, and that choosing such a process will not affect the right to a contested case hearing if a hearing request is received by the agency within the time period stated in the notice and the matter is not resolved through the collaborative process.

(2) The contested case notice shall:

(a) Specify the time within which a person may request a hearing; and

(b) Include a statement that if a request for hearing is not received by the agency within the time stated in the notice, the person shall have waived the right to a hearing under ORS chapter 183, except as provided in OAR 137-003-0075(4).

Stat. Auth.: ORS 183.341 & ORS 183.502

Stats. Implemented: ORS 183.341(1), ORS 183.413, ORS 183.415 & ORS 183.502

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 17, f. & ef. 11-25-77; 1AG 4-1979, f. & ef. 12-3-79; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 7-1991, f. & cert. ef. 11-4-91; JD 1-1997, f. 3-28-97, cert. ef. 4-1-97; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-003-0002

Rights of Parties in Contested Cases

(1) In addition to the information required to be given under ORS 183.413(2) and 183.415(7), before commencement of a con-

tested case hearing, the agency shall inform a party, if the party is an agency, corporation, or an unincorporated association, that such party must be represented by an attorney licensed in Oregon, unless statutes applicable to the contested case proceeding specifically provide otherwise.

(2) Except as otherwise required by ORS 183.415(7), the information referred to in section (1) of this rule may be given in writing or orally before the commencement of the hearing.

(3) Upon the agreement of the agency and the parties, and unless otherwise precluded by law, alternative methods of dispute resolution may be used in contested case matters. Such alternative methods of resolution may include non-binding arbitration, modified contested case proceedings, nonrecord abbreviated hearings or any collaborative method designed to encourage the agency and the parties to work together to develop a mutually agreeable solution, such as negotiation, mediation, use of a facilitator or a neutral fact-finder or settlement conferences, but may not include binding arbitration.

(4) Final disposition of contested cases may be by a final hearing order or, unless precluded by law, by stipulation, agreed settlement, consent order or final order by default. A stipulation, agreed settlement or consent order disposing of a contested case must be in writing and signed by the party or parties. By signing such an agreement, the party or parties waive the right to a contested case hearing. The agency shall incorporate the disposition into a final order.

Stat. Auth.: ORS 183.341 & ORS 183.502

Stats. Implemented: ORS 9.320, ORS 183.341(1), ORS 183.413, ORS 183.415 & ORS 183.502

Hist.: 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 6-1995, f. 8-25-95, cert. ef. 9-9-95; JD 1-1997, f. 3-28-97, cert. ef. 4-1-97; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-003-0003

Late Filing

(1) Unless otherwise provided by law, when a person fails to file any document within the time specified by agency rules or these model rules of procedure, the late filing may be accepted if the agency or presiding officer determines that the cause for failure to file the document timely was beyond the reasonable control of the party.

(2) The agency may require a statement explaining the reasons for the late filing.

Stat. Auth.: ORS 183.341 & ORS 183.390

Stats. Implemented: ORS 183.341(1)

Hist.: JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91

137-003-0005

Participation as Party or Limited Party

(1) When an agency gives notice that it intends to hold a contested case hearing, persons who have an interest in the outcome of the agency's proceeding or who represent a public interest in such result may request to participate as parties or limited parties.

(2) A person requesting to participate as a party or limited party shall file a petition with the agency at least 21 days before the date set for the hearing and shall include a sufficient number of copies of the petition for service on all parties. Petitions untimely filed shall not be considered unless the agency determines that good cause has been shown for failure to file timely.

(3) The petition shall include the following:

(a) Names and addresses of the petitioner and of any organization the petitioner represents;

(b) Name and address of the petitioner's attorney, if any;

(c) A statement of whether the request is for participation as a party or a limited party, and, if as a limited party, the precise area or areas in which participation is sought;

(d) If the petitioner seeks to protect a personal interest in the outcome of the agency's proceeding, a detailed statement of the petitioner's interest, economic or otherwise, and how such interest may be affected by the results of the proceeding;

(e) If the petitioner seeks to represent a public interest in the results of the proceeding, a detailed statement of such public inter-

est, the manner in which such public interest will be affected by the results of the proceeding, and the petitioner's qualifications to represent such public interest;

(f) A statement of the reasons why existing parties to the proceeding cannot adequately represent the interest identified in subsection (3)(d) or (e) of this rule.

(4) The agency shall serve a copy of the petition on each party personally or by mail. Each party shall have seven days from the date of personal service or agency mailing to file a response to the petition.

(5) If the agency determines under OAR 137-003-0003 that good cause has been shown for failure to file a timely petition, the agency at its discretion may:

(a) Shorten the time within which answers to the petition shall be filed; or

(b) Postpone the hearing until disposition is made of the petition.

(6) If a person is granted participation as a party or a limited party, the agency may postpone or continue the hearing to a later date if necessary to avoid an undue burden to one or more of the parties in the case.

(7) In ruling on petitions to participate as a party or a limited party, the agency shall consider:

(a) Whether the petitioner has demonstrated a personal or public interest that could reasonably be affected by the outcome of the proceeding;

(b) Whether any such affected interest is within the scope of the agency's jurisdiction and within the scope of the notice of contested case hearing;

(c) When a public interest is alleged, the qualifications of the petitioner to represent that interest;

(d) The extent to which the petitioner's interest will be represented by existing parties.

(8) A petition to participate as a party may be treated as a petition to participate as a limited party.

(9) If the agency grants a petition, the agency shall specify areas of participation and procedural limitations as it deems appropriate.

(10) An agency ruling on a petition to participate as a party or as a limited party shall be by written order and served promptly on the petitioner and all parties. If the petition is allowed, the agency shall also serve petitioner with the notice of rights required by ORS 183.413(2).

Stat. Auth.: ORS 183.341 & ORS 183.390

Stats. Implemented: ORS 183.341(1), ORS 183.415(4) & ORS 183.450(3)

Hist.: 1AG 17, f. & ef. 11-25-77; 1AG 4-1979, f. & ef. 12-3-79; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91

137-003-0007

Agency Participation as Interested Agency or Party

(1) When an agency gives notice that it intends to hold a contested case hearing, it may also notify the parties that it intends to name any other agency that has an interest in the outcome of that proceeding as a party or as an interested agency, either on its own initiative or upon request by that other agency.

(2) Each party shall have seven days from the date of personal service or mailing of the notice to file objections.

(3) The agency decision to name an agency as a party of as an interested agency shall be by written order and served promptly on the parties and the named agency.

(4) An agency named as a party or as an interested agency has the same procedural rights and shall be given the same notices as any party in the proceeding. An interested agency, unlike a party, has no right to judicial review.

(5) An agency may not be named as a party under this rule without written authorization of the Attorney General.

Stat. Auth.: ORS 180, ORS 183.341 & ORS 183.390

Stats. Implemented: ORS 180.060, ORS 180.220, ORS 183.341(1) & ORS 183.415(4)

Hist.: JD 2-1986, f. & ef. 1-27-86; JD 7-1991, f. & cert. ef. 11-4-91

137-003-0008

Authorized Representative in Designated Agencies

(1) For purposes of this rule, the following words and phrases have the following meaning:

(a) "Agency" means State Landscape Contractors Board, Office of Energy and the Energy Facility Siting Council, Environmental Quality Commission and the Department of Environmental Quality; Insurance Division of the Department of Consumer and Business Services for proceedings in which an insured appears pursuant to ORS 737.505; the State Fire Marshal in the Department of State Police; Division of State Lands for proceedings regarding the issuance or denial of fill or removal permits under ORS 541.605 to 541.685; Public Utility Commission and the Water Resources Department; Land Conservation and Development Commission and the Department of Land Conservation and Development; and State Department of Agriculture for purposes of hearings under ORS 215.705;

(b) "Authorized Representative" means a member of a partnership, an authorized officer or regular employee of a corporation, association or organized group, or an authorized officer or employee of a governmental authority other than a state agency;

(c) "Legal Argument" includes arguments on:

(A) The jurisdiction of the agency to hear the contested case;

(B) The constitutionality of a statute or rule of the application of a constitutional requirement to an agency;

(C) The application of court precedent to the facts of the particular contested case proceeding.

(d) "Legal Argument" does not include presentation of evidence, examination and cross-examination of witnesses or presentation of factual arguments or arguments on:

(A) The application of the facts to the statutes or rules directly applicable to the issues in the contested case;

(B) Comparison of prior actions of the agency in handling similar situations;

(C) The literal meaning of the statutes or rules directly applicable to the issues in the contested case;

(D) The admissibility of evidence or the correctness of procedures being followed.

(2) A party or limited party participating in a contested case hearing before an agency listed in subsection (1)(a) of this rule may be represented by an authorized representative as provided in this rule if the agency has by rule specified that authorized representatives may appear in the type of contested case hearing involved.

(3) Before appearing in the case, an authorized representative must provide the presiding officer with a letter authorizing the named representative to appear on behalf of a party or limited party.

(4) The presiding officer may limit an authorized representative's presentation of evidence, examination and cross-examination of witnesses, or presentation of factual arguments to insure the orderly and timely development of the hearing records, and shall not allow an authorized representative to present legal argument as defined in subsection (1)(c) of this rule.

(5) When an authorized representative is presenting a party or limited party in a hearing, the presiding officer shall advise such representative of the manner in which objections may be made and matters preserved for appeal. Such advice is of a procedural nature and does not change applicable law on waiver or the duty to make timely objection. Where such objections may involve legal argument as defined in this rule, the presiding officer shall provide reasonable opportunity for the authorized representative to consult legal counsel and permit such legal counsel to file written legal argument within a reasonable time after conclusion of the hearing.

Stat. Auth.: ORS 183.457

Stats. Implemented: ORS 183.341(1) & ORS 183.457

Hist.: JD 4-1987(Temp), f. & ef. 7-22-87; JD 1-1988, f. & cert. ef. 3-3-88; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; JD 6-1995, f. 8-25-95, cert. ef. 9-9-95

137-003-0010

Emergency License Suspension, Refusal to Renew

(1) If the agency finds there is a serious danger to the public health or safety, it may immediately suspend or refuse to renew a license. For purposes of this rule, such a decision is referred to as an emergency suspension order. An emergency suspension order must be in writing and may be issued without prior notice to the licensee or an opportunity for a hearing as required for contested cases under ORS Chapter 183.

(2)(a) Except where the danger to the public health or safety is so imminent that opportunity for the licensee to object under section (3) of this rule is not practicable as determined by the agency, the agency shall provide the licensee with notice and opportunity to object prior to issuing the emergency suspension order. For purposes of this rule, this notice is referred to as a pre-suspension notice;

(b) The presuspension notice shall:

(A) Describe generally the acts of the licensee and the circumstances that would be grounds for revocation, suspension or refusal to renew the license under the agency's usual procedures;

(B) Describe generally the reasons why the acts of the licensee and the circumstances seriously and immediately endanger the public's health or safety;

(C) Identify a person in the agency whom the licensee may contact and who is authorized to issue the emergency suspension order or to make recommendations regarding the issuance of the emergency suspension order.

(c) The agency may provide the presuspension notice to the licensee in writing, orally by telephone or in person, or by any other means available to the agency.

(3) Following the presuspension notice, the agency shall provide the licensee an immediate opportunity to respond to the presuspension notice before a person authorized to issue the emergency suspension order or to make recommendations regarding the issuance of the emergency suspension order. An emergency suspension order may be issued anytime thereafter.

(4)(a) When the agency issues an emergency suspension order, the agency shall serve the order on the licensee either personally or by registered or certified mail;

(b) The order shall include the following statements:

(A) Those required under ORS 183.415(2) and (3);

(B) That the licensee has the right to demand a hearing to be held as soon as practicable to contest the emergency suspension order;

(C) That if the demand for hearing is not received by the agency within 90 days of the date of notice of the emergency suspension order the licensee shall have waived its right to a hearing under ORS Chapter 183;

(D) The effective date of the emergency suspension order;

(E) Findings of the specific acts or omissions of the licensee that are grounds for revocation, suspension or refusal to renew the license, and the reasons these acts or omissions seriously and immediately endanger the public's health or safety; and

(F) That the agency may combine the hearing on the emergency suspension order with any other agency proceeding affecting the license. The procedures for a combined proceeding shall be those applicable to the other proceeding affecting the license.

(5)(a) If timely requested by the licensee, the agency shall hold a hearing on the emergency suspension order as soon as practicable;

(b) At the hearing, the agency shall consider the facts and circumstances including, but not limited to:

(A) Whether the acts or omissions of the licensee pose a serious danger to the public's health or safety; and

(B) Whether circumstances at the time of the hearing justify confirmation, alteration or revocation of the order.

Stat. Auth.: ORS 183.341 & ORS 183.390

Stats. Implemented: ORS 183.341(1) & ORS 183.430

Hist.: IAG 14, f. & ef. 10-22-75; IAG 17, f. & ef. 11-25-77; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 7-1991, f. & cert. ef. 11-4-91

137-003-0015**Use of Collaborative Dispute Resolution in Contested Cases**

(1) If, upon receipt of a notice required by ORS 183.415, a party requests to participate in a collaborative dispute resolution (DR) process, but does not make a request for a contested case hearing, any participation by the agency in such a process is voluntary and, in any event, does not toll the period for filing a timely request for a contested case hearing.

(2) If a party makes a timely request for a contested case hearing and also a request to participate in a collaborative DR process offered by the agency:

(a) The agency and the party must sign an agreement containing:

(A) The terms specified in OAR 137-005-0030(1), (5) and (6);

(B) The deadline, if any, for the conclusion of the collaborative process and a statement whether this deadline may be extended by agreement of the agency and the party; and

(C) A statement that, "Failing to reach a settlement or agreement will not affect the right to a contested case hearing."

(b) The agency shall stay the contested case proceeding until the collaborative DR process is completed, the agency or the party opts out of such process, or the deadline, if any, specified in the agreement required by paragraph (2)(a)(B) of this rule.

(3) If the agency agrees to participate in a collaborative DR process, any informal disposition of the contested case shall be consistent with ORS 183.415(5) and OAR 137-003-0002(4).

(4) If the collaborative DR process terminates without settlement of the contested case, the agency shall proceed to schedule the contested case hearing, unless the party withdraws the hearing request.

Stat. Auth.: ORS 183.341 & ORS 183.502

Stats. Implemented: ORS 183.502

Hist.: JD 1-1997, f. 3-28-97, cert. ef. 4-1-97; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-003-0025**Discovery in Contested Cases**

(1) Discovery by the agency or any party may be permitted in appropriate contested cases at the discretion of the agency. Any party may petition the agency pursuant to the requirements in this rule for an order allowing discovery. Before requesting a discovery order, a party must seek the discovery through an informal exchange of information.

(2) Discovery may include but is not limited to one or more of the following methods:

(a) Depositions of a material witness;

(b) Disclosure of names and addresses of witnesses expected to testify at the hearing;

(c) Production of documents, which may but need not be limited to documents that the party producing the documents plans to offer as evidence;

(d) Production of objects for inspection;

(e) Permission to enter upon land to inspect land or other property;

(f) Requests for admissions;

(g) Written interrogatories;

(h) Prehearing conferences, as provided in OAR 137-003-0035.

(3)(a) A party seeking to take the testimony of a material witness by deposition shall file a written request with the agency and send a copy to all other parties. The request must include the name and address of the witness, a showing of the materiality of the witness's testimony, an explanation of why a deposition rather than informal or other means of discovery is necessary, and a request that the witness's testimony be taken before an officer named in the request for the purpose of recording testimony.

(b) For all other forms of discovery, a request for a discovery order must be in writing and must include a description of the attempts to obtain the requested discovery informally. The request must be mailed or delivered to the agency, with a copy to other parties.

(4) Any discovery request must be reasonably likely to produce information that is generally relevant to the case. If the relevance of the requested discovery is not apparent, the agency may require the party requesting discovery to explain how the request is likely to produce relevant information. If the request appears to be unduly burdensome, the agency may require an explanation of why the requested information is necessary or is likely to facilitate resolution of the case.

(5) The agency may, but is not required to, authorize the requested discovery. In making its decision, the agency shall consider any objections. The agency shall issue an order granting or denying a discovery request in whole or in part.

(6) If the agency does authorize discovery, the agency shall control the methods, timing and extent of discovery.

(7) Only the agency may issue subpoenas in support of discovery. The agency may apply to the circuit court to compel obedience to a subpoena.

(8) The agency may delegate to a presiding officer its authority to order and control discovery. The delegation must be in writing, and it may be limited to specified forms of discovery.

(9) The presiding officer may refuse to admit evidence that was not disclosed in response to a discovery order, unless the party that failed to provide discovery offers a satisfactory reason for having failed to do so, or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10). If the presiding officer admits evidence that was not disclosed as ordered, the presiding officer may grant a continuance to allow an opportunity for the agency or other party to respond.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341(1) & ORS 183.425

Hist.: JD 7-1991, f. & cert. ef. 11-4-91; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-003-0035

Prehearing Conferences

(1) Prior to hearing, the agency may, in its discretion, conduct one or more prehearing conferences to facilitate the conduct and resolution of the case. The agency may convene the conference on its own initiative or at a party's request.

(2) The purposes of a prehearing conference may include, but are not limited to the following:

(a) To facilitate discovery and to resolve disagreements about discovery;

(b) To identify, simplify and clarify issues;

(c) To eliminate irrelevant issues;

(d) To obtain stipulations of fact;

(e) To provide to the presiding officer, agency and parties, in advance of the hearing, copies of all documents intended to be offered as evidence at the hearing and the names of all witnesses expected to testify;

(f) To authenticate documents;

(g) To decide the order of proof and other procedural matters pertaining to the conduct of the hearing;

(h) To discuss the use of a collaborative dispute resolution process in lieu of or preliminary to holding the contested case hearing; and

(i) To discuss settlement or other resolution or partial resolution of the case.

(3) The prehearing conference may be conducted in person or by telephone.

(4) The agency must make a record of any stipulations, rulings and agreements. The agency may make an audio or stenographic record of the pertinent portions of the conference or may place the substance of stipulations, rulings and agreements in the record by written summary. Stipulations to facts and to the authenticity of documents and agreements to narrow issues shall be binding upon the agency and the parties unless good cause is shown for rescinding a stipulation or agreement.

(5) After the hearing begins, the presiding officer may at any time recess the hearing to discuss any of the matters listed in subsection (2).

(6) The agency may delegate to the presiding officer the discretion to conduct prehearing conferences.

Stat. Auth.: ORS 183.341 & ORS 183.502

Stats. Implemented: ORS 183.341(1), ORS 183.430 & ORS 183.502

Hist.: JD 7-1991, f. & cert. ef. 11-4-91; JD 1-1997, f. 3-28-97, cert. ef. 4-1-97; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-003-0040

Conducting Contested Case Hearing

(1) The contested case hearing shall be conducted by and under the control of the presiding officer. The presiding officer may be the chief administrative officer of the agency, a member of its governing body, or any other person designated by the agency.

(2) If the presiding officer or any decision maker has an actual or potential conflict of interest as defined in ORS 244.020(1) or (7), that officer shall comply with the requirements of ORS Chapter 244 (e.g., ORS 244.120 and 244.130).

(3) The hearing shall be conducted, subject to the discretion of the presiding officer, so as to include the following:

(a) The statement and evidence of the proponent in support of its action;

(b) The statement and evidence of opponents, interested agencies, and other parties; except that limited parties may address only subjects within the area to which they have been limited;

(c) Any rebuttal evidence;

(d) Any closing arguments.

(4) Presiding officers or decision makers, agency representatives, interested agencies, and parties shall have the right to question witnesses. However, limited parties may question only those witnesses whose testimony may relate to the area or areas of participation granted by the agency.

(5) The hearing may be continued with recesses as determined by the presiding officer.

(6) The presiding officer may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious, or immaterial matter.

(7) Exhibits shall be marked and maintained by the agency as part of the record of the proceedings.

(8) If the presiding officer or any decision maker receives any written or oral ex parte communication on a fact in issue during the contested case proceeding, that person shall notify all parties and otherwise comply with the requirements of OAR 137-003-0055.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341(1), ORS 183.415(9) & ORS 183.462

Hist.: IAG 14, f. & ef. 10-22-75; IAG 4-1979, f. & ef. 12-3-79; JD 2-1986, f. & ef. 1-27-86; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1995, f. 8-25-95, cert. ef. 9-9-95

137-003-0045

Telephone Hearings

(1) Unless precluded by law, the agency may, in its discretion, hold a hearing or portion of a hearing by telephone. Nothing in this rule precludes an agency from allowing some parties or witnesses to attend by telephone while others attend in person.

(2) The agency may direct that a hearing be held by telephone upon request or on its own motion.

(3) The agency shall make an audio or stenographic record of any telephone hearing.

(4) Prior to commencement of an evidentiary hearing that is held by telephone, each party and the agency shall provide to all other parties and to the agency copies of documentary evidence that it will seek to introduce into the record.

(5) Nothing in this rule precludes any party or the agency from seeking to introduce documentary evidence in addition to evidence described in subsection (4) during the telephone hearing and the presiding officer shall receive such evidence, subject to the applicable rules of evidence, if inclusion of the evidence in the record is necessary to conduct a full and fair hearing. If any evidence introduced during the hearing has not previously been provided to the agency and to the other parties, the hearing may be

continued upon the request of any party or the agency for sufficient time to allow the party or the agency to obtain and review the evidence.

(6) The agency may delegate to the presiding officer the discretion to rule on issues raised under this rule.

(7) As used in this rule, "telephone" means any two-way electronic communication device, including video conferencing.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341(1)

Hist.: JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-003-0050

Evidentiary Rules

(1) Evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible.

(2) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, and privileges afforded by Oregon law shall be recognized by the presiding officer.

(3) All offered evidence, not objected to, will be received by the presiding officer subject to the officer's power to exclude irrelevant, immaterial, or unduly repetitious matter.

(4) Evidence objected to may be received by the presiding officer. Rulings on its admissibility or exclusion, if not made at the hearing, shall be made on the record at or before the time a final order is issued.

(5) The presiding officer shall accept an offer of proof made for excluded evidence. The offer of proof shall contain sufficient detail to allow the reviewing agency or court to determine whether the evidence was properly excluded. The presiding officer shall have discretion to decide whether the offer of proof is to be oral or written and at what stage in the proceeding it will be made. The presiding officer may place reasonable limits on the offer of proof, including the time to be devoted to an oral offer or the number of pages in a written offer.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341(1), ORS 183.415(11) & ORS 183.450

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 17, f. & ef. 11-25-77; 1AG 4-1979, f. & ef. 12-3-79; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-003-0055

Ex Parte Communications

(1) An ex parte communication is an oral or written communication to an agency decision maker or the presiding officer not made in the presence of all parties to the hearing, concerning a fact in issue in the proceeding, but does not include communication from agency staff or counsel about facts in the record.

(2) If an agency decision maker or presiding officer receives an ex parte communication during the pendency of the proceeding, the officer shall:

(a) Give all parties notice of the substance of the communication, if oral, or a copy of the communication, if written; and

(b) Provide any party who did not present the ex parte communication an opportunity to rebut the substance of the ex parte communication at the hearing, at a separate hearing for the limited purpose of receiving evidence relating to the ex parte communication, or in writing.

(3) The agency's record of a contested case proceeding shall include:

(a) The ex parte communication, if in writing;

(b) A statement of the substance of the ex parte communication, if oral;

(c) The agency or presiding officer's notice to the parties of the ex parte communication; and

(d) Rebuttal evidence.

Stat. Auth.: ORS 183

Stats. Implemented: ORS 173.341(1), ORS 183.415(9) & ORS 183.462

Hist.: JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88

Contested Cases - Orders and Default Orders - Rehearing and Reconsideration

137-003-0060

Proposed Orders in Contested Cases, Filing Exceptions

(1) If a majority of the officials who are to render the final order in a contested case have neither attended the hearing nor reviewed and considered the record, and the order is adverse to a party, a proposed order including findings of fact and conclusions of law shall be served upon the parties.

(2) When the agency serves a proposed order on the parties, the agency shall at the same time or at a later date notify the parties:

(a) When written exceptions must be filed to be considered by the agency; and

(b) When and in what form argument may be made to the officials who will render the final order.

(3) After receiving exceptions and argument, if any, the agency may adopt the proposed order or prepare a new order.

(4) Nothing in this rule prohibits the staff of a non-party agency from commenting on the proposed order.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341(1), ORS 183.460 & ORS 183.464

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 17, f. & ef. 11-25-75; 1AG 4-1979, f. & ef. 12-3-79; 1AG 1-1981, f. & ef. 11-17-81; JD 6-1983, f. 9-23-83, ef. 9-26-83; JD 2-1986, f. & ef. 1-27-86; JD 7-1991, f. & cert. ef. 11-4-91; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-003-0070

Final Orders in Contested Cases

(1) Final orders in contested cases shall be in writing.

(2) Except as provided in section (3) of this rule, final orders in contested cases shall include the following:

(a) Rulings on admissibility of offered evidence when the rulings are not set forth in the record;

(b) Findings of fact—those matters that are either agreed as fact or that, when disputed, are determined by the factfinder, on substantial evidence, to be facts over contentions to the contrary. A finding must be made on each fact necessary to reach the conclusions of law on which the order is based;

(c) Conclusion(s) of law—applications of the controlling law to the facts found and the legal results arising therefrom;

(d) Order—the action taken by the agency as a result of the facts found and the legal conclusions arising therefrom; and

(e) A citation of the statutes under which the order may be appealed.

(3) When informal disposition of a contested case is made by stipulation, agreed settlement or consent order as provided in OAR 137-003-0002(4), the final order need not comply with section (2) of this rule. However, the order must state the agency action and:

(a) Incorporate by reference the stipulation or agreed settlement signed by the party or parties agreeing to that action; or

(b) Be signed by the party or parties.

(4) The date of service of the order on the parties shall be specified in writing and be part of or be attached to the order on file with the agency, unless service of the final order is not required by statute.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341(1), ORS 183.415 & ORS 183.470

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 4-1979, f. & ef. 12-3-79; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 7-1991, f. & cert. ef. 11-4-91; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-003-0075

Final Orders by Default

(1) The agency may issue a final order by default:

(a) When the agency has given a party an opportunity to request a hearing and the party fails to make a request within a specified time;

(b) When the party withdraws a request for a hearing;

(c) When the agency has scheduled a hearing and the party fails to appear at the specified time and place; or

(d) When the agency has scheduled a hearing in a matter in which only one party is before the agency and that party subsequently notifies the agency that the party will not appear at the

specified time and place, unless the agency has agreed to reschedule the hearing.

(2) The agency may issue a final order by default only after making a prima facie case on the record. The record shall be made at a scheduled hearing on the matter or, if the hearing is cancelled or not held, at an agency meeting or at the time the final order by default is issued, unless the agency designates the agency file as the record at the time the contested case notice is issued in accordance with OAR 137-003-0001(1).

(3) The record may consist of oral (transcribed, recorded or reported) or written evidence or a combination of oral and written evidence. In all cases, the record must contain evidence that persuades the decision maker of the existence of facts necessary to support the order.

(4)(a) When a party requests a hearing after the time specified by the agency, but 70 days or less after the agency has entered a final order by default, the agency may grant the request only if the cause for failure to timely request the hearing was beyond the reasonable control of the party, unless other applicable law provides a different standard. The agency may require the request to be supported by an affidavit and may conduct such further inquiry, including holding a hearing, as it deems appropriate;

(b) If a final order by default has already been entered, the party requesting the hearing shall deliver or mail within a reasonable time a copy of the hearing request to all persons and agencies required by statute, rule, or order to receive notice of the proceeding;

(c) If the hearing request is allowed by the agency, it shall enter an order granting the request and schedule a hearing in due course. If the request is denied, the agency shall enter an order setting forth its reasons for the denial.

(5) The agency shall notify a defaulting party of the entry of a final order by default by delivering or mailing a copy of the order. If the contested case notice contained an order that was to become effective unless the party requested a hearing, and designated the agency file as the record, that order becomes a final order by default if no hearing is requested, and no further order need be served upon the party.

Stat. Auth.: ORS 183.341, ORS 183.390 & ORS 192.445

Stats. Implemented: ORS 183.341(1), ORS 183.415(6) & ORS 183.470

Hist.: JD 2-1986, f. & ef. 1-27-86; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93

137-003-0080

Reconsideration and Rehearing — Contested Cases

(1) A party may file a petition for reconsideration or rehearing of a final order in a contested case with the agency within 60 days after the order is served. A copy of the petition shall also be delivered or mailed to all parties and other persons and agencies required by statute, rule, or order to receive notice of the proceeding.

(2) The petition shall set forth the specific grounds for reconsideration or rehearing. The petition may be supported by a written argument.

(3) A rehearing may be limited by the agency to specific matters.

(4) The petition may include a request for stay of a final order if the petition complies with the requirements of OAR 137-003-0090(2).

(5) The agency may consider a petition for reconsideration or rehearing as a request for either or both. The petition may be granted or denied by summary order and, if no action is taken, shall be deemed denied as provided in ORS 183.482.

(6) Within 60 days after the order is served, the agency may, on its own initiative, reconsider the final order or rehear the case. The procedural and substantive effect of reconsideration or rehearing under this section shall be identical to the effect of granting a party's petition for reconsideration or rehearing.

(7) Reconsideration or rehearing shall not be granted after the filing of a petition for judicial review, except in the manner provided by ORS 183.482(6).

(8) A final order remains in effect during reconsideration or rehearing until stayed or changed.

(9) Following reconsideration or rehearing, the agency shall enter a new order, which may be an order affirming the existing order.

Stat. Auth.: ORS 183.341 & ORS 183.390

Stats. Implemented: ORS 183.341(1), ORS 183.482(1) & ORS 183.482(3)

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 17, f. & ef. 11-25-77; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91

Contested Cases — Stay Proceedings

137-003-0090

Stay Request

(1) Any person who petitions for reconsideration, rehearing or judicial review may request the agency to stay the enforcement of the agency order that is the subject of the petition.

(2) The stay request shall contain:

(a) The name, address and telephone number of the person filing the request and of that person's attorney, if any;

(b) The full title of the agency decision as it appears on the order and the date of the agency decision;

(c) A summary of the agency decision; and

(d) The name, address, and telephone number of each other party to the agency proceeding. When the party was represented by an attorney in the proceeding, then the name, address, and telephone number of the attorney shall be provided and the address and telephone number of the party may be omitted;

(e) A statement advising all persons whose names, addresses and telephone numbers are required to appear in the stay request as provided in subsection (2)(d) of this rule, that they may participate in the stay proceeding before the agency if they file a response in accordance with OAR 137-003-0091 within ten days from delivery or mailing of the stay request to the agency;

(f) A statement of facts and reasons sufficient to show that the stay request should be granted because:

(A) The petitioner will suffer irreparable injury if the order is not stayed;

(B) There is a colorable claim of error in the order; and

(C) Granting the stay will not result in substantial public harm.

(g) A statement identifying any person, including the public, who may suffer injury if the stay is granted. If the purposes of the stay can be achieved with limitations or conditions that minimize or eliminate possible injury to other persons, petitioner shall propose such limitations or conditions. If the possibility of injury to other persons cannot be eliminated or minimized by appropriate limitation or conditions, petitioner shall propose an amount of bond, irrevocable letter of credit or other undertaking to be imposed on the petitioner should the stay be granted, explaining why that amount is reasonable in light of the identified potential injuries;

(h) A description of additional procedures, if any, the petitioner believes should be followed by the agency in determining the appropriateness of the stay request;

(i) In a request for a stay of an order in a contested case, an appendix of affidavits containing evidence (other than evidence contained in the record of the contested case out of which the stay request arose) relied upon in support of the statements required under subsections (2)(f) and (g) of this rule. The record of the contested case out of which the stay request arose is a part of the record of the stay proceedings;

(j) In a request for stay of an order in other than a contested case, an appendix containing evidence relied upon in support of the statement required under subsections (2)(f) and (g) of this rule.

(3) The request must be delivered or mailed to the agency and on the same date a copy delivered or mailed to all parties identified in the request as required by subsection (2)(d) of this rule.

Stat. Auth.: ORS 183.341 & ORS 183.390

Stats. Implemented: ORS 183.341(1) & ORS 183.482(3)

MODEL RULES MISCELLANEOUS PROVISIONS

137-003-0091

Intervention in Stay Proceeding

(1) Any party identified under OAR 137-003-0090(2)(d) desiring to participate as a party in the stay proceeding may file a response to the request for stay.

(2) The response shall contain:

(a) The full title of the agency decision as it appears on the order;

(b) The name, address, and telephone number of the person filing the response, except that if the person is represented by an attorney, then the name, address, and telephone number of the attorney shall be included and the person's address and telephone number may be deleted;

(c) A statement accepting or denying each of the statements of facts and reasons provided pursuant to OAR 137-003-0090 (2)(f) in the petitioner's stay request;

(d) A statement accepting, rejecting, or proposing alternatives to the petitioner's statement on the bond, irrevocable letter of credit or undertaking amount or other reasonable conditions that should be imposed on petitioner should the stay request be granted.

(3) The response may contain affidavits containing additional evidence upon which the party relies in support of the statement required under subsections (2)(c) and (d) of this rule.

(4) The response must be delivered or mailed to the agency and to all parties identified in the stay request within ten days of the date of delivery or mailing to the agency of the stay request.

Stat. Auth.: ORS 183.341 & ORS 183.390

Stats. Implemented: ORS 183.341(1) & ORS 183.482(3)

Hist.: JD 6-1983, f. 9-23-83, ef. 9-26-83; JD 2-1986, f. & ef. 1-27-86; JD 7-1991, f. & cert. ef. 11-4-91

137-003-0092

Stay Proceeding and Order

(1) The agency may conduct such further proceedings pertaining to the stay request as it deems desirable. The agency shall commence such proceedings promptly after receiving the stay request.

(2) The agency shall issue an order granting or denying the stay request within 30 days after receiving it. The agency's order shall:

(a) Grant the stay request upon findings of irreparable injury to the petitioner and a colorable claim of error in the agency order and may impose reasonable conditions, including but not limited to, a bond, irrevocable letter of credit or other undertaking and that the petitioner file all documents necessary to bring the matter to issue before the Court of Appeals within a specified reasonable period of time; or

(b) Deny the stay request upon a finding that the petitioner failed to show irreparable injury or a colorable claim of error in the agency order; or

(c) Deny the stay request upon a finding that a specified substantial public harm would result from granting the stay, notwithstanding the petitioner's showing of irreparable injury and a colorable claim of error in the agency order; or

(d) Grant or deny the stay request as otherwise required by law.

(3) Nothing in OAR 137-003-0055 or in 137-003-0090 to 137-003-0092 prevents an agency from receiving evidence from agency staff concerning the stay request. Such evidence shall be presented by affidavit within the time limits imposed by OAR 137-003-0091(4). If there are further proceedings pursuant to section (1) of this rule, the agency staff may present additional evidence in the same manner that parties are permitted to present additional evidence.

Stat. Auth.: ORS 183.341 & ORS 183.390

Stats. Implemented: ORS 183.341(1) & ORS 183.482(3)

Hist.: JD 6-1983, f. 9-23-83, ef. 9-26-83; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 7-1991, f. & cert. ef. 11-4-91

137-004-0010

Unacceptable Conduct

A presiding officer may expel a person from an agency proceeding if that person engages in conduct that disrupts the proceeding.

Stat. Auth.: ORS 183

Stats. Implemented: ORS 183.341(1)

Hist.: IAG 1-1981, f. & ef. 11-17-81; JD 6-1983, f. 9-23-83, ef. 9-26-83; JD 2-1986, f. & ef. 1-27-86

137-004-0080

Reconsideration — Orders in Other Than Contested Case

(1) A person entitled to judicial review under ORS 183.484 of a final order in other than a contested may file a petition for reconsideration of a final order in other than a contested case with the agency within 60 days after the date of the order. A copy of the petition shall also be delivered or mailed to all other persons and agencies required by statute or rule to be notified.

(2) The petition shall set forth the specific grounds for reconsideration. The petition may be supported by a written argument.

(3) The petition may include a request for a stay of a final order if the petition complies with the requirements of OAR 137-003-0090(2).

(4) The petition may be granted or denied by summary order, and, if no action is taken, shall be deemed denied as provided by ORS 183.484(2).

(5) Within 60 days after the date of the order, the agency may, on its own initiative, reconsider the final order. The procedural and substantive effect of granting reconsideration under this section shall be identical to the effect of granting a party's petition for reconsideration.

(6) Reconsideration shall not be granted after the filing of a petition for judicial review, unless permitted by the court.

(7) A final order remains in effect during reconsideration until stayed or changed.

(8) Following reconsideration, the agency shall enter a new order, which may be an order affirming the existing order.

Stat. Auth.: ORS 183.341, ORS 183.390 & ORS 192.445

Stats. Implemented:

Hist.: JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93

137-004-0100

Public Records Exemption for Home Address

(1) An individual may request that a public body not disclose the information in a specified public record that indicates the home address or personal telephone number of the individual. If the individual demonstrates to the satisfaction of the public body that the personal safety of the individual or the personal safety of a family member residing with the individual is in danger if the home address or personal telephone number remains available for public inspection, the public body shall not disclose that information from the specified public record, except in compliance with a court order, to a law enforcement agency at the request of the law enforcement agency, or with the consent of the individual.

(2) A request under section (1) of this rule shall be submitted to the custodian of public records for the public record that is the subject of the request. The request shall be in writing, signed by the requestor, and shall include:

(a) The name or a description of the public record sufficient to identify the record;

(b) Mailing address for the requestor;

(c) Evidence sufficient to establish to the satisfaction of the public body that disclosure of the requestor's home address or personal telephone number would constitute a danger to the personal safety of the requestor or of a family member residing with the requestor. Such evidence may include copies of the following documents:

(A) An affidavit, medical records, police reports or court records showing that the requestor or a family member residing with the requestor has been a victim of domestic violence;

(B) A citation or an order issued under ORS 133.055 for the protection of the requestor or a family member residing with the requestor;

(C) An affidavit or police reports showing that a law enforcement officer has been contacted concerning domestic violence, other physical abuse or threatening or harassing letters or telephone calls directed at the requestor or a family member residing with the requestor;

(D) A temporary restraining order or other no-contact order to protect the requestor or a family member residing with the requestor from future physical abuse;

(E) Court records showing that criminal or civil legal proceedings have been filed regarding physical protection for the requestor or a family member residing with the requestor;

(F) A citation or a court's stalking protective order pursuant to Chapter 626, Oregon Laws 1993 (SB 833) ORS 163.735 or 163.738, obtained for the protection of the requestor or a family member residing with the requestor;

(G) An affidavit or police reports showing that the requestor or a family member residing with the requestor has been a victim of a person convicted of the crime of stalking, of violating a court's stalking protective order;

(H) A conditional release agreement issued under ORS 135.250 - 135.260 providing protection for the requestor or a family member residing with the requestor;

(I) A protective order issued pursuant to ORS 135.873 or 135.970 protecting the identity or place or residence of the requestor or a family member residing with the requestor;

(J) An affidavit from a district attorney or deputy district attorney stating that the requestor or a family member residing with the requestor is scheduled to testify or has testified as a witness at a criminal trial, grand jury hearing or preliminary hearing and that such testimony places the personal safety of the witness in danger;

(K) A court order stating that the requestor or a family member residing with the requestor is or has been a party, juror, judge, attorney or involved in some other capacity in a trial, grand jury proceeding or other court proceeding and that such involvement places the personal safety of that individual in danger; or

(L) Such other documentary evidence that establishes to the satisfaction of the public body that disclosure of the requestor's home address or personal telephone number would constitute a danger to the personal safety of the requestor or of a family member residing with the requestor.

(3) A public body receiving a request under this rule promptly shall review the request and notify the requestor, in writing, whether the evidence submitted is sufficient to demonstrate to the satisfaction of the public body that the personal safety of the requestor or of a family member residing with the requestor would be in danger if the home address or personal telephone number remains available for public inspection. The public body may request that the requestor submit additional information concerning the request.

(4) If a public body grants the request for exemption with respect to records other than a voter registration record, the public body shall include a statement in its notice to the requestor that:

(a) The exemption shall remain effective for five years from the date the public body received the request, unless the requestor submits a written request for termination of the exemption before the end of the five years; and

(b) The requestor may make a new request for exemption at the end of the five years. If a public body grants the request for exemption with respect to a voter registration record, the public body shall include a statement in its notice to the requestor that:

(A) The exemption shall remain effective until the requestor must update the individual's voter registration, unless the requestor submits a written request for termination of the exemption before that time; and

(B) The requestor may make a new request for exemption from disclosure at that time.

(5) A person who has requested that a public body not disclose his or her home address or personal telephone number may revoke the request by notifying, in writing, the public body to which the request was made that disclosure no longer constitutes a danger to personal safety. The notification shall be signed by the person who submitted the original request for nondisclosure of the home address or personal telephone number.

(6) This rule does not apply to county property and lien records.

(7) As used in this rule:

(a) "Custodian" has the meaning given that term in ORS 192.410(1);

(b) "Public Body" has the same meaning given that phrase in ORS 192.410(3).

Stat. Auth.: ORS 192.445

Stats. Implemented: ORS 192.445

Hist.: JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; JD 8-1995, 8-25-95, cert. ef. 9-9-95

DIVISION 5

COLLABORATIVE DISPUTE RESOLUTION MODEL RULES

137-005-0010

Use of Collaborative Dispute Resolution Processes

(1) Unless otherwise precluded by law, the agency may, in its discretion, use a collaborative dispute resolution process in contested cases, rulemaking proceedings, judicial proceedings, and any other decision-making or policy development process or controversy involving the agency. Collaborative dispute resolution may be used to prevent or to minimize the escalation of disputes and to resolve disputes once they have occurred.

(2) Nothing in this rule limits innovation and experimentation with collaborative or alternative forms of dispute resolution, with negotiated rulemaking or with other procedures or dispute resolution practices not otherwise prohibited by law.

(3) The collaborative means of dispute resolution may be facilitated negotiation, mediation, facilitation or any other method designed to encourage the agency and the other participants to work together to develop a mutually agreeable solution. The agency may also consider using neutral fact-finders in an advisory capacity.

(4) The agency shall not agree to any dispute resolution process in which its ultimate settlement or decision making authority is given to a third party, including arbitration or fact-finding, without prior written authorization from the Attorney General.

(5) Nothing in this rule obligates the agency to offer funds to settle any case, to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to submit to binding arbitration, or to alter any existing delegation of settlement or litigation authority.

Stat. Auth.: ORS 183.341 & ORS 183.502

Stats. Implemented: ORS 183.502

Hist.: JD 1-1997, f. 3-28-97, cert. ef. 4-1-97

137-005-0020

Assessment for Use of Collaborative DR Process

(1) Prior to instituting a collaborative dispute resolution process, the agency may conduct an assessment to determine if the dispute is appropriate for this type of process. The dispute may not be appropriate for collaborative dispute resolution if:

(a) The outcome of the dispute is important for its precedential value, and a collaborative DR process is unlikely to be accepted as an authoritative precedent;

(b) The matter involves significant questions of agency policy, and it is unlikely that a collaborative DR process will help develop or clarify agency policy;

(c) Maintaining established policies and consistency among decisions is important, and a collaborative DR process likely would result in inconsistent outcomes for comparable matters;

(d) The matter significantly affects persons or organizations who are not participants in the process or whose interests are not adequately represented by participants;

(e) A public record of the proceeding is important, and a collaborative DR process cannot provide such a record; or

(f) The agency must maintain authority to alter the disposition of the matter because of changed circumstances, and a collaborative DR process would interfere with the agency's ability to do so.

(2) The assessment may also be used to:

(a) Determine or clarify the nature of the dispute or the issues to be resolved;

(b) Match a dispute resolution process to the objectives and interests of the disputants;

(c) Determine who will participate in the process;

(d) Estimate the time and resources needed to implement a collaborative DR process;

(e) Assess the potential outcomes of a collaborative DR process and the desirability of those outcomes;

(f) Determine the likely means for enforcing any agreement or settlement that may result;

(g) Determine the compensation, if any, of the dispute resolution provider;

(h) Determine the ground rules for the collaborative DR process; and

(i) Determine the degree to which the parties and the agency wish, and are legally able, to keep the proceedings confidential.

(3) The agency may contract with a collaborative DR provider pursuant to OAR 137-005-0040 to assist in conducting the assessment.

Stat. Auth.: ORS 183.341 & ORS 183.502

Stats. Implemented: ORS 183.502

Hist.: JD 1-1997, f. 3-28-97, cert. ef. 4-1-97

137-005-0030

Agreement to Collaborate

In preparation for, or in the course of, a collaborative DR process the agency, the other participants and the provider may enter into a written agreement to collaborate. This agreement may include:

(1) A brief description of the dispute or the issues to be resolved;

(2) A list of the participants;

(3) A description of the proposed collaborative DR process;

(4) An estimated starting date and ending date for the process;

(5) A statement whether the collaborative DR provider will receive compensation and, if so, who will be responsible for its payment;

(6) A description of the process, including, but not limited to: The role of witnesses, whether and how counsel may participate in the process and, consistent with applicable statute and rules, the degree to which the proceedings or communications made during the course of the collaborative DR process are confidential; and

(7) A description of the likely means for enforcing any agreement or settlement that may result.

Stat. Auth.: ORS 183.341 & ORS 183.502

Stats. Implemented: ORS 183.502

Hist.: JD 1-1997, f. 3-28-97, cert. ef. 4-1-97

137-005-0040

Selection and Procurement of Dispute Resolution Providers

(1) A collaborative DR provider may be a permanent or temporary employee of the state or any other individual. The agency may select the collaborative DR provider or may opt to select the provider by consensus of the participants.

(2) A collaborative DR provider who has a financial interest in the subject matter of the dispute, who is an employee of an agency in the dispute, who has a financial relationship with any participant in the collaborative DR process or who otherwise may

not be impartial is considered to have a potential bias. If, before or during the dispute resolution process, a provider has or acquires a potential bias, the provider shall so inform all the participants. Any participant may disqualify a provider who has a potential bias if the participant believes in good faith that the potential bias will undermine the ability of the provider to be impartial throughout the process.

(3) If the collaborative DR provider is a public official as defined by ORS 244.020(15), the provider shall comply with the requirements of ORS chapter 244.

(4) If the agency procures the services of a collaborative DR provider, the agency must comply with all procurement and contracting rules provided by law. A roster of collaborative DR providers and a simplified mediator and facilitator procurement process developed by the Department of Justice may be used by the agency when selecting a collaborative DR provider by consensus.

(5) If the collaborative DR provider is a mediator or facilitator who is not an employee of the agency, the participants shall share the costs of the provider, unless the participants agree otherwise or the provider is retained solely by the agency or by a non-participant.

(6) Whenever the agency compensates a provider who is not an employee of the agency, the agency must execute a personal services contract with the provider. If the agency and the other participants choose to share the cost of the collaborative DR provider's services, the non-agency participants may enter into their own contract with the provider or may be a party to the contract between the agency and the provider, at the discretion of the agency. The agency's contract with a provider must state:

(a) The name and address of the provider and the contracting agency;

(b) The nature of the dispute, the issues being submitted to the collaborative DR process and the identity of the participants, as well as is known at the time the contract is signed;

(c) The services the provider will perform (scope of work);

(d) The compensation to be paid to the provider and the maximum contract amount;

(e) The beginning and ending dates of the contract and that the contract may be terminated by the agency or the provider upon mutual written consent, or at the sole discretion of the agency upon 30 days notice to the provider or immediately if the agency determines that the DR process is unable to proceed for any reason.

(7) A student, intern or other person in training or assisting the provider may function as a co-provider in a dispute resolution proceeding. The co-provider shall sign and be bound by the agreement to collaborate specified in OAR 137-005-0030, if any, and, if compensated by the agency, a personal services contract as specified in section (6) of this rule.

Stat. Auth.: ORS 183.341 & ORS 183.502

Stats. Implemented: ORS 183.502

Hist.: JD 1-1997, f. 3-28-97, cert. ef. 4-1-97

137-005-0050

Confidentiality of Collaborative Dispute Resolution Communications

(1) For the purposes of this rule:

(a) "Mediation" means a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between a mediator and any party or agent of a party, until such time as a resolution is agreed to by the parties or the mediation process is terminated.

(b) "Mediation communication" means:

(A) All communications that are made, in the course of or in connection with a mediation, to a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings; and

(B) All memoranda, work products, documents and other materials, including any draft mediation agreement, that are prepared for or submitted in the course of or in connection with a

mediation or by a mediator, a mediation program or a party to, or any other person present at, mediation proceedings.

(c) "Mediator" means a third party who performs mediation. Mediator includes agents and employees of the mediator or mediation program.

(d) "Party" means a person or agency participating in a mediation who has a direct interest in the controversy that is the subject of the mediation. A person or agency is not a party to a mediation solely because the person or agency is conducting the mediation, is making the mediation available or is serving as an information resource at the mediation.

(2) If the agency is a party to a mediation or is mediating a dispute as to which the agency has regulatory authority:

(a) Subject to approval by the Governor, the agency may adopt confidentiality rules developed by the Attorney General pursuant to Oregon Laws 1997, chapter 670, in which case mediation communications shall be confidential to the extent provided in those rules.

(b) If the agency has not adopted confidentiality rules pursuant to Oregon Laws 1997, chapter 670, mediation communications shall not be confidential, and the agency shall inform the parties in the mediation of that fact in an agreement to collaborate pursuant to OAR 137-005-0030 or other document.

(3) If the agency is mediating a dispute as to which the agency is not a party and does not have regulatory authority, mediation communications are confidential, except as provided in Oregon Laws 1997, chapter 670. The agency and the other parties to the mediation may agree in writing that all or part of the mediation communications are not confidential. Such an agreement may be made a part of an agreement to collaborate authorized by OAR 137-005-0030.

(4) If the agency and the other participants in a collaborative DR process other than a mediation wish to make confidential the communications made during the course of the collaborative DR process:

(a) The agency, the other participants and the collaborative DR provider, if any, shall sign an agreement to collaborate pursuant to OAR 137-005-0030 or any other document that expresses their intent with respect to:

(A) Disclosures by the agency and the other participants of communications made during the course of the collaborative DR process;

(B) Disclosures by the collaborative DR provider of communications made during the course of the collaborative DR process;

(C) Any restrictions on the agency's use of communications made during the course of the collaborative DR process in any subsequent administrative proceeding of the agency; and

(D) Any restrictions on the ability of the agency or the other participants to introduce communications made during the course of the collaborative DR process in any subsequent judicial or administrative proceeding relating to the issues in controversy with respect to which the communication was made.

(b) Notwithstanding any agreement under subsection (4)(a) of this rule, communications made during the course of a collaborative DR process:

(A) May be disclosed if the communication relates to child abuse and is made to a person who is required to report abuse under ORS 419B.010;

(B) May be disclosed if the communication relates to elder abuse and is made to a person who is required to report abuse under ORS 124.050 to 124.095;

(C) May be disclosed if the communication reveals past crimes or the intent to commit a crime;

(D) May be disclosed by a party to a collaborative DR process to another person if the party's communication with that person is privileged under ORS chapter 40 or other provision of law;

(E) May be used by the agency in any subsequent proceeding to enforce, modify or set aside an agreement arising out of the collaborative DR process;

(F) May be disclosed in an action for damages or other relief between a party to a collaborative DR process and a DR provider to the extent necessary to prosecute or defend the matter; and

(G) Shall be subject to the Public Records Law, ORS 192.410 to 192.505, and the Public Meetings Law, ORS 192.610 to 192.690.

(c) If a demand for disclosure of a communication that is subject to an agreement under this section is made upon the agency, any other participant or the collaborative DR provider, the person receiving the demand for disclosure shall make reasonable efforts to notify the agency, the other participants and the collaborative DR provider.

Stat. Auth.: ORS 183.341 & ORS 183.502

Stats. Implemented: OL 1997, Ch. 670

Hist.: JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-005-0060

Mediation

(1) Unless otherwise provided by law, mediation is a voluntary process from which the agency and other participants may withdraw at any time.

(2) The mediator does not represent the interests of any of the participants or offer legal advice. Likewise, the mediator is not a judge and has no decision making power to impose a settlement on the participants or to render decisions.

(3) The person participating in the mediation on behalf of the agency shall be knowledgeable about the issues in dispute and have authority to effectively recommend settlement options to the agency.

Stat. Auth.: ORS 183.341 & ORS 183.502

Stats. Implemented: ORS 183.502

Hist.: JD 1-1997, f. 3-28-97, cert. ef. 4-1-97; JD 3-1997, f. 9-4-97, cert. ef. 9-15-97

137-005-0070

Contract Clauses Specifying Dispute Resolution

(1) The agency may specify or require any form of dispute resolution except binding arbitration as a condition of a contract.

(2) The agency may specify binding arbitration by contract only if the Attorney General has approved the contract containing the clause specifying binding arbitration and the clause itself for legal sufficiency.

(3) The agency may provide for the resolution of technical, scientific or accounting matters of fact by requiring the submission of such matters to a neutral fact finder selected and appointed as specified in a contract clause.

(4) The specification of a method of dispute resolution in a contract clause does not:

(a) Remove the requirement to provide notices or filings or to meet deadlines otherwise required by law, regulation or contract provision;

(b) Constitute a waiver of the sovereign immunity of the State of Oregon; or

(c) Prohibit the participants from entering into an agreement to use any other method of dispute resolution that appears to be more suitable for the particular dispute in lieu of or in addition to the method specified by contract.

Stat. Auth.: ORS 183.341 & ORS 183.502

Stats. Implemented: ORS 183.502

Hist.: JD 1-1997, f. 3-28-97, cert. ef. 4-1-97

137-005-0300

Collaborative Dispute Resolution Pilot Project

(1) Through this rule the Attorney General establishes a dispute resolution pilot program for civil actions filed by the state of Oregon and for matters in which the state may be a defendant.

(2) Cases assigned to the Trial Division or to the Financial Fraud Section of the Civil Enforcement Division of the Department of Justice will be selected for the collaborative DR pilot program based on an assessment conducted by the Department of Justice. Case assessment will be according to Model Rule 137-005-0020 and may include, in addition to the criteria in Model Rule 137-005-0020(1), additional assessment criteria as the department determines is appropriate.

(3) The following rules apply to matters referred to the collaborative DR pilot program.

- (a) OAR 137-001-0005, Definitions;
 - (b) OAR 137-005-0010, Use of Collaborative Dispute Resolution Processes;
 - (c) OAR 137-005-0020, Assessment For Use of Collaborative DR process;
 - (d) OAR 137-005-0030, Agreement to Collaborate;
 - (e) OAR 137-005-0040, Selection and procurement of Dispute Resolution Providers;
 - (f) OAR 137-005-0060, Mediation;
 - (g) OAR 137-005-0310, Notice of Referral to the Collaborative Dispute Resolution Pilot Program.
- Stat. Auth.: OL 1997 Ch. 670
 Stats. Implemented: OL 1997 Ch. 670
 Hist.: DOJ 2-1998, f. 2-25-98, cert. ef. 3-2-98

137-005-0310

Notice of Referral to the Collaborative Dispute Resolution Pilot Program

(1) Except as provided in this rule the opposing counsel in a matter referred to the Collaborative Dispute Resolution Pilot Program under OAR 137-005-0300 shall be notified by the Department of Justice of the following:

- (a) That the matter has been identified as having potential for resolution through a collaborative dispute resolution process; and
- (b) that participation in any collaborative DR process is voluntary.

(2) If required by the rules of the court or by law, the court shall also be notified of the department's interest in utilizing a collaborative DR process in a particular case.

(3) No notice under this rule is required if the matter is being referred to a collaborative DR process or settlement conference:

- (a) As the result of the order of a court;
- (b) As the result of a request which was initiated by opposing counsel in the matter.

Stat. Auth.: OL 1997 Ch. 670
 Stats. Implemented: OL 1997 Ch 670
 Hist.: DOJ 2-1998, f. 2-25-98, cert. ef. 3-2-98

DIVISION 8

PROCEDURAL RULES

137-008-0000

Notice of Proposed Rule

(1) Prior to the adoption, amendment, or repeal of any rule, including the Model Rules, the Attorney General shall give notice of the proposed adoption, amendment, or repeal:

(a) In the Secretary of State's Bulletin referred to in ORS 183.360 at least 21 days before the effective date of the rule;

(b) By mailing a copy of the Notice to persons on the Attorney General's mailing list established pursuant to ORS 183.335(7) and to the legislators specified in ORS 183.335(14) at least 28 days before the effective date of the rule;

(c) By mailing or furnishing a copy of the Notice to:

- (A) The Oregon State Bar;
- (B) The Associated Press; and
- (C) The Capitol Press Room.

(2) When the department adopts, amends or repeals rules specifically applicable to one of its programs listed below, notice in addition to that required by section (1) of this rule shall be provided by mailing a copy of the notice to the individual(s) or organization(s) listed in this section for the program:

- (a) For the Crime Victims' Compensation Program, to:
 - (A) The Workers' Compensation Board;
 - (B) Each district attorney in the state; and
 - (C) Each person on the program's mailing list established pursuant to ORS 183.335(7).
- (b) For the Crime Victims Assistance Program to:
 - (A) Each city attorney that has a certified, comprehensive victims assistance program;

- (B) Each district attorney in the state; and
- (C) Each person on the program's mailing list established pursuant to ORS 183.335(7).

(c) For the Support Enforcement Division, (child support program) to:

- (A) Oregon Legal Services Corporation;
- (B) Multnomah County Legal Aid Service;
- (C) Oregon District Attorneys' Association;
- (D) Each Support Enforcement Division branch office, to be posted in the area most frequently visited by the public;
- (E) The Child Support Section of the Department of Human Resources; and

(F) Each person on the Division's mailing list established pursuant to ORS 183.335(7).

(d) For the Charitable Activities Section:

(A) For professional fund raising regulation, to all professional fund raising firms registered pursuant to ORS 128.821;

(B) For charitable organization regulation, to all charitable corporations and trusts registered pursuant to ORS 128.650;

(C) For bingo game regulation, to all bingo licensees licensed pursuant to ORS 167.118 and 464.250, et seq.;

(D) For raffle game regulation, to all raffle licensees licensed pursuant to ORS 167.118 and 464.250 et seq.;

(E) For Monte Carlo regulation, to all Monte Carlo licensees licensed pursuant to ORS 167.118 and 464.250, et seq.; and

(F) Each person on the section's mailing list established pursuant to ORS 183.335(7) for the appropriate program identified in A-E above.

(e) For the Criminal Intelligence Unit, Organized Crime Section, of the Criminal Justice Division:

- (A) Each District Attorney in the state;
- (B) Each Sheriff in the state;
- (C) Each Chief of Police in the state;
- (D) The Superintendent of the Oregon State Police; and
- (E) Each attendee of the Basic Officer's Intelligence Course conducted by the Criminal Justice Division.

Stat. Auth.: ORS 183.341(2) & ORS 183.341(4)
 Stats. Implemented: ORS 183.341(4)
 Hist.: IAG 13, f. & ef. 10-21-75; JD 3-1983, f. & ef. 6-22-83; JD 8-1983, f. & ef. 11-10-83; JD 7-1989, f. 12-21-89, cert. ef. 12-20-89; JD 6-1994, f. 10-31-94, cert. ef. 11-1-94; JD 1-1998, f. & cert. ef. 2-4-98

137-008-0005

Model Rules of Procedure

Pursuant to ORS 183.341, the Attorney General adopts the Attorney General's Model Rules of Procedure under the Administrative Procedures Act as amended and effective September 15, 1997.

Stat. Auth.: ORS 183.341(2) & ORS 183.341(4)
 Stats. Implemented: ORS 183.341(2), ORS 183.341(4) & ORS 183.390
 Hist.: IAG 5-1979, f. & ef. 12-3-79; JD 7-1989, f. 12-21-89, cert. ef. 12-20-89; JD 6-1994, f. 10-31-94, cert. ef. 11-1-94; JD 1-1998, f. & cert. ef. 2-4-98

137-008-0010

Fees for Public Records and Publications

(1)(a) The Department of Justice may charge a fee reasonably calculated to reimburse the department for costs of providing and conveying copies of public records. The department shall charge 25¢ per page for the first 20 pages and 15¢ per page thereafter to recover the costs of photocopying and normal and reasonable staff time to locate, separate, photocopy and return document(s) to file and to prepare/mail public record(s) to requestors.

(b) "Page" refers to the number of copies produced, either 8 1/2 x 11 or 8 1/2 x 14. Staff will not reduce the copy size or otherwise manipulate records in order to fit additional records on a page, unless staff concludes that it would be the most effective use of their time. Consistent with ORS 192.240, all copies will be double-sided. A double-sided copy consists of two pages. Because of the increased staff time involved in double-sided copying, there is no reduction in the per page fee.

(c) "Normal and reasonable" staff time is 10 minutes or less per request.

(2) Additional charges for staff time may be made when responding to record requests that require more than the "normal and reasonable" time for responding to routine record requests. Staff time shall be charged at the department's hourly billing rate, by position, as follows:

- (a) Assistant Attorney General — \$79/hr;
- (b) Alternative Dispute Resolution Coordinator — \$55/hr;
- (c) Investigator — \$53/hr;
- (d) Paralegal — \$49/hr;
- (e) Law Clerk — \$30/hr;
- (f) General Clerical — \$27/hr;

(g) These charges are for staff time in excess of 10 minutes spent locating, compiling, sorting and reviewing records to prepare them for inspection, as well as all time required to segregate or redact exempt information or to supervise inspection of documents.

(3) The Department shall estimate the costs of making records available for inspection or providing copies of records to requestors. All estimated fees and charges must be paid before public records will be made available for inspection or copies provided.

(4) The Department of Justice may charge a fee reasonably calculated to reimburse the department for costs of department publications, Oregon District Attorneys' Association publications prepared by the department and other department materials intended for distribution. A listing of such available publications and materials shall be maintained by the Department of Justice librarian. The Department of Justice shall charge the following for its regular publications:

- (a) Attorney General's Public Law Conference Papers — \$30;
- (b) Attorney General's Administrative Law Manual and Uniform and Model Rules of Procedure Under the APA — \$15;
- (c) Attorney General's Model Public Contract Rules Manual — \$15;
- (d) Attorney General's Public Records and Meetings Manual — \$15;
- (e) Agency Administrator's Handbook of Basic Public Law — \$10;
- (f) Attorney General Opinions:
 - (A) Bound Volumes - Volume 20 (1940-42) through Volume 48 (1995-1997) including 2-volume index — \$851;
 - (B) Future Bound Volumes — \$65;
 - (C) Slip Opinion Service (yearly) — \$65;
 - (D) Letters of Advice Index, 1969-83 — \$20;
 - (E) Letters of Advice Index, 1983-88 — \$40;
 - (F) Letters of Advice Index, 1988-93 — \$40;
 - (G) Future Letters of Advice Indices — \$40.
- (g) Department of Justice Dispute Resolution Bulletin — \$10/yr.

Stat. Auth.: ORS 192.430(2) & ORS 192.440(3)

Stats. Implemented: ORS 192.440(3)

Hist.: JD 1-1982, f. & ef. 1-7-82; JD 1-1983(Temp), f. & ef. 5-3-83; JD 7-1983, f. & ef. 11-2-83; JD 4-1984(Temp), f. & ef. 11-7-84; JD 1-1985, f. & ef. 1-23-85; JD 3-1986, f. & ef. 1-27-86; JD 2-1990, f. & cert. ef. 2-14-90; JD 6-1994, f. 10-31-94, cert. ef. 11-1-94; JD 1-1998, f. & cert. ef. 2-4-98

137-008-0015

Fees for Mailing, Faxing Records

(1) The Department of Justice may charge requestors to recover actual postage costs for mailing of records. When mailing voluminous records or responding to special requests, the department shall charge, in accordance with OAR 137-008-0010(2), for staff time required to prepare the records for mailing, in addition to actual postage.

(2) When faxing records to requestors, the Department of Justice shall charge \$1 per page for in-state faxes. The department shall charge \$5 for the first page of out-of-state faxes and \$1 per page thereafter. The department limits the number of pages it will fax to 30 pages.

Stat. Auth.: ORS 192.430(2) & ORS 192.440(3)

Stats. Implemented: ORS 192.440(3)

Hist.: JD 6-1994, f. 10-31-94, cert. ef. 11-1-94; JD 1-1998, f. & cert. ef. 2-4-98

137-008-0020

Fees for Electronic Reproduction of Records

(1) The Department of Justice shall charge \$27 per hour, with a \$7.50 minimum, for the staff time required to fill public record requests that require electronic reproduction. Charges include time spent locating, downloading, formatting, copying and transferring records to media.

(2) The department will provide reproduction media at the following rates:

- (a) Diskettes, 5 1/4 or 3 1/2: \$1/ea.
- (b) Video Cassettes, 2 hours: \$6/ea.
- (c) Audio Cassettes: \$2/ea.

(3) Due to the threat of computer viruses, the department will not permit requestors to provide diskettes for electronic reproduction of computer records.

Stat. Auth.: ORS 192.430(2) & ORS 192.440(3)

Stats. Implemented: ORS 192.440(3)

Hist.: JD 6-1994, f. 10-31-94, cert. ef. 11-1-94; JD 1-1998, f. & cert. ef. 2-4-98

137-008-0100

Confidentiality and Inadmissibility of Mediation Communications

(1) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110 and 36.234.

(2) Nothing in this rule affects any confidentiality created by other law. Nothing in this rule relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690. Whether or not they are confidential under this or other rules of the agency, mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(3) This rule applies only to mediations in which the agency is a party or is mediating a dispute as to which the agency has regulatory authority. This rule does not apply when the agency is acting as the "mediator" in a matter in which the agency also is a party as defined in ORS 36.234.

(4) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in ORS 40.190 (OEC Rule 408), notwithstanding any provisions to the contrary in section (9) of this rule.

(5) Mediations Excluded. Sections (6)-(10) of this rule do not apply to:

(a) Mediation of workplace interpersonal disputes involving the interpersonal relationships between this agency's employees, officials or employees and officials, unless a formal grievance under a labor contract, a tort claim notice or a lawsuit has been filed; or

(b) Mediation in which the person acting as the mediator will also act as the hearings officer in a contested case involving some or all of the same matters;

(c) Mediation in which the only parties are public bodies;

(d) Mediation involving two or more public bodies and a private party if the laws, rule or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential;

(e) Mediation involving 15 or more parties if the agency has designated that another mediation confidentiality rule adopted by the agency may apply to that mediation; or

(f) Mediation in which the mediator is acting within the scope of his or her employment with the Department of Justice except to the extent the parties and the employee agree in writing that mediation communications shall be confidential pursuant to this rule.

(6) Disclosures by Mediator. A mediator may not disclose or be compelled to disclose mediation communications in a mediation and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless:

(a) All the parties to the mediation and the mediator agree in writing to the disclosure;

(b) The mediation communication may be disclosed or introduced into evidence in a subsequent proceeding as provided in subsections (c)-(d), (j)-(l) or (o)-(p) of section (9) of this rule; or

(c) The mediator reasonably believes that disclosing the communication is necessary to prevent the commission of a crime that immediately threatens the health or safety of a child.

(7) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in sections (8)-(9) of this rule, mediation communications are confidential and may not be disclosed to any other person, are not admissible in any subsequent administrative, judicial or arbitration proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent proceeding, or introduced as evidence by the parties or the mediator in any subsequent proceeding.

(8) Written Agreement. Section (7) of this rule does not apply to a mediation unless the parties to the mediation agree in writing, as provided in this section, that the mediation communications in the mediation will be confidential and/or nondiscoverable and inadmissible. If the mediator is the employee of and acting on behalf of a state agency, the mediator or an authorized agency representative must also sign the agreement. The parties' agreement to participate in a confidential mediation must be in substantially the following form. This form may be used separately or incorporated into an "agreement to mediate." [Form not included. See ED. NOTE.]

(9) Exceptions to confidentiality and inadmissibility:

(a) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding;

(b) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential or privileged under state or federal law;

(c) A mediation communication is not confidential and may be disclosed by any person receiving the communication to the extent that person reasonably believes that disclosing the communication is necessary to prevent the commission of a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential and may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person;

(d) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule is not confidential and may be disclosed to the extent necessary to make such a report;

(e) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential or that all or part of the mediation communications may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential, privileged or otherwise prohibited from disclosure under state or federal law;

(f) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS chapter 40 or other provision of law. A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree;

(g) An employee of the agency may disclose confidential mediation communications to another agency employee so long as the disclosure is necessary to conduct authorized activities of the agency. An employee receiving a confidential mediation communication under this subsection is bound by the same confidentiality requirements as apply to the parties to the mediation;

(h) A written mediation communication may be disclosed or introduced as evidence in a subsequent proceeding at the discretion of the party who prepared the communication so long as the communication is not otherwise confidential under state or federal law and does not contain confidential information from the mediator or another party who does not agree to the disclosure;

(i) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement;

(j) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential and may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements;

(k) When a mediation is conducted as part of the negotiation of a collective bargaining agreement, the following mediation communications are not confidential and such communications may be introduced into evidence in a subsequent administrative, judicial or arbitration proceeding:

(A) A request for mediation; or

(B) A communication from the Employment Relations Board Conciliation Service establishing the time and place of mediation; or

(C) A final offer submitted by the parties to the mediator pursuant to ORS 243.712; or

(D) A strike notice submitted to the Employment Relations Board.

(l) To the extent a mediation communication contains information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, that portion of the communication may be disclosed as required by statute;

(m) Written mediation communications prepared by or for the agency or its attorney are not confidential and may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding to the extent the communication does not contain confidential information from the mediator or another party, except for those written mediation communications that are:

(A) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege; or

(B) Attorney work product prepared in anticipation of litigation or for trial; or

(C) Prepared exclusively for the mediator or in a caucus session and not given to another party in the mediation other than a state agency; or

(D) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or

(E) Settlement concepts or proposals, shared with the mediator or other parties.

(n) A mediation communication made to the agency may be disclosed and may be admitted into evidence to the extent the Attorney General or the Deputy Attorney General determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law;

(o) The terms of any mediation agreement are not confidential and may be introduced as evidence in a subsequent proceeding, except to the extent the terms of the agreement are exempt from disclosure under ORS 192.410 to 192.505, a court has ordered the terms to be confidential under ORS 30.402 or state or federal law requires the terms to be confidential;

(p) The mediator may report the disposition of a mediation to the agency at the conclusion of the mediation so long as the report does not disclose specific confidential mediation communications. The agency or the mediator may use or disclose confidential mediation communications for research, training or educational purposes, subject to the provisions of ORS 36.232(4);

(q) A mediation communication is not confidential and may be disclosed by any person receiving the communication to the extent that person reasonably believes that disclosing the communication is necessary to prevent the commission of a crime that immediately threatens the health or safety of a child. A mediation communication is not confidential and may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of any crime involving physical violence to a person or a crime involving the health or safety of a child.

(10) When a mediation is subject to section (7) of this rule, the agency will provide to all parties to the mediation and the mediator a copy of this rule or a citation to the rule and an explanation of where a copy of the rule may be obtained. Violation of this provision does not waive confidentiality or inadmissibility.

[ED. NOTE: The form referenced in this rule is not printed in the OAR Compilation. Copies are available from the agency.]

Stat. Auth.: ORS 36.224

Stats. Implemented: ORS 36.224, ORS 36.228, ORS 36.230 & ORS 36.232

Hist.: DOJ 6-1998(Temp), f. & cert. ef. 8-12-98 thru 12-12-98; DOJ 8-1998, f. 11-24-98, cert. ef. 12-1-98; DOJ 2-1999, f. & cert. ef. 1-25-99

DIVISION 9

SELECTION AND HIRING OF PERSONS TO PERFORM PERSONAL SERVICES

137-009-0000

Introduction

(1) The Department of Justice may require the services of consultants, court reporters, expert witnesses, investigators and special assistant attorneys general for special projects. These rules establish a procedure which will require:

- (a) Review of a list of qualified consultants;
- (b) Review the consultant's proposals; and
- (c) Select the consultant to do the work.

(2) No person shall hire a consultant on behalf of the Department of Justice before clearance through this procedure has been obtained.

Stat. Auth.: ORS 279

Stats. Implemented:

Hist.: JD 2-1983, f. & ef. 5-17-83

137-009-0005

Definitions

(1) "Consultant" — An individual or firm capable of performing needed personal services by contract with the Department. (Persons performing routine services for the Department on a continuous ad hoc basis, such as process servers, are specifically exempted from this definition.)

(2) "Department" — The Oregon Department of Justice.

(3) "Originator" — Individual responsible for requesting and hiring consultants.

Stat. Auth.: ORS 279

Stats. Implemented:

Hist.: JD 2-1983, f. & ef. 5-17-83

Guidelines

137-009-0010

Procedure is Necessary

The Department has discretionary authority to contract with consultants. However, all agencies are required by ORS 279.051 to establish procedures for the screening and selection of personal service contractors.

Stat. Auth.: ORS 279

Stats. Implemented:

Hist.: JD 2-1983, f. & ef. 5-17-83

137-009-0015

Conditions for Hiring Consultant

The Department will contract for consultant services only when at least one of the following factors exist:

(1) Work cannot be done within a reasonable time with the Department's own work force;

(2) The required skills or expertise are not available within the Department; or

(3) A consultant personal service contract will result in significant cost savings to the Department.

Stat. Auth.: ORS 279

Stats. Implemented:

Hist.: JD 2-1983, f. & ef. 5-17-83

137-009-0020

Consultant Who is a Member of PERS

A contract for the services of a consultant who is a member of Public Employees' Retirement System (PERS) and who is employed in another department will normally be in the form of an interagency agreement, OAR 122-020-0005.

Stat. Auth.: ORS 279

Stats. Implemented:

Hist.: JD 2-1983, f. & ef. 5-17-83

137-009-0025

Consultant Who is not a Member of PERS

A consultant who is not a member of PERS will be selected through the selection process established herein, OAR 122-020-0015.

Stat. Auth.: ORS 279

Stats. Implemented:

Hist.: JD 2-1983, f. & ef. 5-17-83

137-009-0030

Executive Department Approval Required

A contract with a consultant that will make a total contract amount of \$1,000 per contract or \$2,000 per consultant for the fiscal year shall be submitted to the Executive Department for approval after execution by the parties, unless an exemption is obtained. Funds for the contract shall be available and authorized for expenditure in the agency budget. The source of funds must be described in the contract. No costs can be incurred prior to approval by the Executive Department, OAR 122-020-0015.

Stat. Auth.: ORS 279

Stats. Implemented:

Hist.: JD 2-1983, f. & ef. 5-17-83

137-009-0035

Exceptions

The Attorney General or Deputy Attorney General may approve the employment of a consultant directly without following the procedures established by these rules in the following instances. However, a contract shall be executed in all cases. Approval must still be obtained by the Executive Department before any work may be done by the consultant unless the Executive Department has delegated the approval authority or granted an exemption:

(1) Emergency — An emergency, either time-wise or because of unforeseen developments, where the person is needed in order for the Department to properly represent an agency in a legal matter or perform other necessary activities.

(2) Expert Witness — When the employment of an expert witness with particular qualifications is necessary for the Department to properly represent an agency in a legal matter, or where a technical expert is necessary to instruct or inform Department attorneys regarding the understanding and appropriate presentation of legal issues.

(3) Single Source — Where only a single individual known to the Department is qualified to do the particular job or perform the particular services required, or only the single individual has reasonable access to factual, technical or statistical information necessary to perform the services required (i.e., for purposes of these rules, the employment of individuals pursuant to requests from the Trial Division will be generally considered to fit within

sections (2) or (3) of this rule. A contract complying with these rules is still mandatory.)

Stat. Auth.: ORS 279
Stats. Implemented:
Hist.: JD 2-1983, f. & ef. 5-17-83

137-009-0040

Contract Form

The contract for Court Reporters (Non-PERS) shall be based on the format agreement, **Exhibit 1**. The contract for Non-PERS Special Assistant Attorneys General, Investigators and Expert Witnesses shall be based on the format agreement, **Exhibit 2**. For contracts involving PERS members, the format contract adopted to agency needs promulgated as **Exhibit 1** shall be utilized, if required. The format contract shall in all cases certify that adequate funds are available. Deviations to the format contract must be negotiated and require the approval of the Attorney General or the Deputy Attorney General.

[ED. NOTE: The Exhibits referenced in this rule are not printed in the OAR Compilation. Copies are available from the agency.]
Stat. Auth.: ORS 279
Stats. Implemented:
Hist.: JD 2-1983, f. & ef. 5-17-83

137-009-0045

Responsibility and Action

Selection process shall involve the following:

(1) Attorney General — Designates the Division Administrators to review all proposed requests for personal service contracts.

(2) Originator — Determines that the services of a consultant are necessary; prepares a "Request for Proposal" for consultant services containing complete justification and detailed data, including: (A sample format for this request is Exhibit 3.):

(a) Description of work and whether the individual attorney must be designated as Special Attorney General;

(b) Why the work cannot be accomplished with the resources available to the Department;

(c) A cost estimate for the project and agency to be billed if Department is not to be responsible for payment;

(d) Any special equipment requirements;

(e) Special contracting requirements, if any.

(3) Division Administrator — Reviews and takes appropriate action.

(4) Administrative Services — Certification that funds are available for the duration of the contract or the end of the biennium, whichever is earlier.

(5) Attorney General — Reviews and takes appropriate action.

(6) Originator — Sends request for proposal to all prequalified consultants, requesting either a proposal or a statement that they do not wish to make a proposal. Receives replies from consultants. For ongoing and continuous types of consultant activities, consultants can prequalify by submitting a resume and fees to originator who has provided a description of the activity to all interested persons.

(7) Originator — Receives and reviews final proposals. After receiving approval from Division Administrator, negotiates a contract with best qualified applicant. Forwards the contract already signed by the consultant to the Deputy Attorney General for review and approval. In no case shall the contract extend beyond the existing biennium.

(8) Administrative Services — Forwards contract to the Oregon Executive Department for approval of the contract when the total cost is over \$1,000 per contract or \$2,000 per fiscal year per consultant. (If architectural or engineering service contracts are involved, Department of General Services approval is required, ORS 279.712(2).) Assures that the contract is approved and signed by all concerned. Upon receipt of the signed contract, Administrative Services shall establish a billing and payment schedule if required in accordance with normal Department policy. In no event shall any contract payments be made after the contract expires without a contract extension. In no case shall a

Department employee prepare and sign invoices for an independent contractor.

[ED. NOTE: The Exhibits referenced in this rule are not printed in the OAR Compilation. Copies are available from the agency.]
Stat. Auth.: ORS 279
Stats. Implemented:
Hist.: JD 2-1983, f. & ef. 5-17-83

Hiring of Expert Witnesses and Consultants

137-009-0055

Regarding Expert Witnesses and Consultants in Actions to Establish Paternity

(1) Notwithstanding any other provision of OAR 137-009-0000 to 137-009-0045, the Support Enforcement Division (SED) may retain consultants and expert witness as required in actions filed to establish paternity in accordance with this rule.

(2) SED may request orally or in writing that the physician or other health care professional who provided obstetrical care to the mother of the child for whom paternity is being established complete interrogatories regarding that care, including that person's opinion regarding the date of conception. Under the procedure authorized by this rule, SED may pay the physician or other health care professional a fee which is reasonable and customary within the local community.

(3) SED may request, orally or in writing, that the physician or other health care professional who provided obstetrical care to the mother of the child for whom paternity is being established appear and testify as an expert witness at any proceeding incident to the action to establish paternity. Under the procedure authorized by this rule SED may pay such a witness a fee which is reasonable and customary in the local community.

(4) No contract executed under the authority of this rule shall be for an amount in excess of \$1,000.

(5) The contractor shall perform all work as an independent contractor and will be responsible for any state or federal taxes applicable to the services rendered, nor shall the contractor be eligible for federal social security, workers' compensation or unemployment insurance as a result of this contract.

(6) The contractor, its subcontractors, if any, and all employers providing work, labor or materials under any contract entered into under this rule are subject employers under the Oregon Workers' Compensation Law and shall comply with ORS 656.017, which requires them to provide workers' compensation coverage for all their subject workers.

(7) The hiring of a consultant or expert witness for any purpose not described in this rule must comply with the contracting provisions of OAR 137-009-0000 to 137-009-0045 and other applicable laws.

Stat. Auth.: ORS 279.051
Stats. Implemented:
Hist.: JD 8-1991(Temp), f. & cert. ef. 11-8-91; JD 11-1992, f. & cert. ef. 5-14-92

DIVISION 10

CHARITABLE ORGANIZATION REGISTRATION AND REPORTING

137-010-0005

General Registration

(1) Charitable corporations and trustees, including trustees of charitable remainder trusts, which hold property for charitable purposes over which the State or the Attorney General has enforcement or supervisory power are required to register with the Charitable Activities Section of the office of the Attorney General.

(2) Charitable organizations are not required to register under this section if:

(a) The charitable organization is exempt under ORS 128.640; or

(b) The charitable organization has not received property for charitable purposes; or

(c) The organization is an educational institution which does not hold property in this state and solicitations of individuals residing in this state are confined to alumni of the institution; or

(d) A trustee of a charitable remainder trust is also the sole charitable beneficiary of the trust estate.

(3) Registration shall be on forms provided by the Attorney General and shall be accompanied by a copy of the articles of incorporation and bylaws, trust agreement, or other instruments governing the charitable corporation or trustee. In the case of a testamentary trust, the attachments shall include a copy of the decree of distribution.

Stat. Auth.: ORS 128.876

Stats. Implemented: ORS 128.640 & ORS 128.650

Hist.: IAG 2, f. 2-17-64; IAG 5, f. 8-3-72, ef. 8-15-72; IAG 15, f. & ef. 5-27-76; IAG 1-1979, f. & ef. 2-1-79; IAG 2-1981, f. & ef. 12-1-81; JD 2-1982, f. & ef. 12-30-82; JD 1-1990, f. & cert. ef. 1-25-90

137-010-0010

Contents of General Registration Statement

Every registration statement filed pursuant to the general registration and reporting provisions of the Charitable Trust and Corporation Act shall set forth in detail the following information:

(1) Name and address of the charitable corporation or trustee subject to the Act.

(2) Type of instrument creating or governing the charitable corporation or trustee, date of instrument, and where filed.

(3) Names and addresses of trustees or corporation officers and directors.

(4) Titles of instruments attached to the registration statement.

(5) Description and value of charitable corporation or trust assets and liabilities, identifying whether computed at book or market value.

(6) Purpose of the charitable corporation or trust.

(7) Accounting year adopted by the charitable corporation or trust.

(8) Names and addresses of beneficiaries designated by the instrument governing the charitable corporation or trust.

Stat. Auth.: ORS 128.876

Stats. Implemented: ORS 128.650

Hist.: IAG 2, f. 2-17-64; IAG 15, f. & ef. 5-27-76; IAG 2-1981, f. & ef. 12-1-81; JD 2-1982, f. & ef. 12-30-82; JD 1-1990, f. & cert. ef. 1-25-90

137-010-0015

General Reporting Requirements

(1) Charitable corporations and trustees required to register under OAR 137-010-0005 shall submit annual reports to the Charitable Activities Section of the office of the Attorney General.

(2) Charitable organizations are not required to complete and file a financial reporting form as described in OAR 137-010-0020 if:

(a) All of the following conditions were met during the reporting period:

(A) Total revenue was less than \$25,000;

(B) Net assets or fund balance at the end of the reporting period was less than \$50,000; and

(C) The charitable organization has delivered to the Charitable Activities Section a completed Section I and II of form CT-12 or a written statement containing the same information.

(b) The reporting requirements have been suspended by the Attorney General as to a particular charitable organization pursuant to ORS 128.670(3).

(3) When a charitable trust or corporation is terminated or dissolved, a final report shall be filed with the Attorney General showing the disposition of all remaining assets.

(4) The annual reports shall be on forms as specified in OAR 137-010-0020.

[ED. NOTE: The Form(s) referenced in this rule is not printed in the OAR Compilation. Copies are available from the agency.]

Stat. Auth.: ORS 128.670

Stats. Implemented: ORS 128.670

Hist.: IAG 2, f. 2-17-64; IAG 3, f. 12-31-68; IAG 5, f. 8-3-72, ef. 8-15-72; IAG 6, f. 8-3-72, ef. 8-15-72; IAG 1-1979, f. & ef. 2-1-79; IAG 2-1981, f. & ef. 12-1-81; JD 2-1982, f. & ef. 12-30-82; JD 1-1990, f. & cert. ef. 1-25-90; DOJ 4-1998, f. & cert. ef. 4-2-98

137-010-0020

Contents of Annual Reports

(1) A complete annual report for a charitable corporation organized in a state other than Oregon shall include:

(a) A completed Attorney General's form CT-12F;

(b) A copy of all year-end, federal reporting forms, schedules and attachments filed with the Internal Revenue Service for the same period;

(c) Internal Revenue Service form 990-EZ or 990 completed for the same period if the corporation's federal reporting forms for the period do not include Internal Revenue Service form 990-EZ, 990-PF or 990 and the corporation's total revenue is equal to or greater than \$25,000;

(d) Internal Revenue Service Schedule A of form 990 completed for the same period if the corporation's federal reporting forms for the period do not include Internal Revenue Service Schedule A of form 990 or form 990-PF, and the corporation holds tax exempt status under the section 501(c)(3) or 4947 (a)(1) of the Internal Revenue Code; and

(e) A copy of the independent auditor's report on the corporation's financial records and accompanying financial statements and other attachments if such an audit was prepared.

(2) A complete annual report for a trust with both charitable and non-charitable beneficiaries shall include:

(a) A completed Attorney General's form CT-12S;

(b) A copy of all year-end, federal reporting forms, schedules and attachments filed with the Internal Revenue Service for the same period; and

(c) Internal Revenue Service form 1041-A completed for the same period if the corporation's federal reporting forms for the period do not include Internal Revenue Service form 1041-A;

(d) A copy of the independent auditor's report on the trust's financial records and accompanying financial statements and other attachments if such an audit was prepared.

(3) A complete annual report for a corporation or trust not described in OAR 137-010-0020(1) or OAR 137-010-0020(2) shall include:

(a) A completed Attorney General's form CT-12;

(b) A copy of all year-end, federal reporting forms, schedules and attachments filed with the Internal Revenue Service for the same period;

(c) Internal Revenue Service form 990-EZ or 990 completed for the same period if the organization's federal reporting forms for the period do not include Internal Revenue Service form 990-EZ, 990-PF or 990 and the organization's total revenue is equal to or greater than \$25,000;

(d) Internal Revenue Service Schedule A of form 990 completed for the same period if the organization's federal reporting forms for the period do not include Internal Revenue Service Schedule A of form 990 or form 990-PF, and the organization holds tax exempt status under the section 501(c)(3) or 4947 (a)(1) of the Internal Revenue Code; and

(e) A copy of the independent auditor's report on the corporation's financial records and accompanying financial statements and other attachments if such an audit was prepared.

(4) If the Federal form 990 is submitted as part of the report to the Attorney General, the charitable organization shall not attach a list of contributors as may be required as part of the submission to the Internal Revenue Service. This list is not intended to be subject to public inspection but could be inspected if submitted to the Attorney General's office.

[Publications: The Publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 128.670

Stats. Implemented: ORS 128.670

Hist.: IAG 2, f. 2-17-64; IAG 5, f. 8-3-72, ef. 8-15-72; IAG 2-1981, f. & ef. 12-1-81; JD 2-1982, f. & ef. 12-30-82; JD 1-1990, f. & cert. ef. 1-25-90; DOJ 4-1998, f. & cert. ef. 4-2-98

137-010-0025

Reporting Period

(1) Annual reports required by the Charitable Trust and Corporation Act shall be on a calendar or fiscal year basis selected by

the charitable corporation or trustee, but such fiscal year must coincide with the reporting period used by the corporation or trust on returns prepared for the Internal Revenue Service.

(2) Annual reports shall be submitted not later than four months and 15 days following the close of each calendar or fiscal year adopted by the charitable corporation or trustee.

(3) When the filing day as specified in section (2) of this rule falls on a Saturday, Sunday, or a legal holiday, the due date is the next business day following such Saturday, Sunday, or legal holiday.

(4) Any change in the accounting year should be reported to the Charitable Activities Section, Department of Justice. A short period report is required to be filed with a change of accounting year, covering the financial transactions from the day after the close of the former accounting period to the day before the beginning of the new accounting period. This short period report is treated the same as any report required by the Act, and is due not later than four months and 15 days following the close of the period.

(5) An extension of time may be granted by the Attorney General for a reasonable period for filing a report upon written application filed by or on behalf of the charitable corporation or trustee stating the reason that additional time should be allowed for filing the report beyond the ordinary due date. The request should be submitted on or before the due date for filing the report. An extension of time for filing any required information return with the Internal Revenue Service does not extend the time for filing the report with the Attorney General. However, if the charitable corporation or trustee intends to file a copy of the federal reporting form as part of the report to the Attorney General and if a request for an extension of time has been submitted to the Internal Revenue Service, a signed copy of the federal extension request may be furnished as the form of similar request for an extension of time for filing the complete report with the Attorney General.

(6) The Attorney General shall not consider an annual report or extension as timely filed if the annual report or extension was received by the Attorney General more than 5 business days after the due date described in this rule unless the corporation or trust furnishes proof that the annual report or extension was delivered to the Attorney General on or before the due date for the annual report or extension.

Stat. Auth.: ORS 128.670

Stats. Implemented: ORS 128.670

Hist.: 1AG 2, f. 2-17-64; 1AG 5, f. 8-3-72, ef. 8-15-72; 1AG 1-1979, f. & ef. 2-1-79; 1AG 2-1981, f. & ef. 12-1-81; JD 2-1982, f. & ef. 12-30-82; JD 1-1990, f. & cert. ef. 1-25-90; DOJ 4-1998, f. & cert. ef. 4-2-98

137-010-0030

Payment of Fees

(1) Except as otherwise provided in this rule, each charitable organization filing a report required by this Act shall pay to the Department of Justice, with each such report, a fee as provided in ORS 128.670(7). References to "total amount of its income and receipts" in ORS 128.670(7) shall mean total revenue as defined by Internal Revenue Service form 990, 1041-A, 990-EZ or 990-PF. References to "fund balance" ORS 128.670(7) shall mean net assets or fund balances as defined by Internal Revenue Service form 990, 1041-A, 990-EZ or 990-PF.

(2) The filing fee paid with the filing of a short period report, due to a change of accounting year, shall be based on the organization's reported net assets or fund balance at the end of the period, prorated for the number of months covered by the report, and the organization's reported total revenue for the period covered by the report.

(3) If the fee is not paid when due or if the charitable corporation or trustee fails to file a report by the date due, a penalty charge of an additional \$20 shall be paid to the Department of Justice, except that if a written request for an extension of time is submitted on or prior to the due date for filing the report and is approved, the \$20 penalty charge will not be due unless the report and fee are thereafter not filed within the extended period granted for filing the report. If the extension request is denied, the \$20

penalty charge will not be due if the report and fee are filed within ten days after the denial is received by the charitable corporation or trust or the filing has subsequently been completed by the ordinary due date for filing the report.

(4) A foreign charitable corporation or trustee subject to the reporting requirements of this Act shall pay a fee based on the same fee schedule as identified in section (1) of this rule. The fee shall be based on its total revenue in Oregon and its net assets or fund balance held in Oregon at the end of the reporting period. If, for any reporting year, the organization cannot determine at the end of the year the amount of total revenue derived in Oregon, the revenue fee shall be computed on the total revenue for the organization. If for any reporting period, the organization cannot determine the exact amount of net assets or fund balance or the fixed assets for use in the organization's charitable operations held in Oregon, the asset fee shall be computed on the organization's net assets or fund balance.

(5) Split interest trusts shall pay a fee based on the total fund balance of the trust plus a fee based on the amount of the charitable deduction reported on Internal Revenue Service form 1041-A for the reporting period.

Stat. Auth.: ORS 128.670

Stats. Implemented: ORS 128.670

Hist.: 1AG 5, f. 8-2-72, ef. 8-15-72; 1AG 6, f. 8-2-72, ef. 8-15-72; 1AG 11, f. 3-29-74, ef. 4-25-74; 1AG 1-1979, f. & ef. 2-1-79; 1AG 2-1981, f. & ef. 12-1-81; JD 1-1990, f. & cert. ef. 1-25-90; DOJ 4-1998, f. & cert. ef. 4-2-98

137-010-0033

Notice of Delinquency and Imposition of Additional Penalty

(1) At any time after a report or filing fee is delinquent the Attorney General may, after giving written notice by certified mail to the charitable corporation, trustee, or other charitable organization of the delinquency and requiring it to correct the delinquency, impose an additional penalty, unless the report and the filing fee, including the \$20 penalty charge referred to in OAR 137-010-0030(3), are filed within a specified number of days thereafter, but not less than ten. The additional penalty may be imposed in an amount not to exceed a fee as provided for in ORS 128.670(8)(b).

(2) The charitable corporation, trustee, or other charitable organization receiving a notice of imposition of penalty shall, upon its written request received within ten days, be entitled to a contested case hearing before the Attorney General or his designee to dispute the imposition of the penalty or to submit evidence in mitigation. The hearing shall be held and the Attorney General's order may be appealed in accordance with the procedure for contested cases provided in ORS Chapter 183, but the order shall be reversed or modified only if the court finds that the Attorney General lacked authority to impose the penalty or the amount of the penalty imposed was unconscionable in the circumstances.

(3) The Attorney General may file a certified copy of the original notice assessing an additional penalty, or of the order entered after hearing, with the clerk of any circuit court in the state, after expiration of the time to request a hearing, or expiration of the time in which to appeal, or after final determination of the matter on appeal, whichever is appropriate, and such notice or order shall be docketed in the judgment docket and may be enforced in the same manner as a judgment.

Stat. Auth.: ORS 128.876

Stats. Implemented: ORS 128.670(8)

Hist.: 1AG 15, f. & ef. 5-27-76; 1AG 2-1981, f. & ef. 12-1-81; JD 1-1990, f. & cert. ef. 1-25-90

137-010-0034

Mitigating and Aggravating Factors to be Considered

In establishing the amount of the additional penalty to be imposed, the Attorney General may consider the following factors and shall cite those found applicable:

(1) The past history of the charitable corporation, trustee or other charitable organization in delinquent filing of reports.

(2) Whether a request for an extension of time was received prior to the due date for filing the report.

(3) Whether the cause of the delinquency was unavoidable, or was due to negligence or an intentional act of the charitable corporation, trustee, or other charitable organization.

(4) The opportunity and degree of difficulty to correct the delinquency.

(5) The cooperativeness and efforts made by the charitable corporation, trustee or other charitable organization to correct the delinquency for which the additional penalty is to be imposed.

(6) The cost to the Department of Justice and time involved in investigation and correspondence prior to the time the delinquency is actually corrected.

(7) Any other relevant factor.

Stat. Auth.: ORS 128.876

Stats. Implemented: ORS 128.670(8)

Hist.: IAG 15, f. & ef. 5-27-76; IAG 1-1981, f. & ef. 12-1-81; JD 1-1990, f. & cert. ef. 1-25-90

Miscellaneous

137-010-0040

Place of Filing

Registration and annual reports required by either the Charitable Solicitations Act or the Charitable Trust and Corporation Act shall be submitted to the Charitable Activities Section, Office of the Attorney General, 1515 S.W. 5th, Suite 410, Portland, Oregon 97201-5451.

Stat. Auth.: ORS 128.876

Stats. Implemented: ORS 128.650, ORS 128.660, ORS 128.670, ORS 128.802, ORS 128.804, ORS 128.807, ORS 128.812, ORS 128.821, ORS 128.826 & ORS 128.841

Hist.: JD 2-1982, f. & ef. 12-30-82; JD 1-1990, f. & cert. ef. 1-25-90

137-010-0041

Model APA Rules and Definitions

(1) The Attorney General's Model Rules of Procedure Under the Administrative Procedures Act, effective March 1988, are by this reference adopted as the rules and procedures for carrying out the Charitable Solicitations Act (ORS 128.801 to 128.898 and 128.995) and the Charitable Trust and Corporation Act (ORS 128.610 to 128.750 and 128.896), except as otherwise specifically provided herein.

(2) As used in the Charitable Solicitations Act and these rules, solicitation "campaign" means the day the first solicitation, as defined in ORS 128.801(6), is made until the later of the following dates:

(a) The last day a solicitation is made; or

(b) The day that an entertainment event, if any, occurs in conjunction with the solicitations.

(3) As used in ORS 128.821(3), "personal address" means the street address of a person's dwelling, house or usual place of abode.

(4) As used in the Charitable Solicitations Act, "clear and conspicuous" means that a message is conveyed in a manner that is readily noticeable and will be readily understood by a person being solicited. The location of a written statement on the reverse side of a document is rebuttably presumed not to be conspicuous.

Stat. Auth.: ORS 128.876

Stats. Implemented: ORS 128.670(8)(b), ORS 128.801(6), ORS 128.821(3) & ORS 128.871

Hist.: JD 1-1990, f. & cert. ef. 1-25-90; JD 5-1991, f. & cert. ef. 10-22-91

137-010-0042

Civil Penalty Against Officers and Trustees for Violation of Charitable Trust and Corporation Act

Where, after investigation, the Attorney General finds a violation of ORS 128.896(1) and determines that a civil penalty of up to \$1,000 is an appropriate penalty, the Attorney General shall issue a proposed and final order for assessment of the civil penalty, along with the notice required under ORS 183.415 and in accordance with the requirements of ORS 128.896.

Stat. Auth.: ORS 128.876

Stats. Implemented: ORS 128.899

Hist.: JD 1-1990, f. & cert. ef. 1-25-90

137-010-0043

Denial of Registration or Revocation of Registration of Commercial Fund Raising Firm or Professional Fund Raising Firm

(1) After notice and opportunity for hearing as provided in ORS 183.310 et seq., the Attorney General may deny registration or revoke any registration issued to a commercial fund raising firm or professional fund raising firm. The Attorney General shall deny the registration within ten days of receipt of a completed application or the registration shall be deemed to be approved. A hearing shall be granted within 30 days of receipt of a written request for a hearing from the applicant.

(2) The Attorney General may revoke a firm's registration or deny a registration application if the Attorney General finds:

(a) A material misrepresentation or false statement in the application for registration or other statement filed with the Attorney General, as provided in the Charitable Solicitations Act or these rules; or

(b) Any material violation of ORS 128.821 to 128.861, 128.886 and 128.891 or the rules adopted by the Attorney General pursuant to the Charitable Solicitations Act.

(3) A "material misrepresentation" or a "material violation" will be determined on the facts in each individual case. However, the following circumstances shall always constitute material violations:

(a) The failure to complete and file a fund raising notice with the Attorney General as required by ORS 128.826 or Section 18, Chapter 532, Oregon Laws 1991, prior to making solicitations;

(b) The use of solicitation materials in the course of a solicitation campaign which do not contain the disclosures required by Sections 6 or 20, Chapter 532, Oregon Laws 1991.

(4) A false statement is any statement contrary to truth or fact.

Stat. Auth.: ORS 128.876

Stats. Implemented: ORS 128.871

Hist.: JD 1-1990, f. & cert. ef. 1-25-90; JD 5-1991, f. & cert. ef. 10-22-91

137-010-0044

Refund of Fees

Any refund of \$10 or less of a filing fee paid pursuant to the Charitable Solicitations Act or the Charitable Trust and Corporation Act shall be made only upon a written request from a representative of the organization which overpaid the fee. Unless the Department of Justice, in its discretion, agrees to waive the fee, the department shall retain a fee of \$25 to process refunds of overpayments of fees paid pursuant to ORS 128.670(7). The department is not required to process refunds as described above, if the amount of the refund due does not exceed \$25.

Stat. Auth.: ORS 128.876

Stats. Implemented: ORS 128.670

Hist.: JD 1-1990, f. & cert. ef. 1-25-90; JD 5-1991, f. & cert. ef. 10-22-91

Charitable Solicitation Registration and Reporting Requirements

137-010-0045

Professional Fund Raising Firm Status

(1) "Professional fund raising firm" means any sole proprietorship, partnership, corporation or any other legal entity, organized for profit or as a nonprofit mutual benefit corporation, who, for compensation or other consideration, manages or conducts the solicitation of funds, not including commercial fund raising solicitations, on behalf of any nonprofit organization.

(2) Professional fund raising firm status is evidenced by one or more of the following characteristics:

(a) Access to contributions or other receipts from a solicitation and/or authority to pay expenses associated with the solicitation, including amounts owed to the professional fund raising firm or third party vendors;

(b) Conducting direct solicitations of prospective donors, whether in person or by telephone and whether such solicitations are performed personally or through employees or agents;

(c) Advising nonprofit organizations with regard to the volume, targeting, duration or content of a direct mail solicitation campaign and also having primary responsibility for the campaign's production.

Stat. Auth.: ORS 128.876

Stats. Implemented: ORS 128.801(5)

Hist.: JD 5-1991, f. & cert. ef. 10-22-91

137-010-0050

Professional Fund Raising Firm Registration and Reports

(1) Any person required by Section 17, Chapter 532, Oregon Laws 1991 to register as a professional fund raising firm shall pay an annual registration fee as provided in that section and shall complete and file Form PF-20, "State of Oregon Annual Registration Statement of Professional Fund Raising Firm" with the Attorney General. This procedure shall apply to both new registrations and registration renewals. In addition to the items listed in Section 17, a completed form shall include a confirmation that the applicant has registered with the Oregon Secretary of State's Corporation Division, if it is a foreign corporation, and has registered any assumed business names with that same office, if such registrations are required by ORS 60.701.

(2) At least ten days prior to undertaking each solicitation campaign, a professional fund raising firm shall complete and file Form PF-21, "Professional Fund Raising Firm Solicitation Campaign Notice", as required by Section 18, Chapter 532, Oregon Laws 1991.

(3) Professional fund raising firms required by Section 21, Chapter 532, Oregon Laws 1991, to file financial reports shall complete and file Form PF-22, "Professional Fund Raising Firm Solicitation Campaigns Financial Reports" with the Attorney General.

(4) A person who conducts activities as both a commercial fund raising firm and a professional fund raising firm may operate under either registration.

Stat. Auth.: ORS 128.876

Stats. Implemented: ORS 128.802, ORS 128.804 & ORS 128.812

Hist.: JD 5-1991, f. & cert. ef. 10-22-91

137-010-0055

Commercial Fund Raising Firm Registration and Reports

(1) Any person required by ORS 128.821 to register as a commercial fund raising firm shall pay an annual registration fee as provided in ORS 128.821 and shall complete and file Form PF-10, "State of Oregon Annual Registration Statement of Commercial Fund Raising Firm", with the Attorney General. This procedure shall apply to both new registrations and registration renewals. In addition to the items listed in ORS 128.821(3) a completed form shall include a confirmation that the applicant has registered with the Oregon Secretary of State's Corporation Division, if it is a foreign corporation, and has registered any assumed business names with that same office.

(2) At least ten days prior to undertaking each solicitation campaign, a commercial fund raising firm shall complete and file Form PF-11, "Commercial Fund Raising Firm Solicitation Campaign Notice", as required by ORS 128.826.

(3) Commercial fund raising firms required by ORS 128.841 to file financial reports shall complete and file Form PF-12, "Commercial Fund Raising Firm Solicitation Campaign Financial Report", with the Attorney General.

(4) A person who conducts activities as both a commercial fund raising firm and a professional fund raising firm may operate under either registration.

Stat. Auth.: ORS 128.876

Stats. Implemented: ORS 128.821, ORS 128.826 & ORS 128.841

Hist.: JD 1-1990, f. & cert. ef. 1-25-90; JD 5-1991, f. & cert. ef. 10-22-91; Renumbered from 137-010-0039

DIVISION 20

MISLEADING PRICE REPRESENTATIONS

137-020-0010

Trade Practices Act

(1) Purpose: It is the purpose of this rule to declare as an unlawful trade practice certain representations relating to price reductions.

(2) Scope: At present, it is unlawful under ORS 646.608(1)(j) to make "false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions." This rule is intended to define types of price comparisons which are in violation of that section, by establishing permissible types of reference price advertising. The rule does not address misrepresentations regarding the "reasons for" price reductions. The Examples provided in this rule are for illustrative purposes only.

(3) Authority: This rule is adopted pursuant to ORS Chapter 183 on authority granted to the Attorney General by ORS 646.608(1)(s) and (4).

(4) Effective Date: This rule applies to all advertisements (other than catalogues) printed, distributed, or broadcast, or offers for sale made, after September 1, 1976. Subsection (6)(e) of this rule applies to all catalogues distributed in Oregon after January 1, 1977.

(5) Definitions: As used in this rule:

(a) The definitions of terms set forth in ORS 646.605(1975) are applicable;

(b) "Catalogue" means a multi-page solicitation in which a person offers more than one specific type of goods for sale from which a consumer can order goods directly without going to the seller's place of business, and which is distributed to consumers by means other than by inclusion in a newspaper;

(c) "Competitor" means a retail outlet in the person's geographic market area with whom the person in fact competes for sales;

(d) "Offering Price" means the price at which a person represents that goods will be sold or leased, whether stated as a definite sum of money or as a determinate reduction from a reference price;

(e) "Reference Price" means any price, whether stated in dollars, in terms of a percentage or fraction, or by any other method, to which a person compares the currently represented offering price of its own goods. Examples of "reference prices" include manufacturer's suggested list or suggested retail prices; a competitor's offering price for the same or similar goods; a price at which the person formerly offered for sale or sold the same or similar goods; and an unspecified price at which the person formerly offered for sale or sold the same or similar goods suggested by the use of terms such as "on sale", "reduced to", "_____% off", or the like;

(f) "Readily Ascertainable Reference Price" means a reference price which is capable of being determined, from a stated offering price, by means of a simple arithmetic computation;

(g) "Similar Goods" mean goods associated with a reference price which are similar in each significant aspect, including size, grade, quality, quantity, ingredients, utility and operating characteristics, to the offered goods.

(6) Unfair or Deceptive Use of Reference Prices: A person engages in conduct which unfair or deceptive in trade or commerce when it represents that goods are available for sale or lease by it at an offering price less than a reference price *unless* such reference price comes within any one of the following exceptions:

(a) The reference price is stated or readily ascertainable, and is a price at which the person, in the regular course of its business, made good faith sales of the same or similar goods or, if no sales were made, offered in good faith to make sales of the same or similar goods, either:

(A) Within the preceding 30 days; or

(B) At any other time in the past which is identified.

EXAMPLE: This exception is intended to identify the most common price comparison — to a former price charged by the seller himself. The former price must be one which was used in good faith to make or offer to make sales. Good faith is absent if the person raises his price for the purpose of subsequently claiming reductions. Comparisons to "a" legitimate former price are allowed. Thus, if a chain store reduces its price in one or two outlets to meet localized competition, its price throughout the

rest of the chain can be used as a reference price. Seasonal comparisons from year-to-year are also permitted.

(b) The reference price is the price at which the person will offer the same or similar goods for sale in the future, provided that:

(A) The reference price is stated or readily ascertainable; and

(B) If the reference price will not be put into effect for more than 90 days after the representation, the effective date of the reference price is stated; and

(C) Such reference price is actually put into effect for the purpose of offering in good faith to make sales.

EXAMPLE: This exception permits introductory offering prices and the like.

(c) The reference price is stated or readily ascertainable, and is a price at which an identified or identifiable competitor is or has in the recent regular course of its business offered to make good faith sales of the same or similar goods.

EXAMPLE: A person may rely upon the recent advertised price of a competitor for the same or similar goods, if he reasonably believes the competitor was attempting to make sales at that price. Alternatively, a person can "shop" his competitor to determine the latter's recent offering price.

(d) The reference price is stated or readily ascertainable, and is required by federal or Oregon law to be affixed to the goods, and clear disclosure is made in the same representation that all sales of such goods are not necessarily made at such reference price, if such is in fact the case.

EXAMPLE: This rule is directed at claimed price reductions from the "sticker prices" of automobiles. If a person makes such a price comparison and in fact similar automobiles are sold at less than the "sticker price", that fact must be disclosed clearly in the same representation.

(e) The reference price is stated in a catalogue, so long as the person employing such reference price includes a statement, printed in a manner which a reader of the catalogue is likely to notice, explaining:

(A) The source of the reference price; and

(B) That the reference prices may not continue to be in effect during the entire life of the catalogue, if such is in fact the case. The requirements of this section are satisfied by a single disclosure statement, which applies to the catalogue as a whole, made in conjunction with the explanation to the reader of how to make a purchase from the catalogue.

(f) The reference price is stated and is a price, such as a manufacturer's list price, which the person can document as having been employed in good faith offers to sell the same or similar goods within his market area during the preceding 30 days.

EXAMPLE: Comparing one's current offering price to a manufacturer's list price is valid if the offerer can substantiate that goods have been offered or sold, in good faith, at that list price during the preceding 30 days.

(g) Notwithstanding subsections (6)(a) through (f) of this rule, a person may represent a general price reduction on a variety of merchandise without using a stated or readily ascertainable reference price, so long as:

(A) The amount of reduction is stated expressly, either in terms of a dollar amount or a percentage;

(B) The reduction is from a price or prices at which the person made good faith sales of the same or similar goods at a time in the past which is identified; and

(C) The represented reduction is true as to each item offered for sale.

EXAMPLE: This would permit advertising seasonal clearance sales and the like by means of a general representation as to price reductions, without stating specifically either the reference price or the offering price.

Stat. Auth.: ORS 646

Stats. Implemented: ORS 646.608(1)(u)

Hist.: IAG 16, f. 7-21-76, ef. 9-1-76

137-020-0015

Misleading Use of "Free" Offers

(1) Definitions: As used in this rule:

(a) The definitions of terms set forth in ORS 646.605 are applicable;

(b) "Free" means without charge or cost, monetary or otherwise, to the recipient, and includes terms of essentially identical

import, such as "1¢ sale", "2 for the price of 1" and "give away" and, in the case of real estate, goods or services described in subsection (2)(a) of this rule, an offer of any combination of real estate, goods or services at a single price. A free offer in conjunction with the sale or lease of real estate, goods or services is one that conveys to customers the message that real estate, goods or services are offered at no cost in conjunction with the purchase of other real estate, goods or services for no more than their regular price;

(c) "Verifiable retail value" means:

(A) A price at which an offer or can demonstrate that a substantial number of free items have been sold at retail in Oregon by a person other than the offeror; or

(B) If substantiation described in this section is not available to an offeror, no more than one and one-half times the amount an offeror paid for a free item.

EXAMPLE: If substantiation, as described in this section, is not available, and the offeror pays \$10 for a free item, the verifiable retail value of that free item would be \$15.

(2) Unfair or Deceptive Use of "FREE" Offers: A person engages in conduct which is unfair or deceptive in trade or commerce:

(a) When it makes a free offer in conjunction with the purchase or lease of real estate, goods or services, the price, size, quantity, or quality of which is normally determined by that seller by bargaining with potential purchasers. For purposes of this section, an offer of any combination of real estate, goods and services for a single price is not a free offer if:

(A) The "free" item is offered by a manufacturer or another party, separate from the seller, and there is no direct cost to the seller; or

(B) The offer includes no terms, other than the offer of the combination itself, indicative of a free offer as defined in subsection (1)(b) of this rule and the offer includes one of the following disclaimers, communicated in a clear and conspicuous manner, as defined in OAR 137-020-0050:

(i) "Cost of promotion may increase price of _____". (The phrase shall be completed with a description of the basic real estate, goods or services offered for sale.); or

(ii) "This is a combination offer. Make your best deal on a package price".

(b) When it makes a free offer combined with the offer of real estate, goods or services, the price of which is not normally determined by bargaining and in order to receive the "free" real estate, goods or services the recipient must at any time purchase or lease other real estate, goods or services at a price which is higher than that at which the person offered for sale or sold such real estate, goods or services in the ordinary course of business during the 30 days preceding the "free" offer (unless such higher price is the regular price at which such real estate, goods or services are thereafter sold in the regular course of business);

(c) When it makes a free offer and in order to qualify for the offer, the recipient will be given a presentation intended to result in the promotion of a business or sale or lease of real estate, goods or services unless the offer contains a clear and conspicuous disclosure:

(A) Identifying the business promoted or the goods or services offered for sale or lease;

(B) That the recipient must listen to a sales or promotional presentation in order to receive the free offer or that the recipient is entitled to receive the free offer after refusing to listen to the presentation, whichever is the case. If the free item described is not immediately available for delivery to the recipient after the recipient has listened to a sales or promotional presentation, the recipient shall be given the verifiable retail value of the free item in cash or by a valid check;

(C) Including a description of each potentially free item and its verifiable retail value in the trade area in which the offer is made;

(D) If the free item is one or more of a larger group, if received on a random basis, (in addition to compliance with subsection (e) of this section) a description of the actual odds of

receiving each item based on the initial odds and revised to reflect actual current odds at the beginning of each month of use of the free promotion; if not on a random basis, a description of the method of selection used. The description of the initial odds and the current odds shall include a statement of the total number of each free item to be given away by the offeror and the total number of chances to obtain the free item being distributed by the offeror. If the promotion utilizing the free item involves distribution by more than one offeror or sponsor, the description of the initial odds and the actual current odds also include a statement of the total number of each free item to be given away by all offerors or sponsors and the total number of chances to obtain the free item being distributed by all offerors or sponsors. The odds and verifiable retail value shall be printed in the same size type as the principal description of each free item and shall appear immediately adjacent to said description;

(E) In a telephone or door-to-door solicitation, inclusion of the information required by ORS 646.608(1)(n) within 30 seconds after beginning the conversation.

(d) When it makes a free offer as described in subsection (b) or (c) of this section and, in order to receive the free real estate, goods or services, the recipient is required to pay money to the offeror, promoter or any other person for any fee, including but not limited to a fee for postage, shipping, storage, handling, processing, registration or verification, which terms are used herein for purposes of illustration and not by means of limitation;

(e) In the case of all free goods or services offered on a random basis as described in paragraph (2)(c)(D) of this rule, unless it retains for at least one year a list of the names and addresses of all persons receiving free goods or services with a verifiable retail value of \$10 or more.

Stat. Auth.: ORS 646.608(4)

Stats. Implemented: ORS 646.608(1)(u)

Hist.: IAG 16, f. 7-21-76, ef. 9-1-76; IAG 2-1979, f. 6-22-79, ef. 8-1-79; JD 1-1987, f. 2-5-87, ef. 2-15-87; JD 5-1990, f. 7-5-90, cert. ef. 9-1-90

137-020-0020

Motor Vehicle Price Disclosure

(1) Purpose: The purpose of this rule is to declare as unfair or deceptive in trade or commerce certain motor vehicle pricing practices.

(2) For purposes of this rule, the following definitions shall apply:

(a) "Administrative fee" means any monies or other thing of value which a dealer charges for preparing any and all paperwork to close the sale or lease of a motor vehicle except as prohibited by ORS 802.030(2)(e);

(b) "Advertisement" means any oral, written or graphic notice given in a manner designed to attract public attention and includes, without limitation, public broadcasts, mailings and published notices;

(c) An "average" person, viewer or listener means a person other than one allied with the vehicle industry;

(d) "Buy-down rate" means a financing rate which, due to a dealer's payment of finance charges to a third party, is below the prevailing market financing rate;

(e) "Clear and conspicuous" means that a message is conveyed in a manner that is readily noticeable, will be easily understood by the audience to whom it is directed, and is in a meaningful sequence. In order for a message to be considered "clear and conspicuous", it shall, at a minimum:

(A) Not contradict or substantially alter any terms it purports to clarify, explain or otherwise relate to;

(B) Use abbreviations or terms only if they are commonly understood by the average person or approved by federal or state law;

(C) In the case of radio advertising:

(i) The information required to be disclosed by law shall be spoken with sufficient deliberateness, clarity, and volume so as to be understood by the average radio listener;

(ii) The information shall not be obscured by sounds which interfere with or distract from the disclosure; and

(iii) Any information required in radio advertising shall be deemed to be clear and conspicuous if the ad complies with 15 USC § 1667c(b) and any disclosure required by 15 USC § 1667c(b)(C) also includes all disclosures required by Oregon law.

(D) In the case of television advertising:

(i) The information required to be disclosed by law shall be completely disclosed audibly, visually, or using a combination thereof;

(ii) Any visual message shall be presented unobscured by other images and in a size and time sufficient to allow an average viewer to read with reasonable ease; and

(iii) Any audible message shall be presented with sufficient deliberateness, clarity, and volume so as to be understood by the average television listener unobscured by other sounds which interfere with or distract from the disclosure.

(E) In the case of printed advertising:

(i) The information shall be in close proximity to the terms it purports to clarify, explain or otherwise relate to; and

(ii) The information shall be of sufficient prominence in terms of print style, size and contrast as compared with the remainder of the advertisement so as to be readily noticeable to an average person in the audience to whom it is directed. Print size which is 8 point type or larger in display advertisements which are less than 200 square inches in size or print size which is 10 point type or larger in display advertisements which are 200 square inches or larger in size shall be rebuttably presumed to be of sufficient size to be readily noticeable.

(f) "Dealer" means a person who sells, trades, leases, displays or offers for sale, trade or exchange motor vehicles or offers to negotiate or purchase motor vehicles on behalf of third parties. "Dealer" does not include a security interest holder as shown by the vehicle title issued by any jurisdiction or any person excluded by ORS 822.015(1) to (4) or ORS 822.015(6) to (9);

(g) "Extension sticker" means a label (other than a Monroney sticker or other label bearing the manufacturer's suggested retail price), affixed to a new motor vehicle, displaying the offering price of the motor vehicle;

(h) "Manufacturer's Suggested Retail Price" or "MSRP" means the Monroney price, or if there is no Monroney sticker, then the total price of the vehicle after all factory installed options and factory costs have been added together, less any option package savings offered by the manufacturer;

(i) "Monroney sticker" means the label required by Section 3 of the Automobile Information Disclosure Act, 15 USC Section 1232;

(j) "Motor Vehicle" means any self-propelled vehicle normally obtained for personal, family, or household purposes, including all terrain vehicles, snowmobiles and personal watercraft other than boats. Motor vehicle does not include aircraft;

(k) "Offering price" means the full cash price for which a dealer will sell or lease a motor vehicle to every purchaser or member of the general public without exception, excluding only taxes, license and registration costs, and a maximum administrative fee of \$35;

OFFICIAL COMMENTARY: An example of a correctly calculated offering price would be as follows: A vehicle's MSRP is \$10,000, taxes are \$500, license and registration are \$100, undercoat is \$100 and administrative fees are \$35. The offering price of the vehicle is \$10,100.00. The use of the term "maximum" modifying "administrative fee" is meant to signal that \$35 is the highest amount which may be charged. Nothing in this or any other rule requires a dealer to charge any administrative fee.

(l) "Pattern" means repeated acts that are the same or similar in nature and appear to have some overall connection;

(m) "Practice" means, for purposes of OAR 137-020-0050(2)(k), often, repeated, or customary action;

(n) "Personal Watercraft" means a jet ski or other aquatic device of similar design;

(o) "Rebate" means the payment of money to a consumer or payment to a dealer or third party on behalf of a consumer on the condition that the consumer purchase or lease a motor vehicle;

(p) "Taxes, license and registration costs" means those usual taxes, charges and fees payable to or collected on behalf of gov-

ernmental agencies and necessary for the transfer of any interest in a motor vehicle or for the use of a motor vehicle; and

(q) "Used vehicle" means any vehicle which has been previously delivered to any person for his or her discretionary use for personal or business purposes and for more than a try-out before a contemplated purchase or preparation for sale.

OFFICIAL COMMENTARY: Vehicles that would be considered "used" include, but are not limited to:

- (i) Dealer demonstrators that are delivered to a consumer on a purchase order or retail installment contract, then subsequently returned to the dealer due to an inability to obtain financing; and
- (ii) Demonstrators and company cars that have never been sold to a retail customer, but have been driven for purposes other than test drives or moving, including use by the dealer, the dealer's employees, the dealer's corporate officers or anyone else; and
- (iii) All vehicles that have been driven more than the limited use necessary in moving or road testing a new vehicle prior to purchase or delivery to a consumer.

The intention of this definition is to conform the applicability of the rule to the maximum extent permitted by ORS 646.608 and Weigel v. Ron Tonkin Chevrolet Co., 298 OR 127, 690 P2d 488 (1984).

(3) Failure by a dealer to comply with this rule constitutes unfair or deceptive conduct in trade or commerce.

(a) Any motor vehicle offered for sale or lease in an advertisement stating an offering price or capitalized cost for the motor vehicle shall have affixed to it a clear and conspicuous label or extension sticker stating the offering price of the motor vehicle listed in the advertisement. If a motor vehicle bears a label which states a MSRP and the MSRP is the offering price or capitalized cost for the vehicle, no additional label or extension sticker is required;

(b) Any motor vehicle offered for sale bearing a Monroney sticker or a label stating a MSRP shall have an extension sticker affixed stating the offering price of the vehicle if the offering price is greater than the Monroney sticker price or the stated MSRP;

(c) Any price stated in an advertisement or in a written or oral price quotation given to a prospective buyer shall be the offering price plus taxes, license, registration costs and a maximum administrative fee of \$35. Any written or oral price quotation given in good faith to a prospective buyer, which is less than or on different terms than the offering price on the motor vehicle, may be given by an agent subject to approval by the dealer;

(d) An extension sticker shall accurately itemize and describe the charge(s) added to or subtracted from the MSRP to reach the offering price. No charge may be added for goods or services not actually provided. No charge may be added for services required by the manufacturer or distributor which are performed by a dealer prior to delivery of a motor vehicle to a retail buyer. No charge may be added for any overhead expense such as warehousing, flooring, advertising, and clerical costs; or for transportation costs charged by the manufacturer or distributor to the dealer and included in the MSRP. In the case of inland freight, setup and dealer preparation, the charge listed must be the dealer's actual cost for freight from the port of entry to the dealership, and the actual cost of setup and dealer preparation and not included in the MSRP;

(e) If the offering price is greater than the MSRP, the portion of the difference shown on the extension sticker between the offering price and the MSRP not representing additional goods or services shall be described as "additional dealer profit," "additional mark-up" or by a term of similar import;

(f) A dealer may not make false or misleading representations concerning the nature or amounts of charges listed on a label or the extension sticker by listing charges for additional goods or services provided which are substantially higher than the charges used by the dealer for the sale of the same or substantially similar goods or services to other buyers;

(g) The administrative fee may be separately stated in all advertisements and sales documents and shall not exceed \$35. If separately stated the disclosure shall be clear and conspicuous; and

(h) A dealer shall not represent an administrative fee as a governmental fee or one required by government.

Stat. Auth.: ORS 646.608(1)(u) & ORS 646.608(4)

Stats. Implemented: ORS 646.608(1)(u)

Hist.: 1AG 6-1979, f. & ef. 12-19-79; JD 4-1993, f. 8-6-93, cert. ef. 8-16-93; JD 3-1996, f. 10-18-96, cert. ef. 10-23-96

137-020-0025

Mobile Home Consignment

(1) Purpose: The purpose of this rule is to declare as unfair or deceptive in trade or commerce the practice of selling mobile homes on consignment without complying with this rule.

(2) Authority: This rule is adopted pursuant to ORS Chapter 183 on authority granted to the Attorney General by ORS 646.608(1)(u) and (4).

(3) Effective Date: This rule applies to consignment sales agreements entered into on or after January 1, 1980.

(4) Definitions: For purposes of this rule:

(a) The definitions of terms set forth in ORS 646.605 are applicable;

(b) "Mobile Home Dealer" means a person who regularly engages in the sale of mobile homes as defined by this rule;

(c) "Mobile Home" means a non-self propelled structure, transportable in one or more sections, which is designed to be used as a permanent family dwelling;

(d) "Consignment Seller" means the owner of a mobile home who enlists the assistance of a mobile home dealer to offer his or her mobile home for sale to a third party and where the mobile home dealer receives consideration for such assistance. For purposes of this rule, it does not matter that the mobile home dealer does not take possession of the mobile home;

(e) "Minimum Net Agreement" means an agreement characterized by an arrangement in which a consignment seller agrees to accept a fixed dollar amount as his or her share of the proceeds regardless of the total sale price of the unit sold.

(5) Unfair or Deceptive Mobile Home Consignment Practices: A mobile home dealer engages in conduct which is unfair or deceptive in trade or commerce when it fails to deliver to a consignment seller the written agreements in compliance with the following:

(a) A mobile home dealer shall provide a mobile home consignment seller with a copy of a written consignment agreement prior to the date that the mobile home is offered for sale;

(b) The written consignment agreement shall contain the following:

(A) Identification of the mobile home offered for sale;

(B) The length of the term of the consignment agreement;

(C) If the mobile home dealer advises the consignment seller of an estimated retail value of the mobile home, a statement of that value shall be included;

(D) Identification of any class of expenses, including, but not limited to, taxes, repairs, transportation cost or tear down expenses, to be deducted from the consignment seller's portion of the proceeds of the sale in addition to the mobile home dealer's commission;

(E) The mobile home dealer's commission, stated in terms of a dollar amount or percentage of the sales price, unless it is a minimum net agreement;

(F) In the event of a minimum net agreement, the amount to be paid to the consignment seller shall be so stated;

(G) A statement of whether or not the consignment seller will have the right to approve the final purchase price; and

(H) The signature of the consignment seller.

(c) The mobile home dealer shall promptly deliver to the consignment seller a copy of the purchase agreement, which shall include the sales price, after the purchase agreement has been executed by the third party purchaser.

Stat. Auth.: ORS 646

Stats. Implemented: ORS 646.608(1)(u)

Hist.: 1AG 3-1979, f. 10-11-79, ef. 1-1-80

137-020-0030

Updating

(1) Purpose: It is the purpose of this rule to define as an unfair trade practice the failure to disclose the year in which a motor vehicle or motor vehicle chassis was actually manufactured.

(2) Authority: This rule is adopted pursuant to ORS Chapter 183 on authority granted to the Attorney General by ORS 646.608 (1)(s) and (4).

(3) Definitions: For purposes of these rules:

(a) "Person" is defined in ORS 646.605(4);

(b) "Motor Vehicle" means a self-propelled vehicle intended for use upon public highways which is or may be used or bought primarily for personal, family, or household purposes. For purposes of this rule, the term "motor vehicle" includes mobile homes, motor homes and recreational vehicles, but does not include automobiles and motorcycles;

(c) "Motor Vehicle Chassis" means the frame assembly, power plant, and all other appurtenances necessary to make a motor vehicle self-propelled.

(4) This rule is effective on and after September 1, 1976.

(5) Failure to Disclose Year of Manufacture:

(a) It is unfair or deceptive conduct in trade or commerce to sell, or offer for sale, a motor vehicle to its first purchaser for purposes other than resale without disclosing prior to the time of entering into any binding sales agreement:

(A) The month and year in which such motor vehicle was manufactured; and

(B) If the motor vehicle chassis was manufactured in a month or year different from that of the completed motor vehicle, the month and year in which such motor vehicle chassis was manufactured.

(b) Providing a prospective purchaser with a copy of certificate of origin issued by the manufacturer of the motor vehicle or motor vehicle chassis which sets forth the month and year of manufacture shall constitute adequate disclosure for purposes of this rule.

Stat. Auth.: ORS 646

Stats. Implemented: ORS 646.608(1)(u)

Hist.: 1AG 16, f. 7-21-76, ef. 9-1-76

137-020-0040

Adoption of Federal Credit and Leasing Law

(1) For purposes of this rule, the following definitions shall apply:

(a) "Truth-in-Lending" means the Federal Truth-in-Lending Act, as amended prior to January 1, 1987, (including **15 U.S.C. 1601-1665(a)**), and any regulations which have been adopted thereto prior to January 1, 1987, including **Regulation Z (12 CFR 226)**;

(b) "Federal Consumer Leasing Law" means the consumer leasing portions of the Truth-in-Lending Act, **15 USC §1667** as amended by the **Community Development Act of September 23, 1994, Public Law No. 103-325, §336, 108 Stat 2160, 2234** and all regulations which implement this section including **Regulation M (12 CFR 213)**;

(c) "Person" refers to those individuals and entities as defined in ORS 646.605(4);

(d) "Real Estate, Goods or services" refers to those items defined in ORS 646.605(7).

(2) It is unfair or deceptive conduct in trade or commerce for a person to advertise, offer credit or extend credit related to the purchase of real estate, goods or services in violation of Truth-in-Lending or the Federal Consumer Leasing Law.

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 646

Stats. Implemented: ORS 646.608(1)(u)

Hist.: JD 1-1987, f. 2-5-87, ef. 2-15-87; JD 9-1994(Temp), f. & cert. ef. 11-23-94; JD 5-1995, f. & cert. ef. 4-7-95

137-020-0050

Motor Vehicle Advertising

(1) For purposes of this rule, the definitions specified in OAR 137-020-0020 shall apply.

(2) It is unfair or deceptive in trade or commerce for a dealer to advertise motor vehicles if:

(a) The dealer represents that motor vehicles or other property to be received in trade in conjunction with the purchase of a

motor vehicle will be valued at a specific amount, range of amounts or guaranteed minimum amount;

(b) The dealer represents that purchasers of vehicles will receive a cash rebate, discount certificate, coupon or other similar promotion unless it is offered by a manufacturer or another party, independent of the dealer and without dealer participation;

OFFICIAL COMMENTARY: Rebates controlled by the dealer may be illusory because the dealer may simply increase the offering price or limit the dealer's negotiated price by the same amount as the ostensible value of the rebate. The rule eliminates this possibility by prohibiting such rebates. Rebates which do not expose consumers to those risks are not intended to be prohibited by this rule.

(c) The dealer includes lease and sale offers in the same advertisement without making a clear and conspicuous distinction as to which terms shall apply to each respective offer;

(d) The dealer represents that motor vehicles are offered for sale at a price that is compared in any manner to the dealer's "cost" or terms of essentially identical import unless the advertisement:

(A) Exclusively uses the term "invoice" or "invoice price"; and

(B) Complies with the following:

(i) The invoice price shall be the final price listed on the manufacturer's invoice after subtracting any amount identified on the invoice as being held back for the dealer's account, and after subtracting any advertising fees or manufacturer to dealer rebates or incentives;

(ii) Purchasers shall be able to purchase any vehicle described by the advertisement at the offering price; and

(iii) The invoice shall be readily available for inspection by prospective customers.

(e) The dealer represents that financing is available for the purchase of motor vehicles at a buy-down rate unless the advertisement includes a clear and conspicuous disclosure that the interest rate is not sponsored by the manufacturer, if such is the case, and the amount of the buy-down is reflected in the Federal Truth in Lending Statement, unless the dealer can clearly substantiate that the cost of the buy-down is spread throughout all of the dealer's transactions. For purposes of this subsection, "manufacturer" includes any subsidiaries of the manufacturer which offer motor vehicle financing;

(f) The dealer fails to incorporate a material statement in motor vehicle advertising:

(A) Which is required by law or by these rules, or without which the advertisement would be false or misleading; and

(B) Which is not presented in a clear and conspicuous manner.

(g) The offering price or an offer to lease applies to a specific vehicle, or to a specific or limited number of vehicles of a specific model or type, unless:

(A) The number of vehicles available is disclosed; and

(B) Each vehicle is clearly and conspicuously identified in the advertisement by stock number, vehicle identification number or license plate number.

(h) The vehicle is not available for immediate delivery, unless the advertisement clearly and conspicuously states the vehicle is in transit, on order, or obtainable only by special order or dealer trade, and that it is not in stock;

(i) The dealer advertises a used vehicle, which was manufactured less than five years prior to the date of the advertisement, without designating the vehicle as "used." Other descriptive terms may be substituted for the term used, but not so as to create ambiguity as to whether the vehicle is new or used;

OFFICIAL COMMENTARY: Examples of alternative terms include "executive return," "lease return," "dealer demonstrator," or "rental return."

(j) The dealer uses the word "program" unless the advertisement clearly and conspicuously discloses the nature of the "program" or "certification" that is offered with the motor vehicle, and the origin and prior use of the vehicle;

(k) The dealer advertises or posts on a vehicle any words which imply that the offering price of the vehicle is non-negoti-

able when in fact the dealer has a pattern or practice of negotiating the offering price of the advertised vehicles;

(l) The dealer advertises any vehicle without disclosing material limitations of the terms listed in the offer, including, but not limited to, the length of time that the offering price is in effect. Advertisements which do not list any effective dates will be presumed to offer advertised vehicles at the "advertised price" until such time as the vehicles are subsequently advertised at different terms or for a period of 30 days, whichever comes sooner;

(m) The dealer advertises any vehicle for sale and does not identify the dealer by the complete business name which indicates that it is a dealer of vehicles, or by the word "dealer" or abbreviation "DLR;"

(n) The dealer advertises a vehicle is reduced in price from the dealer's former price, or that the price is a percentage or dollar amount of savings from the dealer's former price, or words to that effect, unless:

(A) The dealer actually advertised or has records showing that the vehicle has been offered for sale at the former price for no less than 10 days in the prior 30 days; and

(B) For new vehicles only, the dealer lists the MSRP in the advertisement.

(o) The dealer uses images, words, phrases, initials, abbreviations or any other items which are not clear and conspicuous;

(p) The dealer explicitly or implicitly claims that the dealer's offering price is lower than another dealer or dealers', unless the dealer can clearly show, through statistical analysis of other prices in the target market and records of the dealership, that such is the case;

(q) The dealer advertises an interest rate that is adjustable without clearly and conspicuously disclosing that the interest rate is adjustable;

(r) The dealer advertises the offering price of a vehicle as discounted or in any way reduced by a specified amount below the MSRP or the dealer's sale price unless the MSRP, the amount of any discount, rebate, or other price reduction and the final offering price are clearly and conspicuously displayed in figures. Each figure shall be labeled with a clear and conspicuous description;

(s) The dealer advertises that more than one vehicle of a given model is available and identifies the offering price of a vehicle using the words "as low as" or "starting at" or words to that effect, unless the advertisement clearly and conspicuously states the number of vehicles available at the offering price; or

(t) The advertisement includes any rebates or reductions, unless the offering price, including such rebates and reductions, is available to every purchaser or member of the general public without exception. Rebates or reductions which are not available to every purchaser or member of the general public, such as "commercial rebate," "college graduate rebate," or "first time buyers' rebate" may be listed in the advertisement, but may not be subtracted from the price so as to reduce the final price.

(3) It is unfair or deceptive in trade or commerce for a dealer to advertise the lease of any vehicles unless the following information is clearly and conspicuously stated:

(a) That the vehicle price stated is for a "lease";

(b) The MSRP and the capitalized cost if different than the MSRP;

(c) The capitalized cost reduction, initial payment, security deposit, administrative fees and any other additional costs due at the time of delivery, and the total of those amounts;

(d) The total lease charge, which includes:

(A) The total of the monthly payments;

(B) Any lease acquisition fees;

(C) The total of the amounts listed in 3(C); and

(D) Any required lease disposition or termination fee.

(e) The monthly lease payment and term of the lease;

(f) The residual value of the vehicle at the end of the lease term; and

(g) Any lease return fee which a consumer must pay if the consumer chooses not to purchase the vehicle at the end of the lease.

Stat. Auth.: ORS 646.608(1)(u) & ORS 646.608(4)

Stats. Implemented: ORS 646.608(1)(u)

Hist.: JD 1-1987, f. 2-5-87, ef. 2-15-87; JD 3-1996, f. 10-18-96, cert. ef. 10-23-96

137-020-0100

Plain Language

(1) Definitions: For purposes of this rule:

(a) "Department" is defined as Oregon Department of Justice;

(b) "Consumer Contract" is defined in ORS 180.540(3) and does not include contracts which state agencies other than the Department may review under ORS 180.540(2);

(c) "Reasonable Fees" includes the prevailing billing rate which the Department has established in OAR 137-008-0010.

(2) Application: Any seller or extender of credit may submit a consumer contract to the Department by:

(a) Completing an application for review. The application may be obtained by calling or writing the Financial Fraud Section, 100 Justice Building, Salem, OR 97310, (503) 378-4732;

(b) Including a \$250 fee for each contract to be reviewed, and such additional "reasonable fees" as the Department determines is necessary to review the contract;

(c) Submitting three copies of the contract to be reviewed;

(d) Underlining in red any words, phrases or provisions which are specifically required, recommended or endorsed by a state or federal statute, rule or regulation.

(3) Review: After a contract is submitted the Department will:

(a) Return the contract and the fee if the Department determines that the contract submitted for review is not a consumer contract; or

(b) Certify the consumer contract meets Oregon Plain Language guidelines if it meets the standards set forth in ORS 180.540, et seq.;

(c) Inform the person submitting the contract that the contract does not comply with Oregon's Plain Language Standard. The Department shall provide a brief explanation of its determination. The explanation need not include every reason for non-compliance and corrections of each stated deficiency will not assure compliance;

(d) Return any fees charged over and above the initial \$250 filing fee to the extent the fee exceeded the cost of review.

(4) Certification: Certification of a consumer contract under this rule is not an approval of the contract's legality or legal effect. The fact that a consumer contract has been certified or not certified shall not be admissible in any action to interpret or enforce a contract or any term of a contract.

(5) No person may use a contract which represents it meets Oregon's Plain Language guidelines unless the person has received certification of the contract pursuant to this rule.

(6) Any oral or written reference to the Department's certification must be accompanied by the following statement: **The Department of Justice Certification of a contract under the Plain Language Contract Act is not an approval of the contract's legality or legal effect.**

Stat. Auth.: ORS 180.540, ORS 183.310 - ORS 183.550 & ORS 646

Stats. Implemented: ORS 180.540, ORS 180.545 & ORS 180.555

Hist.: JD 5-1985, f. 12-20-85, ef. 1-1-86; JD 13-1992, f. & cert. ef. 6-5-92

Gasoline Advertising

137-020-0150

Gasoline Price Advertising

(1) Definitions: For purposes of OAR 137-020-0150 to 137-020-0160 the following definitions shall apply:

(a) "Retailer" means any person who operates a service station, business or other place for the purpose of retailing and delivering gasoline, diesel or other fuel into the tanks of motor vehicles;

(b) "Displayed" means visible from a street or highway adjacent to the place of business;

(c) "Clear and Conspicuous" means in a form that is readily visible to and easily readable by a customer or potential customer

who would be materially affected by the information and means in a location that a person who would be materially affected by the information ought to have noticed the information displayed;

(d) "Full Service" includes services such as washing windshields, windows and headlights, checking fluid levels, checking or adjusting tire pressure and inspecting belts and hoses but does not include a car wash.

(2) Advertising: A retailer is not required to display prices charged for gasoline, diesel or other fuel.

(3) Displayed Prices: Except as provided in section (4) of this rule a retailer displaying a price for gasoline or diesel shall:

(a) Display clearly and conspicuously on each sign the lowest cash price for each grade of gasoline or diesel fuel offered for sale. Each lowest cash price displayed shall be the same size as all other prices displayed on the sign;

(b) Identify clearly and conspicuously for each price the grade of gasoline or diesel fuel;

(c) Arrange all prices in a meaningful and consistent order;

(d) State clearly and conspicuously on the dispensing device and on the sign all conditions applying to the lowest cash price. Conditions limiting the cash price on the display must comply with the following criteria:

(A) All words or symbols of limitations or condition must be presented in equal size and must be equally visible to the consumer;

(B) All words or symbols of limitations or condition must be no less than one-third the size of the words or symbols setting forth the cash price.

(e) Not display prices for products other than gasoline or diesel fuel in a manner creating a likelihood of confusion or misunderstanding with the price of gasoline or diesel fuel;

(f) Not charge a customer more than the amount registered on the dispensing device or per unit that the unit price calibrated on the dispensing device, unless the dispensing device is for diesel fuel and at least 85 percent of the fuel sold during the preceding 12 months by the retailer is diesel;

(g) Calibrate all dispensing devices in the same unit of measurement;

(h) Display the price per unit of measurement and the unit of measurement for each type of fuel in the same unit of measurement as shown on the dispensing device. In the event both cash and credit sales under a discount for cash program are made from the same dispensing device, a sign stating the cash price, and identifying it as such, at least two inches in height must be placed on the pump face in the immediate vicinity of the metered price so both may be observed by the consumer at the same time.

(4) Exceptions:

(a) A retailer who displays only the price of diesel for vehicles with PUC permits and who sells during the preceding 12 months at least 85 percent of its total fuel as diesel need not comply with subsections (3)(a) through (e) of this rule;

(b) A retailer who has a sign existing as of January 1, 1986, more than 20 feet in height as measured from ground level to the bottom of the sign must:

(A) Display clearly and conspicuously on the sign the lowest cash price for the two predominant grades of fuel which the retailer sells to motor vehicles. For purposes of this section, "predominant grades of fuel" means the grades sold in the greatest volume during the preceding 90 days;

(B) Display clearly and conspicuously on a sign visible from the street the lowest cash price for all grades of gasoline or diesel sold;

(C) Comply with all other provisions of section (3) of this rule.

(5) Limitations: A retailer displaying prices for a particular grade of gasoline or diesel shall:

(a) Not require as a condition of buying fuel at the displayed price that the buyer fill the fuel tank of the buyer's vehicle or purchase a specific quantity or dollar amount of fuel. This section shall not apply to sales to truckers with PUC permits;

(b) State clearly and conspicuously in commonly understood terms on each display and at each dispensing device any limitations applying to the price:

(A) For purposes of this rule limitations include but are limited to methods of payment, e.g., credit or cash; level of service, e.g., full service or mini-serve;

(B) In the event each dispensing device on a dispensing island is subject to the same limitations, clear and conspicuous signs may be placed on the canopy above the island that are visible from each side of the island or at the entry points of the island stating the limitation in lieu of a sign placed on each dispensing device on the island.

(6) Other Locations: If a price displayed on a sign is available only in a certain area of the service station or business, the area where the price displayed is available must be clearly and conspicuously identified so customers may readily determine the location of the displayed price.

Stat. Auth.: ORS 646

Stats. Implemented: ORS 646.915 & ORS 646.930

Hist.: JD 7-1985, f. 12-31-85, ef. 1-1-86

137-020-0160

Sales Practices

(1) A retailer may not limit the price advertised for a particular grade of gasoline or diesel to a consumer purchasing or receiving goods or services in addition to the gasoline or diesel fuel except for full services. For purposes of this rule consumer does not include truckers with PUC permits who purchase diesel fuel.

(2) The location at which any grade of gasoline or diesel fuel is dispensed or at which any limitation is applicable shall not be changed except for a bona fide reason and shall not be changed within 60 days of another change except for an emergency or legal necessity.

(3) Violation of OAR 137-020-0150 and this rule is a violation of the Unlawful Trade Practices Act, ORS 646.608(1)(u).

Stat. Auth.: ORS 646

Stats. Implemented: ORS 646.915 & ORS 646.930

Hist.: JD 7-1985, f. 12-31-85, ef. 1-1-86

Registration of Telemarketers

137-020-0200

Definitions

For purposes of OAR 137-020-0200 through 137-020-0203:

(1) "Telephonic Seller" applies to all persons required to register with the Oregon Department of Justice pursuant to ORS 646.551 through 646.565.

(2) "Doing Business in This State" means making telephonic solicitations of prospective purchasers from locations in this state or making telephonic solicitations of prospective purchasers who are located in this state.

(3) "Department" means Department of Justice.

(4) "Item" means any goods and services and includes coupon books which are to be used with businesses other than the seller's business.

(5) "Owner" means a person who owns or controls ten percent or more of the net income of a telephonic seller.

(6) "Person" includes an individual firm, association, corporation, partnership, joint venture, or any other business entity.

(7) "Principal" means an owner, an executive officer of a corporation, a general partner of a partnership, a sole proprietor of a sole proprietorship, a trustee of a trust, or any other individual with similar supervisory functions with respect to any person.

(8) "Purchaser" or "Prospective Purchaser" means a person who is solicited to become or does become obligated to a telephonic seller.

(9) "Salesperson" means any individual employed, appointed or authorized by a telephonic seller, whether referred to by the telephonic seller as an agent, representative, or independent contractor, who attempts to solicit or solicits a sale on behalf of the telephonic seller. The principals of a seller are themselves salespersons if they solicit sales on behalf of the telephonic seller.

(10) "Newspaper of General Circulation" is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, and which has been established, printed and published at regular intervals in the state, county, or city where publication, notice by publication, or official advertising is to be given or made for at least one year preceding the date of the publication, notice or advertisement.

Stat. Auth.: ORS 646
Stats. Implemented: ORS 646.551
Hist.: JD 4-1989, f. & cert. ef. 10-3-89

137-020-0201

Registration

(1) Not less than ten days prior to doing business in this state, a telephonic seller shall register with the Department of Justice by filing the information required by OAR 137-020-0202 and a filing fee of \$400. A seller shall be deemed to do business in this state if the seller solicits prospective purchasers from locations in this state or solicits prospective purchasers who are located in this state.

(2) The information required by OAR 137-020-0202 shall be submitted on a form provided by the Department of Justice and shall be verified by a declaration signed by each principal of the telephonic seller under penalty of perjury. The declaration shall specify the date and location of signing. Information submitted pursuant to OAR 137-020-0202(12) or (13) shall be clearly identified and appended to the filing.

(3) Registration of a telephonic seller shall be valid one year from the effective date thereof and may be annually renewed by making the filing required by OAR 137-020-0202 and paying a filing fee of \$400.

(4) Whenever, prior to expiration of a seller's annual registration, there is a material change in the information required by OAR 137-020-0202, the seller shall, within ten days, file an addendum updating the information with the Department of Justice. However, changes in salespersons soliciting on behalf of a seller shall be updated by addenda filed, if necessary, in quarterly intervals computed from the effective date of registration. The addendum shall provide the required information for all salespersons who are currently soliciting or have solicited on behalf of the seller at any time during the period between the filing of the registration, or the last addendum, and the current addendum, and shall include salespersons no longer soliciting for the seller as of the date of the filing of the current addendum.

(5) Upon receipt of a filing and filing fee pursuant to section (1) or (3) of this rule, the department shall send the telephonic seller a written confirmation of receipt of the filing. If the seller has more than one business location, the written confirmation shall be sent to the principal business location identified in the seller's filing in sufficient number so that the seller has one for each business location. The seller shall post the confirmation of receipt of filing, within ten days of receipt thereof, in a conspicuous place at each of the seller's business locations and shall have available for inspection by any governmental agency at each location a copy of the entire registration statement which has been filed with the department. Until confirmation of receipt of filing is received and posted, the seller shall post in a conspicuous place at each of the seller's business locations within this state a copy of the first page of the registration form sent to the department. The seller shall also post in close proximity to either the confirmation of receipt of filing, or until the confirmation is received, the first page of the submitted registration form, the name of the individual or individuals in charge of each location from which the seller does business in this state, as defined in OAR 137-020-0200(2).

Stat. Auth.: ORS Ch. 646
Stats. Implemented: ORS 646.553
Hist.: JD 4-1989, f. & cert. ef. 10-3-89

137-020-0202

Filing Information

Each filing pursuant to OAR 137-020-0201(1) through (5) shall contain the following information:

(1) The name or names of the seller, including the name under which the seller is doing or intends to do business, if different from the seller's, and the name of any parent or affiliated organization that will engage in business transactions with purchasers relating to sales solicited by the seller or that accepts responsibility for statements made by, or acts of, the seller relating to sales solicited by the seller.

(2) The seller's business form and place of organization and, if the seller is a corporation, a copy of its articles of incorporation and bylaws and amendments thereto; or, if a partnership, a copy of the partnership agreement; or if operating under a fictitious business name, the location where the fictitious name has been registered. All the same information shall be included for any parent or affiliated organization disclosed pursuant to section (1) of this rule.

(3) The complete street address or addresses of all locations, designating the principal location from which the telephonic seller will be conducting business. If the principal location of the seller is not in this state, then the seller shall also designate which of its locations within this state is its main location in the state.

(4) A listing of all telephone numbers to be used by the seller and the address where each telephone using each of these telephone numbers is located.

(5) The name of, and the office held by, the seller's officers, directors, trustees, general and limited partners, sole proprietor, and owners, as the case may be, and the names of those persons who have management responsibilities in connection with the seller's business activities.

(6) The complete address of the principal residence, the date of birth and the driver's license number and state of issuance of each of the persons whose names are disclosed pursuant to section (5) of this rule.

(7) The name and principal residence address of each person the telephonic seller leaves in charge at each location from which the seller does business in this state, as defined in OAR 137-020-0200(2), and the business location which each of these persons is or will be in charge of.

(8) A statement, meeting the requirements of this rule, as to both the seller, whether a corporation, partnership, firm, association, joint venture, or any other type of business entity (and whether identified pursuant to section (5) or (7) of this rule or not), and as to any person identified pursuant to sections (5) and (7) of this rule, who:

(a) Has been convicted of a felony or misdemeanor involving fraud, theft, embezzlement, fraudulent conversion, or misappropriation of property. For purposes of this paragraph, a plea of nolo contendere is a conviction;

(b) Has had entered against him or her a final judgment or order in a civil or administrative action, including a stipulated judgment or order, if the complaint or petition in the civil or administrative action alleged acts constituting a violation of the Unlawful Trade Practices Act, fraud, theft, embezzlement, fraudulent conversion, or misappropriation of property, the use of untrue or misleading representations in an attempt to sell or dispose of real or personal property, or the use of unfair, unlawful or deceptive business practices;

(c) Is subject to any currently effective injunction or restrictive court order relating to business activity as the result of an action brought by a federal, state, or local public agency or unit thereof, including, but not limited to, an action affecting any vocational license;

(d) Has at any time during the previous seven tax years filed for bankruptcy, been adjudged a bankrupt, been reorganized due to insolvency, or been a principal, director, officer, trustee, general or limited partner, or had management responsibilities of any other corporation, partnership, joint venture, or business entity that has so filed or was so adjudicated or reorganized during or within one year after the period that the person held that position. For purposes of subsections (a), (b) and (c) of this section, the statement required by this subdivision shall identify the seller or person, the court or administrative agency rendering the judgment or order, the docket number of the matter, the date of the judg-

ment or order, and the name of the governmental agency, if any, that brought the action resulting in the judgment or order. For purposes of this subsection, the statement required by this subdivision shall include the name and location of the seller or person filing in bankruptcy, adjudged a bankrupt, or reorganized due to insolvency, and shall include the date thereof, the court which exercised jurisdiction, and the docket number of the matter.

(9) The name of the financial institution and account number for each of the seller's demand accounts; checking accounts; and merchant accounts used for the deposit of any credit card charge slips, including but not limited to credit cards issued by VISA, MasterCard, Discover Card, American Express, Diners Club or Carte Blanche.

(10) Every pseudonym or alias ever used or now being used by a salesperson, manager or principal of the telephonic seller's business.

(11) A list of the names and principal residence addresses of salespersons who solicit on behalf of the telephonic seller and the names the salespersons use while so soliciting.

(12) A description of the items the seller is offering for sale and a copy of all sales scripts the telephonic seller requires salespersons to use when soliciting prospective purchasers, or if no sales script is required to be used, a statement to that effect.

(13) A copy of all sales information and literature (including but not limited to scripts, outlines, instructions, and information regarding how to conduct telephonic sales, sample introductions, sample closings, product information, and contest or premium-award information) provided by the telephonic seller to salespersons or of which the seller informs salespersons, and a copy of all written materials the seller sends to any prospective or actual purchaser.

(14) If the telephonic seller represents or implies, or directs salespersons to represent or imply to purchasers that the purchaser will receive certain specific items (including a certificate of any type which the purchaser must redeem to obtain the item described in the certificate) or one or more items from among designated items, whether the items are denominated as gifts, premiums, bonuses, prizes, or otherwise, the filing shall include the following:

(a) A list of the items offered;

(b) The value or worth of each item described to prospective purchasers and the basis for the valuation;

(c) The price paid by the telephonic seller to its supplier for each of these items and the name, address, and telephone number of each item's supplier;

(d) If the purchaser is to receive fewer than all of the items described by the seller, the filing shall include the following:

(A) The manner in which the telephonic seller decides which item or items a particular prospective purchaser is to receive;

(B) The odds a single prospective purchaser has of receiving each described item;

(C) The name and address of each recipient who has, during the preceding 12 months (or if the seller has not been in business that long, during the period the telephonic seller has been in business) received the item having the greatest value and the item with the smallest odds of being received.

(e) All rules, regulations, terms, and conditions a prospective purchaser must meet in order to receive the item.

(15) If the telephonic seller is offering to sell any metal, stone, or mineral, the filing shall include the following:

(a) The name, address, and telephone number of each of the seller's suppliers and a description of each metal, stone, or mineral provided by the supplier;

(b) If possession of any metal, stone, or mineral is to be retained by the seller or will not be transferred to the purchaser until the purchaser has paid in full, the filing shall include the following:

(A) The address of each location where the metal, stone, or material will be kept;

(B) If not kept on premises owned by the seller or at an address or addresses set forth in compliance with section (3) of

this rule, the name of the owner of the business at which the metal, stone, or mineral will be kept;

(C) A copy of any contract or other document which evidences the seller's right to store the metal, stone, or mineral at the address or addresses designated pursuant to paragraph (A) of this subsection.

(c) If the seller is not selling the metal, stone, or mineral from its own inventory, but instead purchases the metal, stone, or mineral to fill orders taken from purchasers, the filing shall include copies of all contracts or other documents evidencing the seller's ability to call upon suppliers to fill the seller's orders;

(d) If the seller represents to purchasers that the seller has insurance or a surety bond of any type relating to a purchaser's purchase of any metal, stone, or mineral from the seller, the filing shall include a complete copy of all these insurance policies and bonds;

(e) If the seller makes any representations as to the earning or profit potential of purchases of any metal, stone, or mineral, the filing shall include data to substantiate the claims made. If the representation relates to previous sales made by the seller or a related entity, substantiating data shall be based on the experiences of at least 50 percent of the persons who have purchased the particular metal, stone, or mineral from the seller or related entity during the preceding six months (or if the seller or related entity has not been in business that long, during the period the seller or related entity has been in business) and shall include the raw data upon which the representation is based, including, but not limited to, all of the following:

(A) The length of time the seller or related entity has been selling the particular metal, stone, or mineral being offered;

(B) The number of purchasers thereof from the seller or related entity known to the seller or related entity to have made at least the same earnings or profit as those represented;

(C) The percentage that the number disclosed pursuant to paragraph (B) of this subsection represents of the total number of purchasers from the seller or related entity of the particular metal, stone, or mineral.

(16) If the telephonic seller is offering to sell an interest in oil, gas, or mineral fields, wells, or exploration sites, the filing shall include disclosure of the following:

(a) The seller's ownership interest, if any, in each field, well, or site being offered for sale;

(b) The total number of interests to be sold in each field, well, or site being offered for sale;

(c) If, in selling an interest in any particular field, well, or site, reference is made to an investigation of these fields, wells, or sites by the seller or anyone else, the filing shall include the following:

(A) The name, business address, telephone number, and professional credentials of the person or persons who made the investigation;

(B) A copy of the report and other documents relating to the investigation prepared by the person or persons.

(d) If the seller makes any representation as to the earning or profit potential of purchases of any interest in these fields, wells, or sites, the filing shall include data to substantiate the claims made. If the representation relates to previous sales made by the seller or a related entity, the substantiating data shall be based on the experiences of at least 50 percent of the purchasers of the particular interests from the seller or the related entity during the preceding six months (or if the seller has not been in business that long, during the period the seller or related entity has been in business) and shall include the raw data upon which the representation is based, including, but not limited to, all of the following:

(A) The length of time the seller or related entity has been selling the particular interests in the fields, wells, or sites being offered;

(B) The number of purchasers of the particular interests from the seller or related entity known to the seller to have made at least the same earnings as those represented;

(C) The percentage which the number disclosed pursuant to paragraph (B) of this subsection represents of the total number of

purchasers of the particular interests from the seller or related entity.

Stat. Auth.: ORS 646

Stats. Implemented: ORS 646.553

Hist.: JD 4-1989, f. & cert. ef. 10-3-89

137-020-0203

Information to be Provided Each Prospective Purchaser

In addition to complying with the requirements of OAR 137-020-0202, as applicable, each telephonic seller, shall, at the time the solicitation is made and prior to consummation of any sales transaction, provide all of the following information to each prospective purchaser:

(1) If the telephonic seller represents or implies that a prospective purchaser will receive, without charge therefor, certain specific items or one item from among designated items, whether the items are denominated as gifts, premiums, bonuses, prizes, or otherwise, the seller shall provide the following:

(a) The information required to be filed by OAR 137-020-0202(14)(d)(A) and (B), and (e);

(b) The complete street address of the location from which the salesperson is calling the prospective purchaser and, if different, the complete street address of the telephonic seller's principal location;

(c) The total number of individuals who have actually received from the telephonic seller, during the preceding months (or if the seller has not been in business that long, during the period the telephonic seller has been in business), the item having the greatest value and the item with the smallest odds of being received.

(2) If the telephonic seller is offering to sell any metal, stone, or mineral, the seller shall provide the following information:

(a) The complete street address of the location from which the salesperson is calling the prospective purchaser and, if different, the complete street address of the telephonic seller's principal location;

(b) The information specified in OAR 137-020-0202(15)(b)(A) and (B) and (e).

(3) If the telephonic seller is offering to sell an interest in oil, gas, or mineral fields, wells, or exploration sites, the seller shall provide the following information:

(a) The complete street address of the location from which the salesperson is calling the prospective purchaser and, if different, the complete street address of the telephonic seller's principal location;

(b) The information required to be filed by OAR 137-020-0202(16)(a), (b) and (d) and (c)(A).

(4) If the telephonic seller represents that office equipment or supplies being offered are offered at prices which are below those usually charged for these items, the seller shall provide the following information:

(a) The complete street address of the location from which the salesperson is calling the prospective purchaser and, if different, the complete street address of the telephonic seller's principal location;

(b) The name of the manufacturer of each of the items the telephonic seller has represented for sale and in which the prospective purchaser expresses interest.

Stat. Auth.: ORS 646

Stats. Implemented: ORS 646.557

Hist.: JD 4-1989, f. & cert. ef. 10-3-89

137-020-0250

Loan Brokers and Misleading Activities

(1) Definitions: As used in this rule:

(a) The definitions of terms set forth in ORS 646.605 are applicable;

(b) "Advance Fee" means any consideration which is assessed or collected, prior to the closing of a loan, by a loan broker and includes, but is not limited to, payments to information providers as defined under ORS 759.700 et seq.;

(c) "Advertise" means any form of solicitation including but not limited to newspaper, radio and television advertisements;

(d) "Borrower" means a person obtaining or attempting to obtain a loan of money or a line of credit for personal use;

(e) "Loan Broker" means any person who:

(A) For or in expectation of consideration arranges or attempts to arrange or offers to find a loan of money or a line of credit;

(B) For or in expectation of consideration assists or advises a borrower in obtaining or attempting to obtain a loan of money, a line of credit, or related guarantee, enhancement, or collateral of any kind or nature; or

(C) Acts for or on behalf of a loan broker for the purpose of soliciting borrowers;

(D) "Loan broker" does not include:

(i) Any person making a direct loan to a consumer;

(ii) Any bank or savings and loan association, trust company, building and loan association, credit union, mutual bank and savings bank, consumer finance company, securities broker-dealer, real estate broker or salesperson, attorney, Federal Housing Administration or Veterans' Administration approved lender, mortgage broker or lender, or insurance company, provided that the person excepted is licensed by or approved by and subject to regulation or supervision of any agency of the United States or this state and is acting within the scope of the license or approval; and also excepting subsidiaries of licensed or chartered consumer finance companies, banks, credit unions, savings and loan associations;

(iii) Mortgage brokers exempt from licensing under ORS Chapter 59 or as defined in ORS 59.015(10);

(iv) Mortgage bankers as defined in ORS 59.015(9);

(v) A person making a retail installment sales;

(vi) Any person who has a contractual correspondent agreement with any qualified lender to deliver first or second mortgages secured by real estate; and

(vii) Any employee of the above exempted persons.

(f) "Principal" means any officer, director, partner, joint venturer, branch manager, or other person with similar managerial or supervisory responsibilities for a loan broker;

(g) "Qualified Lender" means any bank or savings and loan association, trust company, building and loan association, credit union, consumer finance company, retail installment sales company, Federal Housing Administration or Veterans' Administration approved lender or person who has available through a state or federally regulated financial institution \$250,000 which the person has agreed to use to finance loans and who has executed a written contract with a loan broker according to this rule.

(2) It is unfair or deceptive in trade or commerce for a loan broker to charge an advance fee unless the loan broker:

(a) Prior to accepting any advance fees, provides to the prospective borrower a written contract which includes:

(A) The names of the loan broker and any parent organizations under which the parent organization is doing business;

(B) The length of time the loan broker has been in business;

(C) A full and detailed description of the actual services that the loan broker will perform for the prospective borrower;

(D) The number of contracts that the loan broker has entered into in the past 12 months;

(E) The number of loans that have been made to consumers through contracts with the loan broker in the past 12 months and the dollar amount of those loans;

(F) The name of the bank into which the borrower's advance fees will be deposited;

(G) Information concerning who the advance fees are paid to and for what service;

(H) The names of the qualified lenders that are providing loans to the loan broker's customers and the criteria that the qualified lenders are using to determine whether to make a loan to prospective borrowers referred to them by the broker; and

(I) A provision outlining the refund requirement set forth in subsection (3)(a) of this rule.

(b) Has a written contract from a qualified lender agreeing to accept or reject a loan within the time specified in this rule and

agreeing to make a loan if an individual meets specified criteria set forth in the contract;

(c) Notifies the borrower within 14 days of receipt of the application whether the loan has been accepted or rejected and provides the loan within seven days of acceptance;

(d) Provides to the borrower, upon request, all correspondence and written materials with the qualified lender concerning the loan application;

(e) Submits the borrower's application within five days of receiving the application to a qualified lender with whom the loan broker has a written contract;

(f) Place any advance fees in an escrow account; and

(g) Complies with the provisions of section (3) of this rule.

(3) It is unfair and deceptive in trade or commerce for a loan broker to:

(a) Fail to refund within 48 hours of rejecting a loan the advance fees paid;

(b) Advertise or represents that all or most borrowers will qualify for a loan or that persons with bad credit histories or no credit histories will qualify for a loan;

(c) Fail to substantiate to the Oregon Department of Justice, within 14 days of a request, representations made regarding any offer to obtain a loan;

(d) Spend any advance fees until the loan has been granted; and

(e) Advertise loan brokering services without disclosing as a part of that advertisement:

(A) Any material restrictions regarding obtaining a loan;

(B) The qualified lenders who will provide the loans;

(C) The dollar amount of loans which the loan broker has obtained for borrowers;

(D) The cost of the service; and

(E) The maximum period of time the loan broker will take to obtain a written commitment from a qualified lender to loan money.

Stat. Auth.: ORS 183.310 - ORS 183.550, ORS 183.335(5) & ORS 646.608(1)(u) & (4)

Stats. Implemented: ORS 646.608(1)(u)

Hist.: JD 1-1992(Temp), f. & cert. ef. 2-13-92; JD 9-1992, f. & cert. ef. 4-15-92

137-020-0300

Unordered Real Estate, Goods, or Services

(1) As used in OAR 137-020-0300:

(a) "Goods" includes real estate and services;

(b) "Mistake" means unintentionally providing or sending goods to consumers;

(c) "Person" includes individual, corporation, partnership, association or any other legal entity;

(d) "Real Estate, Goods or Services" has the same meaning as ORS 646.605(7);

(e) "Send" includes delivery, mail, provide, or caused to be delivered, mailed or provided;

(f) "Unordered Goods" means any real estate, goods or services which are sent without prior expressed request or consent from the person receiving the goods;

(g) "Unordered Goods" do not include:

(A) Goods sent or services performed by mistake;

(B) A gift given free of charge to a consumer;

(C) Additions to existing services or levels of services already provided to consumers for which there is no separate and specific charge for such additions;

(D) Restructuring, after notice pursuant to section (2) of this rule of existing goods or services or levels of services already provided, where the restructuring does not result in a substantial change in goods or services;

(E) Goods sent pursuant to an agreement that is in compliance with 16 CFR § 425.

(2) A person satisfies the notice requirement of paragraph (1)(g)(D) of this rule when:

(a) The consumer receives one notice separate from the provider's regular billings, at least 30 but not more than 45 days,

in advance of the effective date of the delivery of the new goods, clearly and conspicuously:

(A) Describing the specific goods to be delivered;

(B) Stating the price of the goods to be delivered;

(C) Informing the consumer that the goods will be delivered unless the consumer informs the provider that the goods are not wanted; and

(D) Informing the consumer of at least two methods, at least one of which is expense-free to the consumer, by which the consumer can inform the provider of the consumer's desire not to receive the goods.

(b) The first bill, containing a charge for the goods, clearly and conspicuously, and in direct proximity to an itemized listing of the new charge on the face of the bill, advises the consumer of the inclusion of the new charge on the bill for the new goods and of the consumer's right to cancel those goods within ten days of the receipt of the bill at no cost to the consumer for the period during which those goods were provided prior to effective cancellation.

(3) The notice required by section (2) of this rule shall not require the consumer to cancel the goods to avoid the charge prior to ten days after the consumer's receipt of the first bill containing the charges for goods.

(4) For purposes of this rule, cancellation by mail shall be effective upon the date of mailing the request for cancellation.

(5) It shall be unfair and deceptive in trade or commerce for any person to:

(a) Send a consumer unordered goods unless the person sending the goods proves the goods were sent by mistake, as a gift, or as a result of the consumer's prior expressed request or consent;

(b) Send any bill to a consumer for any unordered goods;

(c) Interrupt, delay, terminate, cancel, or deny delivery of or other provision of goods to a consumer because the consumer has not paid for or returned unordered goods;

(d) Require a consumer to consent to or authorize the receipt of unordered goods as a condition of doing business with the person.

[Publications: The Publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 183.310 - ORS 183.410, ORS 646.608(1)(u) & ORS 646.608(4)

Stats. Implemented: ORS 646.608(1)(u)

Hist.: JD 3-1991(Temp), f. & cert. ef. 5-31-91; JD 9-1991, f. & cert. ef. 11-26-91

Contest, Sweepstakes and Prize Notification Rules

137-020-0410

Definitions and Exemptions

(1) Purpose: The purpose of OAR 137-020-0410 to 137-020-0440 is to declare as unfair or deceptive in trade or commerce certain practices in promotions.

(2) Authority: OAR 137-020-0410 to 137-020-0440 are adopted pursuant to ORS Chapter 183 on authority granted to the Attorney General by ORS 646.608(4) and ORS 646.608(1)(u).

(3) Definitions: For purposes of OAR 137-020-0410 to 137-020-0440:

(a) The definitions set forth in ORS 646.605 are applicable.

(b) "Advertisement" or "solicitation" means any oral, written or graphic notice given in a manner designed to attract public attention and includes without limitation, public broadcasts, and notices published in the electronic press as well as telephone and mail solicitations used to encourage any type of action by the person solicited relating to a promotion.

(c) "Clear and conspicuous" means the message is conveyed in a manner that is reasonably apparent to the audience to whom it is directed. In order for a message to be considered clear and conspicuous, it shall, at a minimum:

(A) Not contradict or substantially alter any terms it purports to clarify, explain or otherwise relate to; and

(B) In the case of printed advertising or solicitations:

(i) Be in close proximity to the terms it purports to clarify, explain or otherwise relate to; and

(ii) Be of sufficient prominence in terms of placement, font or color contrast as compared with the remainder of the advertisement or solicitation so as to be reasonably apparent to the audience to whom it is directed.

(d) "Contest" means a procedure where a prize is awarded or offered in which the outcome depends on the skill of the contestant and includes puzzles, games, and competitions. "Contest" includes any such procedure in which a person is required to purchase anything, pay anything of value or make a donation. "Contest" includes also any such procedure which is advertised in a way creating the reasonable impression that a payment of anything of value, purchase of anything, or making a donation is a condition of awarding a prize or receiving, using, competing for, or obtaining information about a prize.

(e) "Prize" means a gift, award, cash award, or other thing of value offered or awarded to a person in a promotion.

(f) "Promotion" means any contest, sweepstakes or scheme. "Promotion" does not include any contest, sweepstakes or scheme in which the sole act required for entry, participation, or receipt of a prize is that the participant mail or deposit a form or game piece with the sponsor, place a call to a local or toll free number, or mail a request or place a call to a local or toll-free number to obtain a game piece or form which the entrant can then return by mail or deposit at a local retail establishment, provided:

(A) That the fact that no purchase or payment of anything of value to the sponsor is required is clearly and conspicuously disclosed in each advertisement or solicitation; and

(B) No advertisements or solicitations for the contest, sweepstakes, or scheme create the reasonable impression that a payment of anything of value, purchase of anything, or making a donation is a condition of awarding a prize or receiving, using, competing for, or obtaining information about a prize.

(g) "Personal Financial Data" means personal financial data about the person, including but not limited to income, credit card ownership, bank account information, or similar financial information.

(h) "Scheme" means any advertisement or solicitation which requires a person to pay anything of value, make a donation, or creates the reasonable impression that a payment of anything of value, purchase of anything, or making a donation is a condition of awarding a prize or receiving, using, competing for, or obtaining information about a prize.

(i) "Sponsor" means any person who, in connection with any promotion, awards or offers another person a prize or who allows the person to receive, use, compete for, or obtain information about a prize.

(j) "Sweepstakes" means a procedure based on chance of awarding a prize. "Sweepstakes" includes any such procedure in which a person is required to purchase anything, pay anything of value or make a donation as a condition of awarding a prize or receiving, using, competing for, or obtaining information about a prize. "Sweepstakes" includes also any such procedure which is advertised in a way creating the reasonable impression that a payment of anything of value, purchase of anything, or making a donation, is a condition of awarding a prize or receiving, using, competing for, or obtaining information about a prize.

(k) "Verifiable Retail Value" has the meaning given in OAR 137-020-0015(1)(c).

(4) OAR 137-020-0410 to 137-020-0440 apply only to promotions. These rules do not apply to:

(a) Any activity by the State of Oregon or by a private person acting as a duly authorized contractee of the State Lottery Commission;

(b) A qualified nonprofit organization conducting a raffle pursuant to ORS Chapter 464; or

(c) Activity described in ORS 646.612(2).

(5) The information required to be disclosed pursuant to OAR 137-020-0420, OAR 137-020-0430 and OAR 137-020-0440 shall be deemed to be clearly and conspicuously disclosed if it is printed in compliance with this subsection in a distinct portion of the solicitation entitled "Consumer Disclosure", "Official Rules," or words of similar meaning. To comply with this subsection,

the main text of the advertisement or solicitation shall contain clear and conspicuous reference to this portion, and the reference to the portion shall appear in close proximity to each description of the principal prize.

(6) Broadcast advertisements shall be exempt from the requirements of OAR 137-020-0420 and 137-020-0430(2)(a), (b), and (c) if:

(a) The information otherwise required by OAR 137-020-0420 to 137-020-0440 is available in writing; and

(b) The broadcast advertisement clearly and conspicuously refers the consumer to the location where the information is available.

Stat. Auth.: ORS 180.520(1)(c), ORS 646.608(1)(u) & ORS 646.608(1)(u)
Stats. Implemented: ORS 180.520(1)(c), ORS 646.608(1)(u) & ORS 646.608(1)(u)
Hist.: JD 2-1996, f. 6-21-96, cert. ef. 7-8-96

137-020-0420

Rules of Unique Application to Contests

It is unfair or deceptive in trade or commerce for a sponsor to advertise or solicit any person to participate in any contest which requires a person to pay money or make a donation or creates the impression in a reasonable person that a payment of anything of value, purchase of anything, or making a donation is a condition of participation in the contest, unless there is clear and conspicuous disclosure of:

(1) The maximum number of rounds or levels, if the contest has more than one round or level;

(2) The date the final winner will be determined;

(3) The maximum total cost the final winner will have paid to the sponsor to participate in the contest, and, if the final winner must purchase or pay anything of value to a person other than the sponsor as a condition of eligibility, then that fact must be clearly and conspicuously disclosed;

(4) If the contest involves multiple rounds of increasing difficulty, an example illustrative of the last determinative round or a statement that subsequent rounds will be more difficult;

(5) If the contest is judged by other than the sponsor, the identity of or description of the qualifications of the judges;

(6) The method used in judging; and

(7) The name and address of the sponsor, or the sponsor's agent, consistently stated wherever it is used in a promotion, and:

(a) The name and address of the sponsor, or the sponsor's agent, stated on the envelope used to mail the advertisement or solicitation; or

(b) The name and address of the sponsor, or the sponsor's agent, stated on the entry form.

Stat. Auth.: ORS 180.520(1)(c), ORS 646.608(1)(u) & ORS 646.608(1)(u)
Stats. Implemented: ORS 180.520(1)(c), ORS 646.608(1)(u) & ORS 646.608(1)(u)
Hist.: JD 2-1996, f. 6-21-96, cert. ef. 7-8-96

137-020-0430

Rules of Unique Application to Sweepstakes

It is unfair or deceptive in trade or commerce for a sponsor to advertise or solicit any sweepstakes unless there is a clear and conspicuous disclosure of:

(1) The statement of odds of winning in arabic numerals; provided that if the odds of winning depend on the number of entries received, a statement to that effect will be deemed sufficient;

(2) The name and address of the sponsor, or the sponsor's agent, consistently stated wherever it is used in a promotion, and:

(a) The name and address of the sponsor, or the sponsor's agent, stated on the envelope used to mail the advertisement or solicitation; or

(b) The name and address of the sponsor, or the sponsor's agent, stated on the entry form or on the heading to the solicitation; and

(3) The rules for entry without purchase.

Stat. Auth.: ORS 180.520(1)(c), ORS 646.608(1)(u) & ORS 646.608(1)(u)
Stats. Implemented: ORS 180.520(1)(c), ORS 646.608(1)(u) & ORS 646.608(1)(u)
Hist.: JD 2-1996, f. 6-21-96, cert. ef. 7-8-96

137-020-0440

Prohibitions applicable to all promotions (Including Schemes, Sweepstakes, and Contest)

It is unfair or deceptive in trade or commerce for a sponsor to advertise or solicit for a promotion if the sponsor:

(1) Misleads a person as to the source of the promotion. This prohibition includes but is not limited to a promotion which indicates or implies that the promotion originates from a government agency, public utility, insurance company, consumer reporting agency, debt collector, law firm, or common carrier, unless such is the case;

(2) Misleads a person to believe the number of persons eligible for the prize, contest, or next level of the contest is limited, or that a person has been selected to receive a particular prize, unless such is the case;

(3) Represents that a person has been declared a finalist, is in first place, or is otherwise in a limited group of persons with an enhanced likelihood of winning or receiving a prize, from which a single winner or select group of winners will receive a prize, when more than 25% of those receiving the notice have the same chance of winning;

(4) Represents directly or by implication that a person will have an increased chance of receiving a prize by making multiple or duplicate purchases, payments or donations, or by entering more than once, unless such is the case;

(5) Misleads a person that the person is being notified a second or final time of the opportunity to receive or compete for a prize, unless such is the case;

(6) Requires as a condition of participation in any promotion any person to disclose the person's personal financial data;

(7) Creates the reasonable impression that disclosure of a person's personal financial data is a condition of participating in any promotion;

(8) Makes or solicits any charge or fee that is not clearly and conspicuously disclosed in the initial advertisement or solicitation, as a condition of entering or continuing to participate in that promotion;

(9) Connects or combines prizes from different promotions unless the fact that the same prizes may be offered in various promotions is clearly and conspicuously disclosed and the combination of prizes will not affect the stated odds of winning;

(10) Issues any writing which simulates or resembles:

(a) A negotiable instrument as described in ORS 73.1040(1) unless the writing clearly and conspicuously discloses its true value and purposes and the writing would not mislead a reasonable consumer; or

(b) An invoice unless the invoice seeks payment for goods, property or services which the recipient has previously agreed to receive from the sponsor.

(11) Fails to clearly and conspicuously disclose the verifiable retail value in arabic numerals of any prize which the person receiving the notice has been selected to receive or may be eligible to receive;

(12) Fails to clearly and conspicuously disclose the cost of shipping or handling fees or any other charges necessary to participate in a promotion;

(13) Fails to clearly and conspicuously make any other disclosure necessary to assure that the promotion is not misleading, unfair, or deceptive;

(14) Charges a participant in a promotion for shipping, unless the charge is:

(a) Less than or equal to the average cost of postage or the average charge of a delivery service in the business of delivering goods of like size, weight, and kind for shippers other than the offeror of the gift; or

(b) Less than or equal to the exact amount for shipping paid to an independent fulfillment house or an independent supplier, either of which is in the business of shipping goods for shippers other than the offeror of the gift; or

(15) Charges a participant in a promotion for handling, unless the charge is:

(a) Reasonable;

(b) Less than or equal to the actual cost of handling; or

(c) In the case of a general merchandise retailer, less than or equal to the actual amount for handling paid to an independent fulfillment house or supplier, either of which is in the business of handling goods for businesses other than the offeror of the gift.

Stat. Auth.: ORS 180.520(1)(c), ORS 646.608(1)(u) & ORS 646.608(1)(u)
Stats. Implemented: ORS 180.520(1)(c), ORS 646.608(1)(u) & ORS 646.608(1)(u)

Hist.: JD 2-1996, f. 6-21-96, cert. ef. 7-8-96

137-020-0500

Manufactured Dwelling Rule

(1) **Purpose:** The purpose of this rule is to declare as unfair or deceptive in trade or commerce certain practices involving the sale of manufactured dwellings.

(2) **Authority:** This rule is adopted pursuant to ORS Chapter 183 on authority granted by ORS 646.608(4) and ORS 646.608(1)(u).

(3) **Definitions:** For purposes of this rule:

(a) **"Dealer"** means any person in the business of selling, leasing or distributing new or used manufactured dwellings to persons who purchase or lease a manufactured dwelling for use as a residence.

(b) **"Manufactured dwelling"** has the meaning given in ORS 446.003(26)(a).

(c) **"Manufactured dwelling park"** has the meaning given in ORS 446.003(27).

(d) **"Prospective tenant"** means any person who has made any inquiry of a dealer or of the landlord of a manufactured dwelling park concerning the possibility of renting a space in a manufactured dwelling park.

(4) It is unfair or deceptive in trade or commerce for a dealer or a landlord of a manufactured dwelling park to:

(a) Require a prospective tenant to purchase a manufactured dwelling from a particular dealer or one of a group of dealers;

(b) Give preference to a prospective tenant who has purchased a manufactured dwelling from a particular dealer; or

(c) Require a purchaser to rent a space for a manufactured dwelling in a particular manufactured dwelling park or group of such parks.

Stat. Auth.: ORS 180.520(1)(c), ORS 646.608(1)(u) & ORS 646.608(4)

Stats. Implemented: ORS 646.607(1)(u) & ORS 646.608(4)

Hist.: JD 6-1997, f. & cert. ef. 11-3-97

137-020-0600

Misrepresentation of Notarial Powers; Notice of Notarial Powers and Fees

(1) As used in this section: "Notary public" means any person certified by the State of Oregon to provide notarial services as specified by ORS 194.005 to 194.200 and 194.505 to 194.595 who is not a member of the Oregon State Bar and who is not otherwise authorized by federal law to practice, serve as a representative or appear in immigration matters.

(2) It is unfair or deceptive in trade or commerce for a notary public to make an express or implied representation of powers, qualifications, rights or privileges that the notary public does not have, including but not limited to the power to provide advice of any kind on legal or immigration matters.

(3) It is unfair or deceptive in trade or commerce for a notary public to make an express or implied representation that the notary public is a "notario publico," or a "notario," or to advertise notarial services in a language other than English, unless the representation or advertisement clearly and conspicuously includes the following in the language of the representation or advertisement and in English:

(a) A statement, "I am not licensed to practice law in the State of Oregon, and I am not permitted to give legal advice on immigration or other legal matters or accept fees for legal advice"; and

(b) The fees for notarial acts specified under ORS 194.164.

(4) It is unfair or deceptive in trade or commerce for a notary public who makes an express or implied representation that the notary public is a "notario publico," or a "notario," or who adver-

tises notarial services in a language other than English to fail to clearly and conspicuously post a sign containing the information specified in subsection (3)(a) and (3)(b) of this rule in a publicly accessible area of the notary's place of business.

Stat. Auth.: ORS 180.520(1)(c), ORS 646.608(1)(u) & ORS 646.608(4)

Stats. Implemented: ORS 646.608(1)(u) & ORS 646.608(4)

Hist.: DOJ 3-1999, f. & cert. ef. 2-18-99

DIVISION 25

BINGO/RAFFLES/MONTE CARLO

General Provisions

137-025-0020

Definitions

For purposes of these rules, the following definitions shall apply:

(1) The "Department" means the Oregon Department of Justice.

(2) "Bingo" means a game played on a printed form or card containing a grid bearing horizontal and vertical lines of numbers. Each card must include the same number of numbers. The numbers may be pre-printed or completed by the players. Numbers are drawn from a receptacle containing no more than 90 numbers, until there are one or more winners. A winner(s) is determined by the player(s) to first cover or uncover the selected numbers in a designated combination, sequence or pattern as they appear on the player's card. The progress toward a "bingo" of the non-winning players shall be irrelevant in determining the prize payout for the winner(s). A "blackout" (i.e., covering all squares on the grid) shall qualify as a designated sequence or pattern. Games which do not qualify as bingo include, but are not limited to, games marketed as "quick shot bonanza," "pick X" bingo, and "pick-8" bingo in the format utilizing a 40 square grid.

(3) "Pull Tab" means a single folded or banded ticket or card, the face of which is initially covered or otherwise hidden from view to conceal a number, symbol or set of symbols, a few of which numbers or symbols out of every set of pull tabs have been designated in advance and at random as prize winners.

(4) "Raffle" means a form of a lottery in which each participant buys a ticket for an article or money designated as a prize and where the winner is determined by a random drawing. A raffle includes the elements of consideration, chance and a prize. Consideration is presumed to be present unless it is clearly and conspicuously disclosed to prospective participants that tickets to the drawing may be acquired without contributing something of economic value.

(5) "Door Prize Drawing" means a drawing held by a non-profit organization at a meeting of the organization where both the sale of tickets and the drawing(s) occur during the meeting and the total value of the prize(s) does not exceed \$500.

(6) "Handle" means the total amount of money and other things of value bet on the bingo, lotto or raffle games, the value of raffle chances sold or the total amount collected from the sale of imitation money during Monte Carlo events.

(7) "Responsible Officials of the Organization" means the officers of the organization and the board of directors, if any.

(8) "Bingo Game Manager" means any person who is responsible for the overall conduct of bingo games of a charitable, fraternal or religious organization.

(9) "Regular Bingo Game" means a bingo game where players use hard cards or paper cards from a packet which have been purchased for a package price and may be used by players during more than one game of a session.

(10) "Special Bingo Game" means a bingo game where players must purchase individual paper cards where use is limited to a specific bingo game.

(11) "Concessions" means the sale of food, beverages, related bingo supplies, such as daubers, glue and other retail items using a bingo theme sold to bingo players, except:

(a) When sold from booths, kitchens and other locations operated by nonprofit tax-exempt organizations and less than one-half of all of the locations' sales during the reporting period are made to bingo players; or

(b) When sold from a restaurant, tavern or other for-profit establishment which is organized primarily to sell food and beverages to the public and which makes sales to bingo players of Class C or D bingo licensees and such sales are made not more than one day per week per establishment and the establishment is open to the public and serves nonplayers during the bingo session.

(12) "Management or Operation" means supervising the games.

(13) "Administration or Operation" means supervising the games.

(14) "Supervise" means to direct, oversee and inspect the work of others; to exercise authority with respect to decision-making or the implementing of decisions; and responsibility for the performance of functions integral to the operation of bingo and raffles, including operation of the games and operation of the facility used to conduct the games.

(15) "Drawing" means an approved random selection process for determining winners in a raffle. To be random, each number in the drawing must have an equal chance of selection.

(16) "Monte Carlo event" means a gambling event at which wagers are placed with imitation money upon contests of chance in which players compete against the house. As used in this subsection, "imitation money" includes imitation currency, chips or tokens.

(17) "Monte Carlo equipment supplier" means a person or organization who leases equipment to a non-profit tax exempt organization for operation of a Monte Carlo event.

(18) "Monte Carlo event contractor" means a Monte Carlo event supplier who is employed to operate a Monte Carlo event on behalf of a non-profit tax exempt organization.

(19) "Monte Carlo event licensee" means any organization which has obtained a Monte Carlo event license pursuant to OAR 137-025-0410.

Stat. Auth.: ORS 167.117 (10) & (12), ORS 464.250(1) & ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87; JD 1-1989, f. & cert. ef. 3-1-89; JD 1-1991, f. 2-1-91, cert. ef. 3-1-91; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93; JD 7-1997(Temp), f. 12-31-97, cert. ef. 1-1-98 thru 6-20-98; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0030

Eligibility for Licenses in General

(1) Every applicant for a license to conduct bingo, raffle games, or Monte Carlo events must:

(a) Be organized primarily for purposes other than the operation of bingo, Monte Carlo, and raffle games;

(b) Have a valid organizational governing structure, and the members of the governing structure must exercise independent control over the organization's activities and budget;

(c) Be exempt from the payment of federal income taxes and have held that exempt status for at least one year preceding its application for a license. The application must be accompanied by a copy of a determination letter from the Internal Revenue Service, verifying tax exempt status or, if the organization qualifies for tax exempt status other than pursuant to **IRC 501(c)**, a signed opinion letter from an attorney or certified public accountant stating that the organization holds tax exempt status and citing the relevant provisions of the **Internal Revenue Code** which support the tax exempt status. If an Internal Revenue Service determination letter is dated less than one year prior to the date of application to the Department, the applicant shall have the burden of demonstrating that it has met all organizational and operational tests for the exempt status and has been organized primarily for charitable, fraternal or religious purposes for a period of not less than one year prior to the date of the application. Any applicant that claims its tax exempt status through a ruling by the Internal Revenue Service as to its parent organization's tax exempt status must demonstrate that it is covered by such a ruling. The applicant

must have been chartered by the parent organization for a period of one year preceding its application for a license.

(2) No joint license for conducting bingo, Monte Carlo, or raffle games will be issued to two or more organizations. However, the Department may grant approval for a licensee to share the operation of the games with other organizations which would otherwise qualify for a license under section (1) of this rule.

(3) Licenses to conduct bingo, Monte Carlo, or raffle games may not be transferred or assigned.

(4) A licensee shall promptly notify the Department if the licensee loses its federal tax exempt status. A license ceases to be valid if the licensee loses its tax exempt status.

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-88; JD 7-1997(Temp), f. 12-31-97, cert. ef. 1-1-98 thru 6-20-98; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0040

General Requirements of Operations

(1) No person shall conduct bingo, Monte Carlo, or raffle games unless he or she conducts such activities on behalf of a charitable, fraternal or religious organization licensed by the Department to operate such games or engages in such activity as is otherwise exempt from licensing as provided in section (2) of this rule. The sale of pull tabs shall not qualify as bingo, Monte Carlo, or raffle and is not permitted by these rules.

(2) The following activities shall not require a license under these rules:

(a) Door prize drawings;

(b) Operating bingo with a handle of no more than \$2,000 per session and with a total handle of no more than \$5,000 per calendar year;

(c) Holding raffles with a handle of no more than \$2,000 per raffle and with a total handle of no more than \$5,000 per calendar year;

(d) Holding Monte Carlo events with a handle of no more than \$2,000 per Monte Carlo event and a total handle of no more than \$5,000 per calendar year.

(3)(a) Except as provided in subparagraph (b) below, all individuals involved in the operation of bingo or raffle games, or Monte Carlo events shall be volunteers or employees of the licensee. Operation of the games shall not be conducted by independent contractors. However, a bingo licensee may contract with a third party to provide specific collateral services required for the proper and efficient operation of a bingo game. Such services may include bookkeeping/accounting services, payroll services, janitorial services, security services, construction services and legal services. Contract shall be permitted only if the third party regularly performs such services for clients other than licensees and the fee, if any, charged for the service(s) provided is customary and reasonable.

(b) An organization licensed to conduct Monte Carlo events may contract with a licensed or exempted Monte Carlo equipment supplier and/or Monte Carlo event contractor as provided in OAR 137-025-0420 to operate the event, including the provisions of equipment, supplies and personnel, provided that the licensed supplier is paid a fixed fee to conduct the event and the imitation money is sold to players by employees or volunteers of the licensed charitable, fraternal, or religious organization.

(4) A licensee shall not permit the operating expenses of its bingo and raffle games, excluding prizes and money paid to players, to exceed 18.0 percent of the annual handle of its bingo and raffle operations. If the expenses of bingo and raffle games operated by the licensee in the preceding 12 months have exceeded 18.0 percent, the bingo, or raffle license shall not be renewed unless the licensee files, on a form prescribed by the Department, a satisfactory plan for operating in compliance with the 18.0 percent expense limitation. The license shall be conditioned on continued compliance with the plan and may be revoked or suspended in the event of noncompliance.

(5) In the event that compensation is paid to personnel for services related to the operation of bingo, Monte Carlo, and raffle games, the compensation shall not exceed:

(a) 200 percent of the federal minimum wage for nonsupervisory personnel; and

(b) 300 percent of the federal minimum wage for supervisory personnel.

(6)(a) Unless excepted by the Department, the annual handle of combined bingo and raffle operations of any charitable, fraternal or religious organization shall not exceed \$1 million for license years ending prior to October 4, 1997 shall not exceed an amount calculated annually as provided in subsection (b) of this section;

(b) The handle limitation for license years ending December 31, 1991, to December 30, 1992, shall be \$1,160,000. Each subsequent increase shall be based on a percentage equal to the percentage increase in the cost of living for the previous calendar year. The change in the cost of living shall be measured by the change in the Portland Consumer Price Index for all Urban Consumers for All Items as prepared by the Bureau of Labor Statistics of the United States Department of Labor.

(7) No bingo card or raffle tickets shall be sold to persons under 18 years of age unless the sale is made in the presence of their parent or legal guardian.

(8) Unless excepted by the Department, no person shall spend more than 30 hours per week administering or operating bingo and raffle games.

(9) Bingo and raffle licensees with handles in excess of \$250,000 shall limit administrative and prize expenses to ensure that an amount not less than five (5.0) percent of the annual gaming handle is earned and transferred to the organization's general operating account, or other fund as directed by the organization's governing board, for use by the governing board in pursuit of the organization's charitable, fraternal, or religious mission.

Stat. Auth.: ORS 464.250(1) & ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88; JD 6-1991, f. & cert. ef. 10-22-91; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93; JD 7-1997(Temp), f. 12-31-97, cert. ef. 1-1-98 thru 6-20-98; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

Bingo Licenses

137-025-0050

Classes of Licenses

(1) A "Class A" bingo license shall authorize a licensee to collect a bingo handle of an unlimited amount during the license year.

(2) A "Class B" bingo license shall authorize a licensee to collect a bingo handle of no more than \$250,000 during the license year.

(3) A "Class C" bingo license shall authorize a licensee to collect a bingo handle of no more than \$75,000 during the license year.

(4) A "Class D" bingo license shall authorize a licensee to collect a bingo handle of no more than \$20,000 during the license year.

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93; JD 7-1997(Temp), f. 12-31-97, cert. ef. 1-1-98 thru 6-20-98; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0060

Application for Bingo License

(1) An application for a bingo license or license renewal shall be made on a form prescribed by the Department, shall be signed by a responsible official of the organization and shall be accompanied by the license application fee as provided in section (3) of this rule. The Department shall reject applications which are incomplete, are not accompanied by the documents required by this section or are not accompanied by a sufficient license fee. An applicant shall be immediately notified of any such deficiencies. The license application shall include the following information:

(a) The name, address and telephone number of the organization;

(b) A statement of the purposes for which the money received from the bingo games will be used;

(c) A statement as to whether or not the organization has had a license to operate bingo or raffle games denied, revoked or suspended by the State of Oregon or any other licensing authority;

(d) The full names and addresses of the responsible officials of the organization;

(e) For Class A or B bingo licensees, the name and address of the individual proposed by the applicant to act as its supervising bingo game manager;

(f) The address of the location proposed by the applicant where the bingo games will be held; the amount of rent to be paid for the location if not owned by the applicant; the party who is to be paid rent, if any; and a statement that rent will not be paid to a related taxpayer (as defined in **Section 1313(c) of the Internal Revenue Code**) of the organization's officers, directors or bingo game manager;

(g) The class of license sought by the applicant; and

(h) For Class A or B bingo licensees, the name and address of the financial institution and the account number for the bingo account(s) to be used by the applicant.

(2) The applicant shall submit the following documents with the application. The information required in subsections (c) through (f) of this section shall be on forms prescribed by the Department:

(a) A copy of a letter supporting tax exempt status as specified in OAR 137-025-0030(c);

(b) For a Class A or B license, a copy of a current or proposed lease agreement for the location of the bingo games if the applicant does not own the premises intended for use;

(c) For a Class A or B bingo license, a completed authorization to inspect bank records on a form furnished by the Department, authorizing the financial institution to disclose customer information regarding the applicant's bingo account to the Department;

(d) As required by Chapter 914, Oregon Law 1987, a waiver of potential liability claims against the State of Oregon, its agencies, employees and agents for any damages resulting from any disclosure or publication of any information acquired by the Department during any of its investigations, inquiries or hearings;

(e) A consent to inspections authorized by Chapter 914, Oregon Laws 1987, and the rules adopted thereto;

(f) A statement verifying whether or not the applicant has conducted bingo operations during the 12 months prior to submitting the application for a license and, if so, a financial summary of its operation; and

(g) Such other information as may be requested by the Department.

(3) The application fees are as follows:

(a) Class A license — \$100;

(b) Class B license — \$50;

(c) Class C license — \$20;

(d) Class D license — \$20.

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250(2), ORS 464.250(4), ORS 464.280(2)(a) & (b) & ORS 464.510

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

137-025-0070

Issuance of License to Conduct Bingo

(1) Within 60 days after the filing of a completed application for a license or license renewal to conduct bingo, the Department shall either issue a license or notify the applicant in writing, in accordance with ORS 183.310 to 183.550, that the license has been denied, and that the applicant is entitled to a hearing. The license shall be effective for one year from the date it is issued and may be renewed annually, except that a license issued prior to January 1, 1988, shall be effective until January 1, 1989. The form

of the license shall be prescribed by the Department and shall include:

(a) The name of the licensed organization;

(b) The class of license;

(c) The expiration date of the license;

(d) The authorized county and specific location where bingo games may be operated by the licensee; and

(e) Any special conditions of the license.

(2) Each license shall be conspicuously displayed by the licensee during operating hours at its authorized location.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250(2)

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

137-025-0080

Bingo License Renewal and Amendment

(1) Within 60 days prior to the expiration of an existing bingo license, the licensee may apply to the Department to renew the license. The application and fee shall be the same as for the initial license.

(2) A licensee shall not exceed the class limit for gross receipts:

(a) As soon as it is apparent to the licensee that the class limit on annual receipts from licensed activities will be exceeded, it shall immediately notify the Department and shall apply for the license class which is proper, submitting the basic fee required for that class less the amount originally submitted for the previous license;

(b) Any such additional license issued by the Department shall be valid only for the period which remains in the term of the previous license at the time such additional license is issued.

(3) A licensee shall not conduct any bingo operations at a location in addition to the location designated on its license unless approved in advance by the Department. A licensee desiring to change its regular authorized location to operate bingo shall submit an application to amend its license on a form prescribed by the Department.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250(2)

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

137-025-0090

Bingo Game Manager Permit

(1) No person shall act as a bingo game manager for a Class A or B licensee unless he or she has a current bingo game manager permit or temporary authorization from the Department. A Class A or B bingo licensee shall not allow any person to act as a bingo game manager unless he or she possesses a current bingo game manager permit or temporary authorization from the Department. Temporary authorization to act as a manager may be granted by the Department upon the filing of a completed bingo game manager application.

(2) An application for a bingo game manager permit shall be made on a form prescribed by the Department and shall be accompanied by a \$20 permit application fee. The Department shall reject applications which are incomplete or are not accompanied by a sufficient fee. All applicants shall be immediately notified of any such deficiencies. The license application shall include a personal information statement, including information regarding personal identity and personal history; a description of prior bingo employment activity and compensation received; a criminal history statement; finger prints and a completed release of educational, employment and military records form.

(3) A Class A and B licensee shall designate a bingo game manager for the licensee. The bingo game manager permit for the licensee's manager shall be conspicuously displayed by the licensee during operating hours at its authorized location. The licensee shall notify the Department in writing if it intends to designate a different bingo game manager:

(a) The bingo game manager shall be responsible for the overall operation of the bingo games by ensuring that:

(A) The public and the licensees are protected from fraud;

(B) All provisions of ORS 167.118, ORS Chapter 464 and OAR 137-025-0010 et seq. are followed;

(C) All records are completed and correct; and

(D) All monies derived from the bingo game are safeguarded until transferred to the licensee's bingo checking account.

(b) To the extent that they are not assumed by the board of directors or a bingo committee designated by the board, the duties and responsibilities of a bingo game manager include the following:

(A) Personnel actions regarding bingo workers including hiring, firing, training, evaluating, scheduling work periods, and/or setting salaries;

(B) Scheduling the bingo activity, including determining the time and days of operation;

(C) Setting the scope of the bingo activity by determining:

(i) The number of games to be played;

(ii) The type of games to be played;

(iii) The cost to each player to participate; and

(iv) The type and amount of prizes to be awarded.

(D) Setting the scope of marketing activities related to the bingo activity by determining:

(i) Type and scope of promotional activities; and

(ii) The media, content, timing, and target market area of advertising.

(4) A bingo game manager shall be knowledgeable regarding the rules for the conduct of bingo games.

(5) Within 60 days after the filing of a completed application for a permit, the Department shall either issue a permit or notify the applicant in writing, in accordance with ORS 183.310 to 184.550 that the permit has been denied and that the applicant is entitled to a hearing. The permit shall be effective for one year from the date it is issued and may be renewed annually. The form of the permit shall be prescribed by the Department.

(6) No person may concurrently act as a bingo game manager for more than one licensee unless such participation is approved by the Department.

(7) The organization's designated bingo game manager shall be physically present and shall personally oversee the operation of the game at least 50 percent of the time the licensee's bingo games are in session for each reporting period. The Department may approve a lower percentage requirement for designated managers of licensees holding exceptions pursuant to OAR 137-025-0190.

(8) Any person to whom a bingo game manager permit is issued shall notify the Department upon any change of the person's name, residence or mailing address, or change of employment if employed by a licensee. Notice required under this section may be given in person or by mail and:

(a) Must be given within 30 days of the date of the change;

(b) Must be in writing and contain the old and new name, residence or mailing address, or employer(s); and

(c) Must contain the person's bingo game manager permit number.

Stat. Auth.: ORS 464.250(1)

Stats. Implemented: ORS 464.250(1), (2), (3) & (4) & ORS 464.280

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

137-025-0091

Licensee/Permittee Qualifications

Pursuant to ORS 464.280, an applicant or holder of a bingo or raffle license or permit shall establish the following qualifications:

(1) Basic knowledge of the rules and regulations governing the operation of bingo by Class A and B licensees;

(2) Honesty, integrity and forthrightness, including completeness of relevant information submitted by the applicant in the course of the application process;

(3) Adherence to local, state and federal laws and regulations;

(4) Financial responsibility and integrity in financial transactions. Past insolvency, bankruptcy or intention to file for bankruptcy shall not per se disqualify an applicant.

Stat. Auth.: ORS 464.250(1)

Stats. Implemented: ORS 464.280

Hist.: JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

137-025-0100

Notice of Bingo Activities

Prior to conducting bingo operations, each Class A or B bingo licensee shall file with the Department a schedule of bingo activities on a form provided by the Department. The form shall list the regular sessions conducted by the licensee, specifying the days and hours of the week. The licensee shall not conduct operations except during the times on file with the Department. A licensee desiring to change its scheduled bingo activities shall file an amended schedule with the Department on a form prescribed by the Department.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

137-025-0110

Operator Lists

Each Class A or B bingo licensee shall submit to the Department, on a form prescribed by the Department, a list of the names, address and dates of birth of all employees who conduct bingo operations on behalf of the licensee. An initial list shall be submitted on or before the date the licensee begins conducting bingo operations pursuant to these rules. An updated list of employees shall be filed once every 90 days.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

Bingo Records and Reports

137-025-0120

Daily Bingo Records

Each Class A or B bingo licensee shall prepare and retain a daily bingo record on a form prescribed by the Department. A form shall be completed for each session and shall require the following information:

(1) The date, time and location of the session.

(2) A count of the attendance and the time the attendance count was made.

(3) The handle collected during the session.

(4) The gross receipts collected during session from the sale of concessions if the sale of concessions is operated by the licensee.

(5) The number of regular bingo game cards sold and the total money collected from such sales.

(6) For special bingo games, the number of cards sold and the total money collected from such sales for each game.

(7) For each bingo game of a session, the value of the prizes awarded to the winner(s) and the number of winners receiving such prizes.

(8) The total value of prizes awarded during the session.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250(5)

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0130

Bingo Receipts

(1) Each Class A or Class B licensee shall maintain a record of all winners of prizes valued at \$100 or more. The record shall be completed on a form prescribed by the Department. A form shall be completed for each session and shall require the following information:

(a) The name of the licensee;

(b) The date;

(c) A description of the prize;

(d) The amount of each cash prize;

(e) The name and address of the prize winner; and

(f) The signature of the prize winner.

(2) It shall be the responsibility of the licensee to see that the prize winner is accurately identified, and the licensee shall require such proof of identification as is necessary to establish the winner's identity. The licensee shall not pay out any prize until the winner has furnished to the licensee all information required by this rule to be upon the prize record.

(3) The record of prize winners shall be affixed to the daily bingo report for that session, along with a copy of the games schedule for that session, and shall be retained for a period of three years.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250(5)

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0140

Bingo Reports

(1) Each Class C or D licensee shall file an annual report with the Department no later than 60 days after the end of its license year. The report shall be on a form prescribed by the Department. The report shall include the following information:

(a) The total number of bingo sessions held during the license year;

(b) The total bingo handle;

(c) The total receipts from concessions if operated by the licensee;

(d) The total amount of cash prizes and the total cost to the licensee of all noncash prizes awarded;

(e) The total expenses directly related to the operation of bingo, including concessions if operated by the licensee, itemized by major categories of expenses;

(f) The total expenses expressed as a percentage of the total of the bingo handle plus the total receipts from concessions if operated by the licensee; and

(g) The net income from bingo activities.

(2) A Class B licensee shall file an annual report no later than 60 days after the end of the license year. The report shall be on a form prescribed by the Department. The report shall include the following information:

(a) The total number of bingo sessions held during the license year;

(b) The total bingo handle for the license year;

(c) The total receipts from concessions if operated by the licensee;

(d) The total amount of cash prizes and the total cost to the licensee of all noncash prizes awarded;

(e) The total expenses directly related to the operation of bingo, including concessions if operated by the licensee, itemized by major categories of expenses, including the following:

(A) A listing of each employee connected with the management, promotion, conduct or operation of the bingo game along with the employee's duties, hours and compensation;

(B) A statement describing the allocation method used in allocating common use expenses; and

(C) A detailed listing of all other expenses.

(f) The total expenses expressed as a percentage of the bingo handle plus the total receipts from concessions if operated by the licensee; and

(g) The total number of customers participating.

(3) A Class A licensee shall file a quarterly report for each of the following periods of the year: January 1 through March 31; April 1 through June 30; July 1, through September 30; and October 1, through December 31. The reports shall be on a form prescribed by the Department. The reports shall be filed no later than 30 days after the end of the reporting period. A licensee need not file a report for a quarterly period if the license was issued during the last month of the quarterly reporting period. However, if the licensee elects not to file a report, any activities during that month shall be included in the next quarterly report. The report shall include the following information:

(a) The total number of bingo sessions held during the quarter;

(b) The total bingo handle for the quarter;

(c) The total receipts from concessions if operated by the licensee;

(d) The total amount of cash prizes, and the total cost to the licensee of all noncash prizes awarded;

(e) The total expenses directly related to the operation of bingo, including concessions if operated by the licensee, itemized by major categories of expenses, including the following:

(A) A listing of each employee connected with the management, promotion, conduct or operation of the bingo game along with the employee's duties, hours and compensation;

(B) A statement describing the allocation method used in allocating common use expenses; and

(C) A detailed listing of all other expenses.

(f) The total expenses expressed as a percentage of the bingo handle plus the total receipts from concessions if operated by the licensee; and

(g) The total number of customers participating during the reporting period.

(4) All bingo reports shall be signed by the bingo game manager and a responsible official of the organization who shall be a different person than the bingo game manager.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250(5)

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0150

Bingo Fees

(1) All annual and quarterly bingo reports filed with the Department shall be accompanied by a fee, made payable to the Department of Justice, as follows:

(a) Class D license — No fee;

(b) Class C license — A fee of \$10 plus 0.4 of 1 percent of the bingo handle in excess of \$20,000;

(c) Class B license — A fee of 0.4 of 1 percent of the bingo handle up to \$75,000 and 0.8 of 1 percent of the bingo handle in excess of \$75,000;

(d) Class A license — A fee of 0.95 of 1 percent of the bingo handle.

(2) A delinquency fee of \$20 or 1 percent of the fee described above, whichever is greater, shall be paid by the licensee if the report or regular fee is not delivered to the Department by the due date.

(3) When the filing date for reports and fees falls on a Saturday or legal holiday, the due date is the next business day following the Saturday or legal holiday.

(4) The amended fee schedule shall apply to annual and quarterly reporting periods ending September 30, 1993, and thereafter.

Stat. Auth.: ORS 464.250(1)

Stats. Implemented: ORS 464.250(2) & ORS 464.250(3)

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

Operation of Bingo Games

137-025-0160

Conduct of Bingo in General

(1) No employee of the licensee involved in the conduct of bingo games may receive a prize or participate as a player at a bingo game session in which the employee is actually involved in the conduct of the bingo games.

(2) All prizes awarded in connection with bingo games, whether in cash or merchandise, and all rules by which such prizes may be won, including costs to a participant, shall be disclosed to each participant prior to that participant taking part in the activity or paying for the opportunity to take part in the activity. Disclosures shall be made by conspicuously posting or displaying upon the premises where the activity is operated a complete description of the rules of the activity, an explanation of how each prize can be won, and the cost to participate in the activity.

(3) The numbers for bingo shall be physically selected from a container, and players shall be able to view the selection process, including an unobstructed view of the container or blower cham-

ber. Immediately following the drawing of each number in the bingo game, the caller shall display the letter and number for viewing by the participants. Numbers shall not be selected by electronic equipment, such as by computer.

(4) All prizes, or script redeemable for prizes, paid to the winner(s) shall be paid by the licensee; no prizes or script shall be transferred from non-winners to the winner(s).

(5) Bingo cards may not be purchased or played other than at the approved location of the licensee's game; a player must be present to win.

(6) Except for the conduct of "bonanza" bingo described in section (7) of this rule, the numbers shall be drawn and announced during the play of the game; each player covers the corresponding number, if present on the bingo card, as each number is called.

(7) A licensee may play "bonanza" bingo by drawing a pre-designated quantity of bingo numbers before the actual playing of the bonanza bingo game only if the licensee complies with the following procedures:

(a) Bonanza bingo cards shall remain sealed until such time as they are sold to the players;

(b) The balls drawn in advance of the bonanza bingo game shall be drawn during a bingo session in the presence of the players; and

(c) The quantity of numbers drawn in advance shall be fewer than the number which would produce a probable instant winner, based upon the rules of the game and the expected number of players.

(8) No operator shall engage in any act, practice, or course of operation as would operate as a fraud to affect the outcome of any bingo game.

(9) Cages or blowers used to mix and select bingo numbers shall be designed and constructed in such a manner which reasonably provides a thorough mix of the numbers and random selection. Cages and blowers shall be cleaned and maintained in good repair so as to prevent damage to the bingo numbers.

(10) Bingo numbers shall be periodically inspected, cleaned and maintained in good condition by the licensee. No bingo numbers may be used in play which are defective, cracked, broken, illegible, out of round or damaged in such a manner that would interfere with or affect the random selection process. Only sequentially complete sets of bingo numbers shall be placed in play; there shall be no duplication of numbers.

(11) No person shall tamper with, mutilate, weight, or otherwise alter a bingo number in any manner that would interfere with or affect the random selection process.

(12) The Department may immediately remove any bingo number or set of bingo numbers from play if a violation is found. The number or number set shall not be returned to play until the violation is corrected. The Department may require that any bingo number or number set be replaced or tested for compliance if a violation is found or suspected.

Stat. Auth.: ORS 464.250(1) & ORS 464
Stats. Implemented: ORS 464.250(7)
Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88; JD 1-1991, f. 2-1-91, cert. ef. 3-1-91;
JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

137-025-0170

Bingo Checking Account

Each Class A or B licensee shall have one or more separate checking accounts for bingo related purposes. All bingo proceeds, except amounts paid for prizes shall be deposited in the bingo checking account within three business days of their collection. Expenses which are exclusively related to the conduct of bingo games shall be paid from the bingo account. After bingo expenses have been paid, the licensee may transfer funds from the bingo account to another account of the licensee. The licensee shall retain a copy of all bingo checking account records, including account statements, canceled checks, check registers, and deposit slips for a period of three years.

Stat. Auth.: ORS 464
Stats. Implemented: ORS 464.250(5)
Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0180

Bingo Operating Limits

(1) Unless excepted by the Department, a licensee shall not operate bingo games for more than 15 hours nor more than three days in any one calendar week. However, a Class C or D licensee may operate without restriction as to number of days or hours per week if its total operations are limited to no more than 12 consecutive days during its license year.

(2) A licensee shall not award a prize exceeding \$1,500 in value in any one game.

(3) The "operating expenses" of all bingo and raffle games, conducted by the licensee as defined in ORS 167.117(14), excluding prizes and money paid to players, shall not exceed 18 percent of the total of the annual handle of those games plus the total receipts from concessions, if operated by the licensee:

(a) Operating expenses shall include the cost of concessions if operated by the licensee, but shall not include the wholesale cost of food, beverages and other related concessions of such operations;

(b) If expenses are related to both the bingo operations and the nonbingo operations of a licensee (such as rent, utilities and employee salaries), a reasonable allocation shall be made between the bingo and nonbingo activities. Employee salaries shall be allocated based upon hours spent in bingo and nonbingo activities;

(c) All leasehold improvements and improvements to bingo facilities owned by the licensee may be reasonably amortized;

(d) No salary of an employee of the licensee shall be considered an operating expense for purposes of this subsection, if less than 20 percent of the employee's time is devoted to activities directly related to the games;

(e) Fees paid to the Department are not operating expenses for purposes of this subsection;

(f) If a licensee subleased its space or equipment to one or more additional licensees, the licensee may pro rate its rental expenses based on proportional use of the property; the pro rate shall be based on the actual hours of use by that licensee compared to the total hours of use of the other licensees.

Stat. Auth.: ORS 464.250(1)
Stats. Implemented: HB 3009, 1997
Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0190

Exceptions Approved by Department

(1) A bingo licensee that has received tax exempt status under the **Internal Revenue Code Section 501(c)(3)** and was operating a bingo game in Oregon in January, 1987, may apply for certain exceptions as provided in ORS 464.390. Requests for exceptions shall be prepared on forms prescribed by the Department. The forms shall include a description of why the licensee believes there is a compelling community need for the charitable activities funded by its bingo operations, a list of limits for which it seeks an exception plus the desired levels for which approval is sought, an explanation as to why its funding will be reduced unless the specific exceptions are granted, a monthly financial summary of its bingo operations for the period of January 1, 1986 to June 30, 1987, including the handle, the amount paid for prizes, the net receipts and the organization's regular hours of operation and such other information as may be requested by the Department.

(2) For purposes of this rule, "funding" shall refer to the net receipts from bingo operations available to the licensee after prizes, expenses and fees to the Department have been paid.

(3) The Department shall consider the following factors in evaluating whether there is a compelling community need for the charitable activities funded by a bingo operation:

(a) The nature of the charitable activities conducted or supported to date;

(b) The importance of those activities to the community;

(c) The prospect that those activities will be assumed by another organization or governmental entity or that a charitable

beneficiary can find similar funding or services elsewhere in the community; and;

(d) The level of community involvement in the organization's activities, including community financial support received through fundraising other than bingo and participation by individuals in the community in the management of the organization.

(4) For purposes of determining whether or not the Act will seriously reduce an organization's funding, the Department shall consider the level of net receipts generated by the bingo operation prior to June 30, 1987 and shall account for inflation in approving any exception. In approving any exception, the Department shall presume that, except for the payment of fees required by this Act, the net receipts as a percentage of handle for the period covered by the exception shall not be less than the comparable relationship which existed prior to June 30, 1987.

(5) The Department shall review the exceptions granted under this rule not less than once per year, unless the Department determines that there has been a material change of circumstances since the time the exceptions were granted to the licensee, in which case the Department shall initiate an immediate review of the license. The Department will not continue an exception that otherwise meets the requirements of this rule if there has been a material change of circumstances as defined in ORS 464.390(4) since the time when the licensee was granted the exception.

[Publications: The Publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0191

Multi License Supervision

(1) Pursuant to ORS 464.310(2), the Department may authorize an individual to manage the operation of a bingo facility on behalf of more than one licensee if:

(a) The individual is employed by or is a member of a bingo licensee and manages one or more functions described below for all of the licensees conducting bingo at the same facility;

(b) The individual's management responsibilities on behalf of the other licensees are solely related to the use, maintenance or upkeep of the facility, which may include janitorial and security services and ordering supplies relating to these functions;

(c) The individual does not exercise supervision or control over functions related to the operation of the games of more than one bingo licensee.

(2) An individual seeking the Department's approval to operate on behalf of more than one licensee as provided in section (1) of this rule, shall make application to the Department on a form prescribed by the Department.

Stat. Auth.: ORS 464.250(1)

Stats. Implemented: ORS 464.310(2)

Hist.: JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

Raffle Licenses

137-025-0200

Classes of Licenses

(1) A "Class A" raffle license shall authorize a licensee to conduct raffle games throughout the license year, but games with a handle of more than \$1,000 and no more than \$5,000 shall not exceed 12 per license year, and games with a handle of more than \$5,000 shall not exceed two per license year.

(2) A "Class B" raffle license shall authorize a licensee to conduct raffle games throughout the license year with the handle for each such game not to exceed \$5,000, but games with a handle of more than \$1,000 shall not exceed 12 per license year.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

137-025-0210

Application for Raffle License

(1) An application for a raffle license or license renewal shall be made on a form prescribed by the Department, shall be signed by a responsible official of the organization, and must be accompanied by the license application fee as provided in section (3) of this rule. The Department shall reject applications which are incomplete, are not accompanied by the documents required by this section, or are not accompanied by a sufficient license fee. An applicant shall be immediately notified of any such deficiencies. The license application shall include the following information:

(a) The name, address and telephone number of the organization;

(b) A statement of the purposes for which the money received from the raffle games will be used;

(c) A statement as to whether or not the organization has had a license to operate bingo or raffle games denied, revoked or suspended by the State of Oregon or any other licensing authority; and

(d) The full names and addresses of the responsible officials of the organization.

(2) The applicant shall submit the following documents with the application. The information required in subsections (b) and (c) of this section shall be on forms prescribed by the Department and shall be signed by a responsible official of the organization:

(a) A copy of a letter supporting tax exempt status as specified in OAR 137-025-0030(1)(c);

(b) As required by Oregon Laws 1987, Chapter 914, a waiver of potential liability claims against the State of Oregon, its agencies, employees and agents for any damages resulting from any disclosure or publication of any information acquired by the Department during any of its investigations, inquiries or hearings;

(c) A consent to inspection authorized by Chapter 914, Oregon Laws 1987, and the rules adopted thereto; and

(d) Such other information as requested by the Department.

(3) The application fees are as follows:

(a) Class A raffle license — \$50;

(b) Class B raffle license — \$20.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250(2), ORS 464.250(4) & ORS 464.280(2)(b)

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

137-025-0220

Issuance of License to Conduct Raffles

(1) Within 60 days after the filing of a completed application for a license or license renewal to conduct raffles, the Department shall either issue a license or notify the applicant in writing, in accordance with ORS 183.310 to 183.550, that the license has been denied, and that the applicant is entitled to a hearing. The license shall be effective for one year from the date it is issued and may be renewed annually, except that a license issued prior to January 1, 1988, shall be effective until January 1, 1989.

(2) The form of the license shall be prescribed by the Department and shall include:

(a) The name of the licensed organization;

(b) The class of license;

(c) The expiration date of the license;

(d) Any special conditions of the license.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 183.310, ORS 183.550 & ORS 464.250(2)

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

137-025-0230

Raffle License Renewal and Amendment

(1) Within 60 days prior to the expiration of an existing raffle license, the licensee may apply to the Department to renew the license. The application and fee shall be the same as for the initial license.

(2) A licensee shall not exceed the class limit for gross receipts:

(a) If a Class B licensee desires to conduct games with sales in excess of \$5,000, it shall notify the Department and shall apply for a Class A license, submitting the basic fee required for that class less the amount originally submitted for the previous license;

(b) Any such additional license issued by the Department shall be valid only for the period which remains in the term of the previous license at the time such additional license is issued.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250(2)

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

Raffle Records and Reports

137-025-0240

Raffle Records

(1) A raffle licensee shall maintain the following records or information with regard to individual raffle games and retain the information for a period of three years:

(a) The total amount of proceeds received from the sale of tickets for each raffle game;

(b) All expenses relating to the conduct of each raffle game; and

(c) The winning ticket stubs.

(2) A Class A licensee shall maintain a raffle log book for all raffle games where sales are intended to exceed \$5,000. The raffle log book shall be retained by the licensee for a period of three years. The raffle log book shall contain:

(a) A list of the names of all volunteers or employees who receive raffle tickets for sale;

(b) The numbers of tickets received by each seller;

(c) The number of purchased tickets returned to the licensee by each seller; and

(d) The amount of money from ticket sales returned to the licensee by each seller.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250(5)

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0250

Raffle Receipts

(1) A record shall be prepared by a raffle licensee for each winner of a prize with a retail value of \$100 or more, which shall include:

(a) The name of the licensee;

(b) The date of the drawing;

(c) A description of the prize;

(d) The name and address of the prize winner; and

(e) The signature of the prize winner.

(2) A raffle licensee shall obtain a receipt from the seller/distributor for all noncash prizes awarded with a retail value of more than \$500.

(3) The preceding receipts shall be retained by the licensee for a period of three years.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250(5)

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0260

Notice of Raffle Game

(1) Prior to conducting sales of raffle tickets, each Class A raffle licensee shall submit to the Department a completed raffle notice for all raffles where sales are intended to exceed \$5,000.

(2) The notice shall be submitted on a form to be obtained from the Department. The information to be submitted shall include:

(a) The name of the organization;

(b) The organization's raffle license number;

(c) The location, date and time for the draw;

(d) A description of and the retail value of the prizes to be awarded;

(e) The total number of tickets to be offered for sale and the price of each ticket; and

(f) A copy of a sample ticket.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250(4) & ORS 464.250(7)

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0270

Raffle Reports

(1) A raffle licensee shall file an annual report with the Department of Justice no later than 60 days after the end of the license year. The report shall be on a form prescribed by the Department. The report shall include the following information:

(a) The number of raffle games held during the license year;

(b) The date of each drawing;

(c) The total sales of each game;

(d) The total expenses relating to the conduct of each raffle game;

(e) The total amount of cash prizes and the total cost to the licensee of all noncash prizes awarded;

(f) The total expenses of all games expressed as a percentage of the total raffle handle; and

(g) The net income from raffle games.

(2) All raffle reports shall be signed by a responsible official of the organization.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250(5)

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0280

Raffle Fees

(1) All annual raffle reports filed with the Department shall be accompanied by a fee, made payable to the Department of Justice, of 0.5 of 1 percent of the raffle handle listed in the report. A delinquency fee of \$20 or one percent of the fee described above, whichever is greater, shall be paid by the licensee if the report or regular fee is not delivered to the Department by the due date.

(2) When the filing date for reports and fees falls on a Saturday or legal holiday, the due date is the next business day following the Saturday or legal holiday.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250(3)

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

Operation of Raffle Games

137-025-0290

Conduct of Raffles in General

(1) Tickets for entry into a raffle shall constitute a separate and equal chance to win with all other tickets sold or issued. No person may be required to obtain more than one ticket, or to pay for anything other than the ticket, in order to enter a raffle.

(2) No person may be required to be present at a raffle drawing in order to be eligible to receive a prize.

(3) In conducting a drawing in connection with any raffle, each ticket seller shall return to the organization stubs or other detachable sections of all tickets sold. Except for duck races as provided for in OAR 137-025-0291 and alternate drawing formats approved by the Department in section (8) of this rule, the organization shall place each stub or other detachable section of each ticket sold in a receptacle out of which the winning tickets are to be drawn. The receptacle must be designed so that each ticket placed therein has an equal opportunity with every other ticket to be the one withdrawn.

(4) No unsold ticket or stub shall be entered in the draw container or be otherwise considered for the draw to determine the winner or winners of any prize.

(5) Where prizes for a raffle are unclaimed, the prizes shall be held in a trust for a period of one year from the date of the draw. If at that time the prizes are unclaimed, the prize shall be donated to the licensee.

(6) A raffle licensee shall not sell tickets more than twelve months in advance of the draw date.

(7) If for any reason the raffle is not completed and the prizes not awarded on the scheduled drawing date, the sponsoring organization must take all steps necessary to notify ticket purchasers of that fact and return all money received from ticket purchasers within 30 days.

(8) An alternate drawing format may be used to determine the winner(s) if such a format is approved by the Department prior to the sale of any ticket or other form of raffle entry. The alternate

format must meet the definition of a drawing as defined in OAR 137-025-0020(16). To be approved, an alternate drawing format request must be submitted to the Department in writing at least 30 days prior to the sale of entries and must contain at a minimum, the following information:

- (a) The time, date and location of the drawing;
- (b) The type of random selection process to be used and complete details of its operations;
- (c) A description of how game integrity will be ensured so that each participant has an equal chance of winning.

Stat. Auth.: ORS 464.250(1)

Stats. Implemented: ORS 464.250(7)

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

137-025-0291

Duck Race Regulations

A licensee conducting a "Duck Race" raffle shall comply with the following:

(1) All ducks shall be positioned above the river at the same location and shall be released simultaneously. Once dropped, the ducks shall enter the river without interference or obstruction.

(2) Once the ducks enter the river, the ducks shall not receive human assistance until the race is concluded.

(3) The ducks shall be identified so that each duck corresponds to a separate numbered raffle ticket. The method of identification of the ducks shall be waterproof.

(4) At the finish line, the licensee shall construct a boom which will be designed to act to funnel the ducks to a chute. The chute shall be constructed so as to allow one duck at a time to pass through. The boom and the chute shall be reasonably secure. The boom shall be wide enough to capture the ducks that reach the finish line area as they move down stream.

(5) The course for the race shall be established so that the race may be observed by raffle purchasers. The length of the course shall be established so that the race will be conducted in less than one hour. The licensee shall conduct a test of the course, by releasing a sample of ducks and observing their progress, within one week prior to the race date. Once the race has started, a course shall not be altered.

(6) If a duck race is not completed in 90 minutes from the time the ducks are released into the river, the race shall be terminated and the licensee shall conduct the raffle by drawing tickets from a container as provided in OAR 137-029-0290(1) - (5).

Stat. Auth.: ORS 464.250(1)

Stats. Implemented: ORS 464.250(7)

Hist.: JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

137-025-0300

Raffle Prize Limits

(1) The total cash prize(s) offered or awarded in a raffle shall not exceed \$1,500.

(2) No prize shall be offered or awarded with a retail market value in excess of \$50,000 and the cumulative retail value of all prizes offered or awarded at a raffle shall not exceed \$100,000.

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0310

Raffle Tickets

(1) The following information must be printed upon each ticket sold or shall be otherwise provided to each purchaser at the time of the sale:

- (a) The date and time of the drawing;
- (b) The location of the drawing;
- (c) The name of the organization conducting the raffle;
- (d) The price of the chance;
- (e) A full and fair description of the prize or prizes to be awarded;
- (f) The retail market value of each prize to be awarded; and
- (g) The total number of tickets which may be sold.

(2) The preceding rules regarding raffle tickets do not apply to operations exempted by OAR 137-025-0040(2).

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250(1)

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88; JD 1-1989, f. & cert. ef. 3-1-89

Monte Carlo Events

137-025-0400

Monte Carlo Events in General

(1) All personnel conducting a Monte Carlo event shall be:

(a) volunteers or employees of a non-profit tax exempt organization licensed to conduct Monte Carlo events pursuant to OAR 137-025-0420;

(b) volunteers or employees of a non-profit tax exempt organization exempted from the requirement to hold a Monte Carlo event license pursuant to OAR 137-025-0040(2)(d); or

(c) employees or individual independent contractors of a Monte Carlo event contractor licensed pursuant to OAR 137-025-0420.

(2) No person or organization shall act as a Monte Carlo equipment supplier without a valid Monte Carlo equipment supplier license granted by the Department, except as provided in subparagraph (3) of this rule.

(3) A non-profit tax exempt organization may lease Monte Carlo equipment to another non-profit tax exempt organization without obtaining a Monte Carlo equipment supplier license.

(4) No person or organization shall act as a Monte Carlo event contractor licensee without a valid Monte Carlo event contractor license granted by the Department.

(5) No licensed Monte Carlo equipment supplier or licensed Monte Carlo event contractor shall enter into an agreement to lease Monte Carlo equipment and/or operate Monte Carlo games for a nonprofit tax exempt organization unless they obtain a signed written contract in compliance with OAR 137-025-0450. Equipment shall not be provided or services performed other than pursuant to the price and terms as provided in such contract.

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: JD 7-1997(Temp), f. 12-31-97, cert. ef. 1-1-98 thru 6-20-98; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

Monte Carlo Licenses

137-025-0405

Classes of Monte Carlo Charitable Games Licenses

(1) A "Class A" Monte Carlo license shall authorize a licensee to conduct Monte Carlo events with a gross handle of more than \$10,000 per event throughout the license year, but shall not exceed 7 events per license year.

(2) A "Class B" Monte Carlo license shall authorize a licensee to conduct Monte Carlo events throughout the license year with (a) the handle for each such event not to exceed \$5,000 per event, but shall not exceed 7 events per license year; or (b) the handle for each such event not to exceed \$10,000 per event, but shall not exceed 2 events per license year.

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: JD 7-1997(Temp), f. 12-31-97, cert. ef. 1-1-98 thru 6-20-98; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0410

Application for Monte Carlo Event License

(1) An application for a Monte Carlo license or license renewal shall be made on a form prescribed by the Department, shall be signed by a responsible official of the organization, and must be accompanied by the license application fee as provided in section (3) of this rule. The Department shall reject applications which are incomplete, are not accompanied by the documents required by this section, or are not accompanied by a sufficient license fee. An applicant shall be immediately notified of any such deficiencies. The license application shall include the following information:

(a) The name, address and telephone number of the organization;

(b) A statement of the purposes for which the money received from the Monte Carlo events will be used;

(c) A statement as to whether or not the organization has had a license to operate bingo, raffle games, or Monte Carlo events denied, revoked or suspended by the State of Oregon or any other licensing authority; and

(d) The full names and addresses of the responsible officials of the organization.

(2) The applicant shall submit the following documents with the application. The information required in subsections (b) and (c) of this section shall be on forms prescribed by the Department and shall be signed by a responsible official of the organization:

(a) A copy of a letter supporting tax exempt status as specified in OAR 137-025-0030(1)(c);

(b) As required by ORS 464.280, a waiver of potential liability claims against the State of Oregon, its agencies, employees and agents for any damages resulting from any disclosure or publication of any information acquired by the Department during any of its investigations, inquiries or hearings;

(c) A consent to inspection authorized by ORS 464.280 and the rules adopted thereto; and

(d) Copies of current or proposed rental or service contracts for facility lease or rental, and Monte Carlo event service or equipment provider. If no contract has been proposed or offered at the time of license application, applicant shall submit such contracts for approval by the Department, not less than seven days prior to the actual conduct of any Monte Carlo event.

(e) Consent to allow Department employees to be present on the premises before, during, and after the conduct of the Monte Carlo event to inspect and test equipment and examine records maintained by licensee.

(f) Such other information as requested by the Department.

(3) The non-refundable application fees are as follows:

(a) Class A Monte Carlo event license—\$50;

(b) Class B Monte Carlo event license—\$20.

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: JD 7-1997(Temp), f. 12-31-97, cert. ef. 1-1-98 thru 6-20-98; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0415

Application for Monte Carlo Supplier/Event Contractor License

(1) An application for a Monte Carlo equipment supplier and a Monte Carlo event contractor license or license renewal shall be made on a form prescribed by the Department, shall be signed by a responsible official of the organization, and must be accompanied by the license application fee as provided in section (3) of this rule. The Department shall reject applications which are incomplete, are not accompanied by the documents required by this section, or are not accompanied by a sufficient license fee. An applicant shall be immediately notified of any such deficiencies. The license application shall include the following information:

(a) The name, address and telephone number of the organization;

(b) A statement as to whether or not the organization has had a license to provide equipment or services for Monte Carlo events, bingo or raffle games denied, revoked or suspended by the State of Oregon or any other licensing authority; and

(c) The full names and addresses of the responsible officials of the organization.

(2) The applicant shall submit the following documents with the application. The information required in subsections (b) and (c) of this section shall be on forms prescribed by the Department and shall be signed by a responsible official of the organization:

(a) Proof of compliance with applicable state and local business registration laws and regulations.

(b) As required by Oregon ORS 464.280, a waiver of potential liability claims against the State of Oregon, its agencies, employees and agents for any damages resulting from any disclosure or publication of any information acquired by the Department during any of its investigations, inquiries or hearings;

(c) A consent to allow Department employees access to licensees' place of business for inspection and testing of equipment and examine records maintained by licensees.

(d) Consent to allow Department employees to be present on the premises where Monte Carlo events are held before, during, and after the conduct of the Monte Carlo event to inspect and test equipment and examine records maintained by licensee.

(e) A list of all games and gaming equipment offered for sale, lease, or rental.

(f) Such other information as requested by the Department.

(3) The non-refundable application and licensing investigation fees are as follows:

(a) Monte Carlo equipment supplier license—\$50.

(b) Monte Carlo event contractor license—\$250.

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: JD 7-1997(Temp), f. 12-31-97, cert. ef. 1-1-98 thru 6-20-98; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0420

Issuance of License to Conduct Monte Carlo Events or Supply Equipment and Services

(1)(a) Within 60 days after the filing of a completed application for a license or license renewal pursuant to OAR 137-025-0410 or 137-025-0415, the Department shall either issue a license or notify the applicant in writing, in accordance with ORS 183.310 to 183.550, that the license has been denied, and that the applicant is entitled to a hearing.

(b) The license shall be effective for one year from the date it is issued and may be renewed annually.

(2) The form of the license shall be prescribed by the Department and shall include:

(a) The name of the licensed organization;

(b) The class of license;

(c) The expiration date of the license;

(d) Any special conditions of the license.

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: JD 7-1997(Temp), f. 12-31-97, cert. ef. 1-1-98 thru 6-20-98; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0425

Monte Carlo License Renewal and Amendment

(1) Within 60 days prior to the expiration of an existing Monte Carlo event license or a Monte Carlo equipment supplier or event contractor license, the licensee may apply to the Department to renew the license. The application and fee shall be the same as for the initial license.

(2) A Monte Carlo event licensee shall not exceed the class limit for gross receipts:

(a) If a Class B licensee desires to conduct games with sales in excess of \$5,000 the limits described in OAR 137-025-0405(2), it shall notify the Department and shall apply for a Class A license, submitting the basic fee required for that class less the amount originally submitted for the previous license;

(b) Any such additional license issued by the Department shall be valid only for the period which remains in the term of the previous license at the time such additional license is issued.

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: JD 7-1997(Temp), f. 12-31-97, cert. ef. 1-1-98 thru 6-20-98; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

Operation of Monte Carlo Events

137-025-0430

Conduct of Monte Carlo Events in General

(1) Any person, corporation, or organization desiring to conduct Monte Carlo events shall:

(a) Comply with and meet all applicable provisions of ORS 128.610 et seq., 167.117 et seq., 464.250 et seq., OAR 137-025 et

seq. and the applicable provisions of all other state, federal, and local laws.

(b) Be issued and maintain all applicable local licenses.

(2) A Monte Carlo event licensee shall not sell imitation money more than twelve months in advance of the event date.

(3) No Monte Carlo event shall be conducted that exceeds 12 hours in length. For the purposes of this subsection, the 12-hour period is not dependent upon whether contests of chance are continuously operated.

(4) Monte Carlo events shall not be conducted in the same location more than 15 times in a calendar month or 40 times in a calendar year.

(5) An organization conducting a Monte Carlo event may not directly or indirectly rent a facility for the event from a licensed Monte Carlo equipment supplier or a Monte Carlo event contractor.

(6) Any Monte Carlo event contractor, employee, or agent assisting the conduct of a Monte Carlo event shall wear a printed or typed name tag clearly visible by the participants. The printing on the tag shall include, but not be limited to the following:

(a) First name of the person;

(b) The name of the private Monte Carlo event contractor's company for whom the person is working.

Stat. Auth.: ORS 464.250(1)

Stats. Implemented: HB 3009, 1997

Hist.: JD 7-1997(Temp), f. 12-31-97, cert. ef. 1-1-98 thru 6-20-98; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0435

Notice of Monte Carlo Event

(1) At least 10 days prior to conducting a Monte Carlo event, each Monte Carlo licensee shall submit to the Department a completed Monte Carlo event notice for all Monte Carlo events where sales of imitation money are intended to exceed \$5,000.

(2) The notice shall be submitted on a form to be obtained from the Department. The information to be submitted shall include:

(a) The name of the organization;

(b) The organization's Monte Carlo event license number;

(c) The location, date and time for the event;

(d)(A) A description of; and

(B) The retail value of the prizes to be awarded which exceed \$100 in value;

(e) A description of the manner in which imitation money may be redeemed for prizes.

(f) The name and address of any supplier of rented Monte Carlo equipment and/or any Monte Carlo event contractor that will conduct the event. A copy of any contract for such equipment or services shall accompany the notice.

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: JD 7-1997(Temp), f. 12-31-97, cert. ef. 1-1-98 thru 6-20-98; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0440

Monte Carlo Equipment Supplier/Event Contractor Contracts

(1) A Monte Carlo event contract with a licensed Monte Carlo equipment supplier and/or a Monte Carlo event contractor shall include, but not be limited to the following:

(a) Name and license number of the non-profit tax exempt organization which will conduct the event;

(b) Name and license number of the Monte Carlo equipment supplier and/or Monte Carlo event contractor;

(c) Date, times and location of events to be conducted;

(d) Detailed list of games to be conducted;

(e) Description of gaming equipment including number of gaming tables to be supplied;

(f) All rental terms and conditions including contract price;

(g) Number of dealers or other workers supplied, if any; and

(h) Signature and name of official of each party to the contract.

(2) A contract shall not provide for the operation of events for a period that exceeds one year in duration.

(3) No licensee shall pay a percentage of the receipts of the net profits from the Monte Carlo event for the rental of Monte Carlo event equipment, services, labor, or premises.

(4) A Monte Carlo event contractor shall deliver to the Department a copy of any contract for services no less than ten days prior to the Monte Carlo event.

Stat. Auth.: ORS 464.250(1)

Stats. Implemented: HB 3009, 1997

Hist.: JD 7-1997(Temp), f. 12-31-97, cert. ef. 1-1-98 thru 6-20-98; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0450

Purchase/Sale of Monte Carlo Imitation Money

(1) Imitation money shall be sold only by bona fide members or employees of the licensee organization. No imitation money shall be sold, or cash handled, by a Monte Carlo event contractor, his agents, or employees regardless of whether said person is a member of the licensed charitable, fraternal, or religious organization.

(2) All imitation money sold for use at a Monte Carlo event shall be identifiable as sold by the particular licensee or event contractor operating the event. A licensee may not collect from any player a sum in excess of \$200 per event for the purchase of imitation money for use at such Monte Carlo event.

(3) A Class A licensee shall follow the following described procedures in the sale of imitation money to Monte Carlo players.

(a) Each player shall receive a player identification card. The cards shall be sequentially numbered and the player's name shall be completed on the card. The player's name shall also be entered next to the same sequential number on a form prescribed by the department.

(b) The player identification card shall contain incremental amounts of money, the total of which shall not exceed \$200. Each time the player purchases imitation money, the licensee's seller shall cancel an amount on the card equal to the amount paid by the player.

(c) The licensee shall make good faith efforts to collect all player identification cards before the close of the event.

(4) Licensees shall conspicuously post a notice that no player may pay more than \$200 for imitation money per event

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: JD 7-1997(Temp), f. 12-31-97, cert. ef. 1-1-98 thru 6-20-98; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0455

Monte Carlo Event Prizes

(1) No cash prize shall be offered or awarded. Once purchased, imitation money cannot be redeemed for cash or cash equivalent.

(2) No prize shall be offered or awarded with a retail market value in excess of \$50,000 and the retail market value of prizes offered or awarded to Monte Carlo players shall not exceed \$100,000 per event.

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: JD 7-1997(Temp), f. 12-31-97, cert. ef. 1-1-98 thru 6-20-98; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0460

Authorized Games

(1) During a Monte Carlo event, an organization may conduct only the following authorized games of chance:

(a) Blackjack;

(b) Roulette;

(c) Craps;

(d) Caribbean stud poker;

(e) Let it ride;

(f) Wheel of fortune;

(g) Red dog;

(h) Jackpot; and

(i) Pai gow

(2) No other games may be conducted unless approved in writing by the Department. To be considered for approval, an

authorized game request must be submitted in writing to the Department at least 30 days prior to the event.

(3) No games utilizing any electromechanical device or other mechanism employing electronic chips, tubes, video display screens or microprocessors are allowable.

(4) Equipment used in the conduct of a Monte Carlo event shall be maintained in good repair and proper working order. Equipment which is not so maintained may immediately be removed from play at the direction of the Department.

(5) The utilization of equipment and method of play shall be such that each participant is afforded an equal chance of winning.

(6) No organization worker or contract worker shall conduct the game when his or her immediate family member is a participant at the worker's table.

(7) No person under the age of 18 years of age shall be permitted to participate in gaming at the Monte Carlo event or assist in the conduct of the Monte Carlo event.

(8) No volunteer or employee of a licensee No employee of a licensee paid for working a Monte Carlo event, or employee or agent of a Monte Carlo event contractor may participate in playing any game, either directly or indirectly or by proxy, or bid on, or receive any prize, at any Monte Carlo event at which they have worked in any capacity.

(9) Each game shall be conducted by a dealer present at the gaming table. The dealer shall be an employee or volunteer of the organization conducting the event or an employee or agent of a licensed Monte Carlo event contractor.

Stat. Auth.: ORS 464.250(1)

Stats. Implemented: HB 3009, 1997

Hist.: JD 7-1997(Temp), f. 12-31-97, cert. ef. 1-1-98 thru 6-20-98; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

Monte Carlo Reports and Records

137-025-0470

Monte Carlo Event Reports

(1) A Monte Carlo event licensee shall file an annual report with the Department of Justice no later than 60 days after the end of the license year. The report shall be on a form prescribed by the Department. The report shall include the following information:

(a) The number of Monte Carlo events held during the license year;

(b) The date of each event;

(c) The total Monte Carlo imitation money sales of each event;

(d) The total Monte Carlo expenses relating to the conduct of each event;

(e) The total cost to the licensee of all Monte Carlo prizes awarded;

(f) For purposes of this rule, if other activities are held at the event, the licensee may make a reasonable allocation between the Monte Carlo and non-Monte Carlo activities.

(2) All Monte Carlo event reports shall be signed by a responsible official of the organization.

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0475

Monte Carlo Event Records

A Monte Carlo event licensee shall maintain the following records or information on forms prescribed by the department, with regard to individual Monte Carlo events and retain the information for a period of three years:

(1) In the case of a Class A licensee, the information relating to the sale of imitation money at each Monte Carlo event required by OAR 137-025-0430(3). In the case of a class B licensee, information sufficient to establish gross sales of imitation money at each Monte Carlo event.

(2) All Monte Carlo expenses relating to the conduct of each Monte Carlo event;

(3) A description of all Monte Carlo prizes offered in conjunction with each Monte Carlo event, and the retail value of each prize which is valued at \$100 or more;

(4) Any contract with a licensed supplier of Monte Carlo event equipment and/or a licensed Monte Carlo event contractor;

(5) Any contract for rental/use of premises for the event.

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

137-025-0480

Monte Carlo Event Fees

(1) All annual Monte Carlo reports filed with the Department shall be accompanied by a fee, made payable to the Department of Justice, of 0.5 of 1 percent of the Monte Carlo handle listed in the report. A delinquency fee of \$20 or one percent of the fee described above, whichever is greater, shall be paid by the licensee if the report or regular fee is not delivered to the Department by the due date.

(2) When the filing date for reports and fees falls on a Saturday or legal holiday, the due date is the next business day following the Saturday or legal holiday.

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98

Miscellaneous

137-025-0500

Suspension, Revocation and Civil Penalties

(1) After notice and opportunity for hearing, as provided in ORS 183.310 to 183.550, the Department may assess a civil penalty not to exceed \$10,000 and may deny, revoke, suspend or refuse to renew any license or permit, for conduct as specified in ORS 464.470. In setting the amount of the civil penalty or the term of suspension, the Department shall consider the nature of the violation and whether the applicant, licensee, permit holder, or person with an interest in the bingo or raffles operation or proposed operation knew or should have known that the conduct constituted grounds for such action.

(2) The Department may take actions as specified in subparagraph (1) for conduct as describe in ORS 464.470. Such conduct includes, but is not limited to:

(a) Violating ORS 167.117, ORS 167.118, ORS Chapter 464, or these rules;

(b) Denying representatives of the Department or any law enforcement officer access to a location where a licensee conducts bingo or raffle game activity, or failing to promptly produce for the preceding officials for inspection or audit any records or receipts related to bingo or raffle operations;

(c) Misrepresenting or failing to disclose to the Department any material fact;

(d) Failing to file completed reports or pay fees within 30 days after receiving notification from the Department of a delinquency; and

(e) Operating a bingo, raffle game, or Monte Carlo event without a license, unless exempt under OAR 137-025-0040;

(f) Failing to maintain an adequate financial record keeping system and/or failure to keep accurate financial books and records.

(3) In determining whether to deny, revoke or suspend a license or permit due to past criminal activity, the Department will consider the following with respect to the applicant/licensee/permittee:

(a) The nature and severity of the criminal act(s);

(b) The relevance of the crime as it relates to the legal operation of nonprofit gaming;

(c) Mitigating or extenuating circumstances;

(d) Proximity in time of the criminal activity;

(e) Age at the time of the criminal activity;

(f) Pattern or frequency of criminal activity; and

(g) Honesty and forthrightness in disclosing the past criminal activity to department personnel.

(4) The Department may deny, revoke or suspend a license or permit if the applicant is a relative or associate of another individual or organization who has engaged in conduct in violation of ORS 464.470(1) and there is clear and convincing evidence that the applicant is likely to be subject to the control or influence of the violator.

(5) The Department may require an applicant, permittee or licensee whose permit or license has been denied or revoked to wait a period of time designated by the Department before reapplying for a permit/license.

Stat. Auth.: ORS 464.250(1)

Stats. Implemented: HB 3009, 1997

Hist.: DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98, Renumbered from 137-025-0320

137-025-0520

Model APA Rules

The Attorney General's Model Rules of Procedure under the Administrative Procedures Act, effective September 15, 1997, are by this reference adopted as the rules and procedures for carrying out ORS 167.117, ORS 167.118 and ORS Chapter 464, except as otherwise specifically provided herein.

[ED. NOTE: The full text of the Attorney General's Model Rules of Procedure is available from the agency.]

Stat. Auth.: ORS 914

Stats. Implemented: HB 3009, 1997

Hist.: DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98, Renumbered from 137-025-0330

137-025-0530

Effective Dates

(1) OAR 137-025-0010 is repealed, effective January 1, 1988.

(2) OAR 137-025-0020 to 137-025-0030, 137-025-0050 to 137-025-0110, 137-025-0190 to 137-025-0230 and 137-025-0330 shall take effect on November 1, 1987.

(3) OAR 137-025-0040, 137-025-0120 to 137-025-0180 and 137-025-0240 to 137-025-0320 shall take effect on January 1, 1988.

Stat. Auth.: ORS 464

Stats. Implemented: ORS 464.250(1)

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87; DOJ 5-1998, f. 6-19-98, cert. ef. 6-20-98, Renumbered from 137-025-0330

DIVISION 30

PUBLIC BIDDING

137-030-0000

Definitions

All capitalized terms have the meanings set forth below, unless otherwise defined in the chapter 137, division 30 rules.

(1) Addendum or Addenda: An addition or deletion to, a material change in, or general interest explanation of the Solicitation Document. Addenda shall be labeled as such and distributed to all interested Entities in accordance with these rules.

(2) Agency: A public agency or public contracting agency as defined in ORS 279.011(7) that has not established its own rules of procedure pursuant to ORS 279.049(5).

(3) Bid: A competitive offer, binding on the Bidder and submitted in response to an Invitation to Bid.

(4) Bidder: An Entity that submits a Bid in response to an Invitation to Bid.

(5) Closing: The date and time announced in the Solicitation Document as the deadline for submitting Offers.

(6) Competitive Range: The number of Proposers the Agency will negotiate with if the Agency intends to negotiate with Proposers in accordance with OAR 137-030-0090. The Competitive Range must be stated in the Solicitation Document, but will be decreased if the number of Proposers that submit Proposals is less than the specified number, or may be increased by the Agency in accordance with OAR 137-030-0090.

(7) Conduct Disqualification: A Disqualification pursuant to ORS 279.037.

(8) Contract: The Written agreement, resulting from the Solicitation Document that sets forth the rights and obligations of the parties.

(9) Contract Review Authority: The Director of the Oregon Department of Administrative Services or the Agency's local contract review board created pursuant to ORS 279.055 as applicable.

(10) Contract Price: The total of the awarded Bid or Proposal amount, including any approved alternates, and any fully executed change orders or amendments.

(11) Contract Release Order: The document authorizing a purchase from an operative Contract (e.g. an existing requirements contract).

(12) Contractor: The Entity awarded the Contract in response to the Solicitation Document.

(13) Days: Calendar days unless otherwise specified by these rules.

(14) DBE Disqualification: A Disqualification pursuant to ORS 200.065, 200.075, or 279.111.

(15) Descriptive Literature: The Offeror's materials submitted to provide information concerning the products available in response to the Solicitation Document.

(16) Disqualification: The preclusion of an Entity from contracting with an Agency for a period of time. Disqualification may be a Conduct Disqualification or DBE Disqualification. An Agency is authorized to disqualify an entity in accordance with OAR 137-030-0110.

(17) Electronic Advertisement: Electronic advertisement for Offers available over the internet via:

(a) The World Wide Web; or

(b) Telnet, provided the Agency maintains an internet World Wide Web site that describes how an Entity can access the advertisement through the internet via a telnet application. The Agency may maintain the World Wide Web site directly or through any third party service provider.

(18) Electronic Data Interchange Operating Agreement or EDI Operating Agreement: A series of standards that provide computer-to-computer exchange of business documents between organizations over telephone lines or computer networks. An EDI document is a document that has been transmitted pursuant to an EDI Operating Agreement.

(19) Entity: A natural person capable of being legally bound, sole proprietorship, limited liability company, corporation, partnership, limited liability partnership, limited partnership, profit and nonprofit unincorporated association, business trust, two or more persons having a joint or common economic interest, or any other person with legal capacity to contract, or a government or governmental subdivision.

(20) Facsimile: A document that has been transmitted to and received by the Agency in a format that is capable of being received via a device commonly known as a facsimile machine (e.g. a Facsimile Bid). A facsimile machine allows hard copy documents (written, typed or drawn material) to be sent over telephone lines and printed in another location.

(21) Foreign Contractor: A Contractor that is not domiciled in or registered to do business in the State of Oregon. See OAR 137-030-0130.

(22) Invitation to Bid or ITB: A Solicitation Document calling for Bids.

(23) Offer: A Bid or Proposal as applicable.

(24) Offeror: A Bidder or Proposer as applicable.

(25) Opening: The date, time and place announced in the Solicitation Document for the public opening of Written sealed Offers.

(26) Product Sample: A representative specimen of the item offered by the Offeror in response to the Solicitation Document. Unless otherwise provided in the Solicitation Document, the Product Sample shall be the exact product or a representative portion of that product offered by the Offeror.

(27) Proposal: A competitive Offer, binding on the Proposer and submitted in response to a Request for Proposals.

(28) Proposer: An Entity that submits a Proposal in response to a Request for Proposals.

(29) **Public Improvement:** Projects for construction, reconstruction or major renovation on real property by or for an Agency. "Public improvement" does not include emergency work, minor alteration, ordinary repair or maintenance necessary in order to preserve that Public Improvement.

(30) **Public Work:** Is defined in ORS 279.348(3).

(31) **Request for Proposals or RFP:** A Solicitation Document calling for Proposals.

(32) **Responsible Offeror** (also, **Responsible Bidder** or **Responsible Proposer**, as applicable): Is an Entity that has submitted an Offer and meets the standards set forth in OAR 137-030-0100(2)(e) and that has not been disqualified by the Agency under OAR 137-030-0110.

(33) **Responsive Offer** (also, **Responsive Bid** or **Responsive Proposal**, as applicable): An Offer that substantially complies with applicable solicitation procedures and requirements and the Solicitation Document.

(34) **Signed or Signature:** Any mark, word or symbol executed or adopted by an Entity evidencing an intent to be bound.

(35) **Solicitation Document:** An Invitation to Bid or Request for Proposals and includes all documents incorporated by reference.

(36) **Specification:** Any description of the physical or functional characteristics, or of the nature of a supply, service or construction item, including any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery and the quantities or qualities of materials to be furnished under the Contract. Specifications generally will state the result to be obtained and may, on occasion, describe the method and manner of doing the Work to be performed.

(37) **Tie Offers:** Tie Offers shall have the meaning set forth in OAR 137-030-0095.

(38) **Work:** The furnishing of all materials, equipment, labor, and incidentals necessary to successfully complete any individual item or the entire Contract and successful completion of all duties and obligations imposed by the Contract.

(39) **Written or Writing:** Conventional paper documents either manuscript or printed, in contrast to spoken words. It includes electronic transmissions if the Solicitation Document or Contract permits.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.011 & ORS 279.049(1)

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0005

Competitive Procurement

(1) **Generally.** An Agency shall award its Contracts by competitive procurement except as otherwise allowed or required in ORS 279.015(1)(a)-(h), (2), (3) or (4), 279.029(2), 279.053, 279.059(2), 279.095, 279.570, 279.850 or 282.210.

(2) **Federal Provisions.** If federal funds are involved, federal laws, rules and regulations shall govern the provisions of ORS 279.011 to 279.063 and these rules in the event of conflict.

Stat. Auth.: ORS 279.049

Stats. Implemented: 279.015(1) & ORS 279.056

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0006

Prequalification of Offeror

(1) Prequalification.

(a) **Mandatory Prequalification.** An Agency may, by rule, resolution, ordinance or other regulation, require mandatory prequalification of Offerors on forms prescribed by the Agency's Contract Review Authority. An Agency must indicate in the Solicitation Document if it will require mandatory prequalification. Mandatory prequalification is when an Agency conditions an Entity's submission of an Offer upon the Entity's prequalification. The Agency shall not consider an Offer from an Entity that is not prequalified if the Agency required prequalification.

(b) **Permissive Prequalification.** An Agency may prequalify an Entity for the Agency's solicitation list on forms prescribed by the Agency's Contract Review Authority, but the Agency shall not limit distribution of a solicitation to that list.

(2) **Prequalification Presumed.** If an Offeror is currently prequalified by either the Oregon Department of Transportation or the Oregon Department of Administrative Services to perform Contracts, the Offeror shall be rebuttably presumed qualified to perform similar Work for other Agencies.

(3) **Standards for Prequalification.** An Entity may prequalify by demonstrating to the Agency's satisfaction:

(a) That the Entity's financial, material, equipment, facility and personnel resources and expertise, or ability to obtain such resources and expertise, indicate that the Entity is capable of meeting all contractual responsibilities;

(b) The Entity's record of performance;

(c) The Entity's record of integrity;

(d) The Entity is qualified to contract with the Agency.

(See, OAR 137-030-0100(2)(e)).

(4) **Notice Of Denial.** If an Entity fails to prequalify for a mandatory prequalification, the Agency shall notify the Entity and specify the reasons under section (3) of this rule and inform the Entity of the Entity's right to a hearing under ORS 279.043 and 279.045.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.039, ORS 279.041 & ORS 279.047

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 1-1995, f. & cert. ef. 1-9-95; Renumbered from 137-030-0025; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0008

Eligibility to Bid or Propose on Construction Contracts

(1) **Construction Contracts.** An Agency shall not consider an Entity's Offer to do Work as a contractor, as defined in ORS 701.005(2), unless the Entity has a current, valid certificate of registration issued by the Construction Contractors Board.

(2) **Landscape Contracts.** An Agency shall not consider an Entity's Offer to do Work as a landscape contractor as defined in ORS 671.520(2), unless the Entity has a current, valid landscape contractors license issued pursuant to ORS 671.560 by the State Landscape Contractors Board.

(3) **Noncomplying Entities.** The Agency shall deem an Offer received from an Entity that fails to comply with this rule nonresponsive and shall reject the Offer, unless contrary to federal law.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.027(1)(k), ORS 671.530 & ORS 701.055

Hist.: JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0010

Solicitation Methods

(1) **Policy.** It is the policy of the State of Oregon to encourage open and impartial competition in public contracting. Competition exists not only in prices, but in a Contractor's ability to perform, technical competence, ability to provide timely deliveries, and quality and performance of products and services. While an Invitation to Bid is a common method of procurement, it is not always the most advantageous or practical solicitation method. However pursuant to State policy, Agencies must make every effort to construct public improvements, as defined in ORS 279.011, at the least cost to the Agency.

(2) **Solicitation Methods.** The Agency may encourage meaningful competition through a variety of solicitation methods. The Agency shall choose the solicitation method that is most likely to encourage Offers representing optimal value to the Agency.

(a) The Agency may use an Invitation to Bid if the Agency believes it will receive optimal value by selecting the lowest priced Offer that meets the technical requirements of the Agency's Specifications.

(b) The Agency may use a Request for Proposal if the Agency believes it will receive optimal value:

(A) By selecting an Offer using both price and non-price related factors; or

(B) By selecting an Offer using both price and non-price related factors and permitting negotiations pursuant to OAR 137-030-0090.

(c) The Agency may permit negotiations under a Request for Proposal pursuant to OAR 137-030-0090 when:

(A) The Agency is willing to consider alternative terms and conditions to reduce Agency cost or enhance the value of the product or service requested; or

(B) The Agency finds negotiation is required to effect a successful procurement (e.g. the specifications are complex and the Agency expects numerous queries as to the proper interpretation of the specification; the work requires a high level of technical or managerial competence that cannot be defined adequately in the specifications; or the Agency believes discussions are necessary to gauge the Proposer's understanding of complex specifications).

(3) **Solicitation Documents.** The Solicitation Document shall include the following:

(a) Instructions and information concerning submission requirements including Opening and Closing, the address of the office to which Offers must be delivered, the Agency's contact person for the solicitation and any other special information, *e.g.*, whether Offers may be submitted by Facsimile or Electronic Data Interchange. The interval between the date of issuance of the Solicitation Document and Closing should not be less than 14 Days for an ITB and not less than 30 Days for RFP unless the Agency finds a shorter interval is in the public's interest;

(b) If applicable, description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements and evaluation criteria which the Agency will use to determine the lowest responsible Bidder or best responsible Proposer;

(c) The Agency's need, including any relevant background;

(d) The anticipated schedule, deadlines, protest process, and evaluation process, if any;

(e) The form and submission of Offers and any information required therein, including Bid or Proposal security, if any;

(f) All Addenda issued by the Agency;

(g) The evaluation criteria the Agency will use to determine acceptability of any product or service;

(h) Reference to certain statutory preferences as follows:

(A) With respect to a State Agency, preference for materials and supplies manufactured from recycled materials under ORS 279.570, recycled oil pursuant to ORS 279.590 and paper products that reduce production of solid waste or contain recycled paper under ORS 279.621. Pursuant to ORS 279.555, the State Agency shall also include the following language: "Vendors shall use recyclable products to the maximum extent economically feasible in the performance of the contract Work set forth in this document."

(B) With respect to a public Agency, preference for materials and supplies manufactured from recycled materials under ORS 279.570 and recycled oil pursuant to ORS 279.590.

(i) If the Solicitation Document is an Invitation to Bid, the Agency shall set forth objective evaluation criteria in the Solicitation Document. Examples of such criteria include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, ownership or life-cycle cost formulas, performance history on other private and public Contracts, experience of key personnel, adequacy of equipment and physical plant, financial wherewithal, sources of supply, references and warranty provisions. Evaluation criteria need not be precise predictors of actual future costs; but, to the extent possible, such evaluation factors shall be reasonable estimates based upon information the Agency has available concerning future use;

(j) If the Solicitation Document is a Request For Proposal, the Agency shall set forth selection criteria in the Solicitation Document. The criteria shall be as objective as possible. Evaluation factors need not be precise predictors of actual future costs and performance; but to the extent possible, such evaluation fac-

tors shall be reasonable estimates based on information available to the Agency. The Solicitation Document shall also describe the following:

(A) If the Agency is willing to negotiate terms and conditions of the Contract, the Agency must identify the specific terms and conditions that are subject to negotiation and authorize Offerors to propose certain alternative terms and conditions in lieu of the terms and conditions the Agency has identified as authorized for negotiation. The Agency must describe the evaluation and negotiation process consistent with OAR 137-030-0090, including the Competitive Range; and

(B) Evaluation criteria and relative importance of the criteria. Examples of evaluation criteria include price or cost, quality of a product or service, past performance, management, capability, personnel qualification, prior experience, compatibility, reliability, operating efficiency, expansion potential, experience of key personnel, adequacy of equipment and/or physical plant, financial wherewithal, sources of supply, references and warranty provisions.

(k) Terms and conditions that will apply to the Contract, including applicable terms and conditions, warranties and bonding requirements. The Agency shall include in the Contract, terms and conditions to public contracts as prescribed by ORS 279.310 to 279.650, as applicable:

(A) Payment of laborers and materialmen; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279.312);

(B) If the Contract calls for demolition work described in ORS 279.313(1), a condition requiring the Contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective;

(C) If the Contract calls for lawn or landscape maintenance, a condition requiring the Contractor to compost or mulch yard waste material at an approved site, if feasible and cost effective;

(D) Payment of claims by public officers (ORS 279.314);

(E) Hours of labor (ORS 279.316 and 279.338);

(F) Environmental and natural resources regulations (ORS 279.318);

(G) A condition requiring the use of a certified inmate work force in accordance with ORS 279.319, if the Contract is for the removal, abatement or demolition of asbestos in a state building;

(H) Payment for medical care and attention to employees (ORS 279.320);

(I) Maximum hours and overtime (ORS 279.334);

(J) Claims for overtime (ORS 279.336);

(K) Overtime requirement for local governments (ORS 279.340 and 279.342);

(L) Prevailing wage rates (ORS 279.348 to 279.365);

(M) Fee paid to BOLI (ORS 279.352);

(N) Retainage (ORS 279.400 to 279.430 and 279.435);

(O) Prompt payment policy (ORS 279.435);

(P) Contractor's relations with subcontractors (ORS 279.445);

(Q) Notice of claim (ORS 279.528);

(R) With respect to State Agencies, provisions regarding use of recovered resources and recycled materials and to the extent economically feasible, use of recycled paper and PETE products (ORS 279.545 to 279.555);

(S) Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385;

(T) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279.111. (*See* OAR 137-030-0100(4));

(U) A Contract provision substantially providing that: "If Contractor is an employer, Contractor is a subject employer under the Oregon Workers Compensation Law and shall comply with ORS 656.017 and shall provide Workers' Compensation coverage for all their "subject workers," as defined under ORS Chapter 656." (ORS 279.320(2)); and

(V) Contractor's certification that all subcontractors performing work described in ORS 701.005(2) (*i.e.*, construction work) will be registered with the Construction Contractors Board or

licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence Work under the Contract.

(W) If the Contract is for a Public Improvement, a condition that the Contractor shall demonstrate it has established a drug-testing program for its employees.

(4) Additional Terms and Conditions.

(a) The Agency may include additional terms and conditions as applicable to the Contract. If federal grant funds are involved, the federal laws, rules and regulations applicable to the grant shall govern in the event they conflict with a provision required by ORS 279.545 to 279.746.

(b) Unless otherwise provided in the Contract, the Contractor shall not assign, sell, dispose of, or transfer rights, nor delegate duties under the Contract, either in whole or in part, without the Agency's prior Written consent. Unless otherwise agreed by the Agency in Writing, such consent shall not relieve the Contractor of any obligations under the Contract. Any assignee or transferee shall be considered the agent of the Contractor and be bound to abide by all provisions of the Contract. If the Agency consents in Writing to an assignment, sale, disposal or transfer of the Contractor's rights or delegation of Contractor's duties, the Contractor and its surety, if any, shall remain liable to the Agency for complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless the Agency otherwise agrees in Writing.

(5) Compliance and Exceptions.

(a) An Offeror is responsible for knowing and understanding the terms and conditions included in or applicable to a Solicitation Document;

(b) By signing and returning the Offer the Offeror acknowledges acceptance of and agrees to be bound by the terms and conditions of the Contract. If the Request for Proposal authorizes proposal of alternative terms under OAR 137-030-0015, the Offeror agrees to be bound by the nonnegotiable terms and conditions of the Contract and any proposed terms and conditions offered for negotiation upon the Agency's Written acceptance of the proposed terms and conditions.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.007, ORS 279.017, ORS 279.021(1), ORS 279.025, 279.029(2) & (3), ORS 279.033, ORS 279.310 - ORS 279.650, ORS 279.748, ORS 701.005 & ORS 701.055

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0011

Brand Name Products

(1) **Generally.** The Agency's Solicitation Document shall not expressly or implicitly require any product by brand name or mark, nor shall it require the product of any particular manufacturer or seller, except pursuant to an exemption granted under ORS 279.017(2).

(2) **Equivalents.** An Agency may identify products by brand names so long as the following language: "approved equal"; "or equal"; "approved equivalent" or "equivalent", or similar language is included in the Solicitation Document. The Agency shall determine, in its sole discretion, whether an Offeror's alternate product is "equal" or "equivalent".

Stat. Auth.: ORS 279.049

Stats. Implemented: 279.017(1) & (2)

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; Renumbered from 137-030-0045; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0012

Bids or Proposals Are Offers

(1) **Offer and Acceptance.** The Bid or Proposal is the Bidder's or Proposer's offer to enter into a Contract. The Offer is a "Firm Offer," i.e., the Offer shall be held open by the Offeror for the Agencies acceptance for the period specified in OAR 137-030-0080. The Agency's award of the Contract constitutes acceptance of the Offer and binds the Offeror to the Contract.

(2) **Responsive Offer.** An Agency may award a Contract only to a Responsible Offeror with a Responsive Offer.

(3) **Contingent Offers.** Except to the extent the Proposer is authorized to propose certain terms and conditions pursuant to OAR 137-030-0010 and 137-030-0090, a Proposer shall not make its Offer contingent upon the Agency's acceptance any terms or conditions (including Specifications) other than those contained in the Solicitation Document.

(4) **Offeror's Acknowledgement.** By signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposal permits proposal of alternative terms under OAR 137-030-0010(2), the Offeror's Offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by the Agency in Writing.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.029, ORS 279.035 & ORS 279.037

Hist.: JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; Renumbered from 137-030-0007; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0013

Facsimile Bids and Proposals

(1) **Agency Authorization.** An Agency may authorize Offerors to submit Facsimile Offers. If the Agency determines that Bid or Proposal security is or will be required, the Agency should not authorize Facsimile Offers unless the Agency has another method for receipt of such security. Prior to authorization the Agency must determine whether the Agency's equipment and personnel are capable of receiving the size and volume of anticipated Offers within a short period of time and establish administrative procedures and controls:

(a) For receiving, identifying, recording, and safeguarding Facsimile Offers; and

(b) To ensure timely delivery of Offers to the location of Opening and to preserve the "sealed" requirement of competitive procurement.

(2) **Provisions To Be Included in Solicitation Document.** In addition to all other requirements, if the Agency authorizes a Facsimile Offer, the Agency will include in the Solicitation Document provisions substantially similar to the following:

(a) A Facsimile Offer, as used in this solicitation, means an Offer, modification of an Offer, or withdrawal of an Offer that is transmitted to and received by the Agency via a facsimile machine.

(b) Offerors may submit Facsimile Offers in response to this solicitation. The entire response must arrive at the place and by the time specified in this Solicitation Document.

(c) Offerors must Sign their Facsimile Offers.

(d) The Agency reserves the right to award the Contract solely on the Facsimile Offer. However, upon the Agency's request the apparently successful Offeror shall promptly submit its complete original Signed Offer.

(e) The data and compatibility characteristics of the Agency's receiving facsimile machine as follows:

(A) Telephone number;

(B) Compatibility characteristics, e.g. make and model number, receiving speed, communications protocol.

(f) The Agency is not responsible for any failure attributable to the transmission or receipt of the Facsimile Offer including, but not limited to the following:

(A) Receipt of garbled or incomplete documents.

(B) Availability or condition of the receiving facsimile machine.

(C) Incompatibility between the sending and receiving facsimile machine.

(D) Delay in transmission or receipt of documents.

(E) Failure of the Offeror to properly identify the Offer documents.

(F) Illegibility of Offer documents.

(G) Security and confidentiality of data.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.027

Hist.: JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0014

Use of Electronic Data Interchange

(1) **Agency Authorization.** An Agency may authorize Offerors to submit EDI Offers. If the Agency determines that Bid or Proposal security is or will be required, the Agency should not authorize EDI Offers unless the Agency has a method for receipt of such security. Prior to authorizing EDI Offers, the Agency must:

(a) Establish administrative procedures and controls for receiving, identifying, recording, and safeguarding EDI Offers, to ensure timely delivery of the Offers to the Opening location and to preserve the "sealed" requirement of competitive procurement;

(b) Determine whether the Agency's procedures, controls, equipment and personnel are capable of receiving the size and volume of anticipated EDI Offers within a short period of time; and

(c) Make available to interested vendors an EDI "trading partner" or operating agreement ("EDI Operating Agreement").

(2) **EDI Operating Agreement.** An EDI Operating Agreement must address the basic legal issues required to formalize an EDI relationship. The EDI Operating Agreement shall include the following:

(a) Selection of EDI standards and methods of communication;

(b) Allocation of responsibilities for ensuring that the equipment, software and services are operated and maintained effectively;

(c) Procedures for making system changes that may impair the ability of the parties to communicate;

(d) Required security and authentication procedures and services;

(e) The method for establishing receipt of Offers and for evidencing the Offeror is bound to its Offer;

(f) The need (if any) for maintaining confidentiality;

(g) The allocation of liabilities for failure to meet requirements under the EDI Operating Agreement;

(h) Methods for resolving any disputes under the EDI Operating Agreement; and

(i) Document backup and replacement procedures.

(3) **Provisions To Be Included in Solicitation.** In addition to all other requirements, if the Agency authorizes an EDI Offer, the Agency will include in the Solicitation Document provisions substantially similar to the following:

(a) An EDI Offer, as used in this solicitation, means an Offer, modification of an Offer, or withdrawal of an Offer that is transmitted to and received by the Agency in accordance with the EDI Operating Agreement between the Agency and Offeror.

(b) An Offeror may submit an EDI Offer in response to this solicitation provided the Offeror has an effective EDI Operating Agreement with the Agency. The EDI Offer must arrive at the place and by the time specified in the Solicitation Document.

(c) An Offeror must Sign its EDI Offer in accordance with the EDI Operating Agreement between Agency and the Offeror.

(d) The Agency reserves the right to award the Contract based solely on the EDI Offer. Unless otherwise provided under the EDI Operating Agreement, the Offeror shall promptly submit conformed Signed documents upon the Agency's request.

(e) Unless otherwise expressly agreed upon under the EDI Operating Agreement, the Agency is not responsible for any failure attributable to the transmission or receipt of the EDI Offer including, but not limited to the following:

(A) Receipt of garbled or incomplete documents.

(B) Availability or condition of the receiving equipment.

(C) Incompatibility between the sending and receiving equipment.

(D) Delay in transmission or receipt of documents.

(E) Failure of the Offeror to properly identify the Offer documents.

(F) Illegibility of Offer documents.

(G) Security and confidentiality of data.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.027 & ORS 279.049

Hist.: JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0015

Public Notice of Solicitation

(1) **Notice and Distribution Fee.** An Agency shall furnish Notice to a sufficient number of Entities for the purpose of fostering and promoting competition. The Notice shall indicate where, when, how, and for how long the Solicitation Document may be obtained and generally describe the Work or goods to be acquired. The Notice may contain any other appropriate information. The Agency may charge a fee or require a deposit for the Solicitation Document. The Agency may furnish Notice using any method determined to foster and promote competition, including:

(a) Mail notice of the availability of Solicitation Documents ("Notice") to Entities that have expressed an interest in the Agency's procurements; or

(b) Place Notice on the Oregon Department of Administrative Services' electronic procurement system known as the Vendor Information Program ("VIP"); or

(c) Place Notice on the Agency's internet website.

(2) **Advertising.** An Agency shall advertise every solicitation for Offers, unless the Contract Review Authority for that Agency has exempted the solicitation from the advertisement requirement.

(a) Unless the Agency publishes by Electronic Advertisement as permitted under subsection (2)(b), the Agency shall publish the advertisement for Offers at least once in at least one newspaper of general circulation in the area where the Contract is to be performed and in as many additional issues and publications as the Agency may determine to be necessary or desirable to foster and promote competition.

(b) An Agency may publish by Electronic Advertisement if:

(A) The Agency has published a notice that it may publish future advertisements for Offers by Electronic Advertisement. The Agency shall publish such notice weekly, for no less than 4 consecutive weeks, in at least one newspaper of general circulation in the area where the business office of the Agency is located and in as many additional issues and publications as the Agency may determine to be necessary or desirable to provide notice to potential Offerors. The Agency notice shall include the World Wide Web location (i.e. Uniform Resource Locator or URL) where the Agency will publish future Electronic Advertisements or alternatively, to the Web location where the Agency will publish information on accessing the Electronic Advertisement via a telnet application;

(B) The Agency posts in its business office a notice that the Agency will publish advertisements for Offers by Electronic Advertisement. The notice shall include the World Wide Web location (i.e. Uniform Resource Locator or URL) where the Agency publishes Electronic Advertisements or alternatively, to the Web location where the Agency publishes information on accessing the Electronic Advertisement via telnet; and

(C) The Contract Review Authority for the Agency determines Electronic Advertisement is less expensive than publishing by newspaper under subsection (2)(a).

(c) In addition to the Agency's publication required under subsection (2)(a) or (2)(b), the Agency shall also publish advertisement for Offers in at least one trade newspaper of general statewide circulation if the Contract is for a Public Improvement with an estimated cost in excess of \$125,000 (see, OAR 137-040-0010(1)).

(d) All advertisements for Offers shall set forth:

(A) The scheduled Closing, which shall not be less than 5 Days after the date of the last publication of the advertisement;

(B) The date that Entities must file applications for prequalification if prequalification is a requirement and the class or classes of Work for which Entities must be prequalified;

(C) The nature of the Work to be performed or the goods to be purchased;

(D) The office where Contract terms, conditions and Specifications may be reviewed;

(E) The name, title and address of the Agency person authorized to receive Offers;

(F) The scheduled Opening;

(G) That the Agency may reject any Offer that does not comply with all prescribed public procurement procedures and requirements;

(H) That the Agency may reject for good cause any or all Offers upon the Agency's finding that it is in the public interest to do so;

(I) That the Offer must include a statement indicating whether the Offeror is a "resident bidder," as defined in ORS 279.029;

(J) Whether or not a Contractor or subcontractor must be licensed under ORS 468A.720, to Work with asbestos-containing materials; and

(K) That the Agency shall not receive or consider an Offer for a construction Contract unless the Offeror is registered with the Construction Contractors Board as required by ORS 701.055, or licensed by the State Landscape Contractors Board, as required by ORS 671.530.

(3) **Posting Advertisement for Offers.** The Agency shall post a copy of each advertisement for Offers at the principal business office of the Agency. An Offeror may obtain a copy of the advertisement for Offers upon request.

(4) **Minority, Women Emerging Small Business.** State agencies shall provide timely notice of all solicitations to the Advocate for Minority, Women and Emerging Small Business if the estimated Contract Price exceeds \$5,000.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 200.035, ORS 279.007 & ORS 279.025

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 3-1987, f. & ef. 5-18-87; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

Bid or Proposal Preparation

137-030-0020

Offer Preparation

(1) **Instructions.** An Offeror shall submit and Sign its Offer in accordance with the Solicitation Document. An Offeror shall initial and submit any correction or erasure to its Offer prior to the Opening in accordance with the requirements for submitting an Offer under the Solicitation Document.

(2) **Forms.** An Offeror shall submit its Offer on the form(s) provided in the Solicitation Document, unless an Offeror is otherwise instructed in the Solicitation Document.

(3) **Documents.** An Offeror shall provide the Agency with all documents and Descriptive Literature required under the Solicitation Document.

(4) **Facsimile or EDI Submissions.** If the Solicitation Document permitted Facsimile or EDI Offers OAR 137-030-0010(3)(a)(D), an Offeror may submit its Offer by Facsimile or EDI. The Agency shall not consider Facsimile or EDI Offers unless authorized by the Solicitation Document.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.027

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0030

Offeror Submissions

(1) **Product Samples and Descriptive Literature.** An Agency may require Product Samples or Descriptive Literature if it is necessary or desirable to evaluate the quality, features or characteristics of the offered items. The Agency will dispose of Product Samples, or return or make available for return Product

Samples to the Offeror in accordance with the Solicitation Document.

(2) Identification of Offers.

(a) To ensure proper identification and handling, Offers shall be submitted in a sealed envelope appropriately marked or in the envelope provided by the Agency, whichever is applicable. If the Agency permits Facsimile or EDI Offers in the Solicitation Document, the Offeror may submit and identify Facsimile or Electronic Data Interchange Offers in accordance with the Solicitation Document.

(b) The Agency is not responsible for Offers submitted in any manner, format or to any delivery point other than as required in the Solicitation Document.

(3) **Receipt of Offers.** The Offeror is responsible for ensuring the Agency receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.027

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0035

Bid or Proposal Security

(1) **Security Amount.** If an Agency requires Bid or Proposal security, it shall be not less than 5% nor more than 10% of the Offeror's Bid or Proposal. An Agency shall not use Bid or Proposal security to discourage competition. The Agency shall expressly provide for any Bid or Proposal security in its Solicitation Document. The Offeror shall forfeit Bid or Proposal security after award if the Offeror fails to Sign the Contract promptly and properly.

(2) **Public Improvement Contracts.** Unless an Agency has otherwise exempted a solicitation or class of solicitations from Bid or Proposal security pursuant to ORS 279.033, the Agency shall require Bid or Proposal security for its solicitation of Offers for Public Improvements. The Agency may require Bid or Proposal security even if it has exempted a class of solicitations from Bid or Proposal security.

(3) **Form of Bid or Proposal Security.** An Agency may accept only the following forms of Bid or Proposal security:

(a) A surety bond from a surety company authorized to do business in the State of Oregon;

(b) An irrevocable letter of credit issued by an insured institution as defined in ORS 706.008; or

(c) A cashier's check or Offeror's certified check.

(4) **Return of Security.** An Agency shall return or release the Bid or Proposal security of all unsuccessful Offerors after a Contract has been executed and a performance bond provided (if such performance bond is required), or after all Offers have been rejected. The Agency may return the Bid or Proposal security of unsuccessful Offerors prior to award if the return does not prejudice Contract award and the security of at least the Bidders with the three lowest Bids, or the Proposers with the three highest scoring Proposals, is retained pending execution of a Contract.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.027(4), ORS 279.031, ORS 279.033 & ORS 279.722

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0040

Pre-Offer Conferences

(1) **Purpose.** An Agency may hold pre-Offer conferences with prospective Offerors prior to Closing, to explain the procurement requirements or to conduct site inspections.

(2) **Required attendance.** The Agency may require attendance at the pre-Offer conference as a condition for making an Offer.

(3) **Scheduled time.** If an Agency holds a pre-Offer conference, it shall be held within a reasonable time after the Solicitation Document has been issued, but sufficiently before the Closing to

allow Offerors to consider information provided at that conference.

(4) **Statements Not Binding.** Statements made by an Agency's representative at the pre-Offer conference do not change the Solicitation Document unless the Agency confirms such statements with a Written Addendum to the Solicitation Document.

(5) **Agency Announcement.** The Solicitation Document shall set forth:

(a) The time, date and location of any pre-Offer conference; and

(b) Whether attendance at the conference will be mandatory or voluntary; and

(c) That statements made by the Agency's representatives at the conference are not binding upon the Agency unless confirmed by Written Addendum.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.007 & ORS 279.027

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0050

Request for Change or Protest; Request for Clarification

(1) **Delivery.** An Offeror shall deliver to an Agency a request for change to or protest of Specifications or Contract terms and conditions in Writing. A Proposer may request a change to add alternative terms and conditions for negotiation if the Request for Proposals permits negotiation pursuant to OAR 137-030-0010 and 137-030-0090. Unless otherwise specified in the Solicitation Document, an Offeror must deliver any request or protest as follows:

(a) For Public Improvement Contracts, 10 Days prior to Closing;

(b) For other Contracts, 5 Days prior to Closing.

(2) **Content.**

(a) An Offeror's Written request for change or protest shall include:

(A) A detailed statement of the legal and factual grounds for the request or protest;

(B) A description of the resulting prejudice to the Offeror; and

(C) A statement of the form of relief requested or any proposed changes to the Contract terms and conditions (including Specifications).

(b) An Offeror shall mark its request or protest as follows:

(A) Solicitation Specification or Contract Provision Request for Change (or Protest); and

(B) Solicitation Document Number (or Other Identification as specified in the Solicitation Document).

(3) **Agency response.** The Agency shall not consider an Offeror's request for change or protest after the deadline established for submitting such request or protest. The Agency shall provide notice to the applicable Entity if it entirely rejects the request or protest. If the Agency agrees with the Entity's request or protest, in whole or in part, the Agency shall either issue an Addendum reflecting its determination under OAR 137-030-0055 or cancel the Solicitation under OAR 137-030-0115.

(4) **Extension of Closing.** If an Agency receives a Written request for change or protest from an Offeror in accordance with this rule, the Agency may extend Closing if the Agency determines an extension is necessary to consider the request or protest and to issue an Addendum, if any, to the Solicitation Document.

(5) **Clarification.** Prior to the deadline for submitting a Written request for change or protest, an Offeror may request that the Agency clarify any provision of the Solicitation Document. The Agency's clarification to an Offeror, whether orally or in Writing, does not change the Solicitation Document and is not binding on the Agency unless the Agency amends the Solicitation Document by Addendum.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.017, ORS 279.023, ORS 279.027 & ORS 279.067

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0055

Addenda to a Solicitation Document

(1) **Issuance; Receipt.** The Agency may change a Solicitation Document only by Written Addenda. An Offeror shall provide Written acknowledgement of receipt of all issued Addenda with its Offer, unless the Agency otherwise specifies in the Addenda.

(2) **Distribution.** The Agency shall send Addenda to all Entities known to have obtained the Solicitation Document or to have attended any mandatory pre-Offer conference. The Agency shall notify prospective Offerors of Addenda in accordance with OAR 137-030-0015(2). The Agency may inform prospective Offerors of Addenda by telephone, but the Agency shall confirm the oral notice in Writing in accordance with OAR 137-030-0015(2).

(3) **Timelines; Extensions.** The Agency shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. The Agency should extend the Closing if the Agency determines prospective Offerors need additional time to review Addenda. Except to the extent required by public interest, the Agency shall not issue Addenda less than 72 hours before the Closing unless the Addendum also extends the Closing.

(4) **Request for Change or Protest.** Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum as provided in OAR 137-030-0050(2)-(5), within 24 hours following issuance of the Addendum, or up to the last day allowed to submit a request for change or protest under OAR 137-030-0050, whichever date is later. The Agency shall consider only an Offeror's request for change or protest to the Addendum; the Agency shall not consider a request for change or protest to matters not added or modified by the Addendum.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.035 & ORS 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0060

Pre-Opening Modification or Withdrawal of Offers

(1) **Modifications.** An Offeror may modify its Offer in Writing prior to the Closing. An Offeror shall prepare and submit any modification to its Offer to the Agency in accordance with OAR 137-030-0020 and 137-030-0030, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror shall mark the submitted modification as follows:

(a) Bid (or Proposal) Modification;

(b) Solicitation Number (or Other Identification as specified in the Solicitation Document).

(2) **Withdrawals:**

(a) An Offeror may withdraw its Offer by Written notice submitted on the Offeror's letterhead, Signed by an authorized representative of the Offeror, delivered to the location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by the Agency prior to the Closing. The Offeror or authorized representative of the Offeror may also withdraw its Offer in person prior to the Closing, upon presentation of appropriate identification and satisfactory evidence of authority;

(b) The Agency may release an unopened Offer withdrawn under subsection (2)(a) to the Offeror or its authorized representative, after voiding any date and time stamp mark;

(c) The Offeror shall mark the Written request to withdraw an Offer as follows:

(A) Bid (or Proposal) Withdrawal;

(B) Solicitation Number (or Other Identification as specified in the Solicitation Document).

(3) **Documentation.** The Agency shall include all documents relating to the modification or withdrawal of Offers in the appropriate solicitation file.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.025(2), ORS 279.027, ORS 279.049, ORS 279.029(6)(a) & ORS 279.035

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 12-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0065

Receipt, Opening, and Recording of Offers

(1) **Receipt.** An Agency shall electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The Agency shall not open the Offer or modification, but shall store it in a secure place until Opening. If the Agency inadvertently opens an Offer or a modification prior to the Opening, the Agency shall reseal and store the opened Offer or modification for Opening. The Agency shall document the resealing for the solicitation file (e.g. "Agency inadvertently opened the Offer due to improper identification of the Offer").

(2) **Opening and recording.** An Agency shall publicly open Offers including any modifications made to the Offer pursuant to OAR 137-030-0060. In the case of Invitations to Bid, to the extent practicable, the Agency shall read aloud the name of each Bidder, the Bid price(s), and such other information as the Agency considers appropriate. In the case of Requests for Proposals or voluminous Bids, if the Solicitation Document so provides, the Agency will not read Offers aloud.

(3) **Availability.** After Opening, the Agency shall make the Offers available for public inspection except for those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with applicable law. *See* ORS 192.501(2); ORS 646.461 to 646.475. To the extent the Agency determines such designation is not in accordance with applicable law, the Agency shall make those portions available for public inspection. The Offeror shall separate information designated as confidential from other nonconfidential information at the time of submitting its Offer. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and shall be publicly available regardless of an Offeror's designation to the contrary.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.027 & ORS 279.035

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0070

Late Offers, Late Withdrawals and Late Modifications

Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. An Agency shall not consider late Offers, withdrawals or modifications except as permitted in OAR 137-030-0075 or 137-030-0090.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.027 & ORS 279.035

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0075

Mistakes

(1) **General.** To protect the integrity of the competitive solicitation process and to assure fair treatment of Offerors, an Agency should carefully consider whether to permit waiver, correction or withdrawal for certain mistakes.

(2) **Agency Treatment of Mistakes.** An Agency shall not allow an Offeror to correct or withdraw an Offer for an error in judgment. If the Agency discovers certain mistakes in an Offer after Opening, but before award of the Contract, the Agency may take the following action:

(a) An Agency may waive, or permit an Offeror to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the Offer, or an

insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:

(A) Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;

(B) Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and

(C) Acknowledge receipt of an Addendum to the Solicitation Document, provided: it is clear on the face of the Offer that the Offeror received the Addendum and intended to be bound by its terms; and the Addendum involved did not affect price, quantity or delivery.

(b) An Agency may correct a clerical error if the intended Offer and the error are evident on the face of the Offer, or other documents submitted with the Offer, and the Offeror confirms the Agency's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Examples include typographical mistakes, errors in extending unit prices, transposition errors, arithmetical errors, instances in which the intended correct unit or amount is evident by simple arithmetic calculations (for example a missing unit price may be established by dividing the total price for the units by the quantity of units for that item or a missing, or incorrect total price for an item may be established by multiplying the unit price by the quantity when those figures are available in the Offer). In the event of a discrepancy, unit prices shall prevail over extended prices.

(c) An Agency may permit an Offeror to withdraw an Offer based on other errors only if the Offeror shows by clear and convincing evidence:

(A) The nature of the error; and

(B) That the error is not a judgment error, minor informality or clerical error.

(3) **Rejection for Mistakes.** The Agency shall reject any Offer in which a mistake is evident on the face of the Offer and the intended correct Offer is not evident or cannot be substantiated from documents accompanying the Offer, *i.e.*, documents submitted with the Offer, pursuant to solicitation requirements.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.029 & ORS 279.035

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0080

Time for Agency Acceptance

An Offeror's Offer is a Firm Offer, irrevocable, valid and binding on the Offeror for not less than 30 Days from Closing unless otherwise specified in the Solicitation Document.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.029(1)

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0085

Extension of Time for Acceptance of Offer

An Agency may request, orally or in Writing, that Offerors extend, in Writing, the time during which the Agency may consider their Offer(s). If an Offeror agrees to such extension, the Offer shall continue as a Firm Offer, irrevocable, valid and binding on the Offeror for the agreed-upon extension period.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.029(1)

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0090

Offer Evaluation and Award

(1) **General.** If awarded, the Agency shall award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer submitting the best, Responsive Proposal. The Agency may award by item, groups of items or the

entire Offer provided such award is consistent with the Solicitation Document and in the public interest. The Agency may reject any or all Offers:

- (a) Not in compliance with the Solicitation Documents;
- (b) Not in compliance with all prescribed public solicitation procedures; or
- (c) For good cause, upon the Agency's finding that it is in the public interest to do so.

(2) **Agency Evaluation.** The Agency shall evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable law. The Agency shall not evaluate an Offer using any other requirement or criterion.

(3) **Offeror Submissions.**

(a) The Agency may require an Offeror to submit Product Samples, Descriptive Literature, technical data, or other material and may also require any of the following prior to award:

- (A) Demonstration, inspection or testing of a product prior to award for characteristics such as quality or workmanship;
- (B) Examination of such elements as appearance, finish, taste, or feel; or
- (C) Other examinations to determine whether the product conforms to Specifications.

(b) The Agency shall evaluate product acceptability only in accordance with the criteria disclosed in the Solicitation Document to determine that a product is acceptable. The Agency shall reject an Offer providing any product that does not meet the Solicitation Document requirements. An Agency's rejection of an Offer because it offers nonconforming Work or goods is not Disqualification and is not appealable under ORS 279.043.

(4) **Evaluation of Bids.** The Agency shall use only objective criteria to evaluate Bids as set forth in the ITB. The Agency shall evaluate Bids to determine which Responsible Offeror offers the lowest Responsive Bid. In determining the lowest Responsive Bid, the Agency shall add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides. The Agency shall not negotiate scope of Work or other terms or conditions under an Invitation to Bid process.

(5) **Evaluation of Proposals.**

(a) The Agency shall only evaluate Proposals in accordance with criteria set forth in the RFP and applicable law. The Agency shall evaluate Proposals to determine the Responsible Proposer submitting the best Responsive Proposal. An Agency may seek information from a Proposer only to clarify the Proposer's Proposal. Such clarification shall not vary, contradict or supplement the Proposal. The Agency shall not seek clarification of a nonresponsive Proposal. A Proposer must submit Written and Signed clarifications and such clarifications become part of the Proposer's Proposal. Unless the Agency permitted negotiation in accordance with OAR 137-030-0010 in its Request for Proposals, the Agency may only negotiate:

- (A) The statement of Work; and
- (B) The Contract Price as it is affected by negotiating the statement of Work.

(b) If the Agency permitted negotiation in the Request for Proposals in accordance with OAR 137-030-0010, the Agency shall evaluate Proposals and may negotiate as follows:

(A) If the Solicitation Document provided that negotiation may occur at Agency's discretion, the Agency may forego negotiations and evaluate all Proposals in accordance with subsection (5)(a) of this rule;

(B) Unless the solicitation is canceled, after the Opening the Agency will evaluate all Proposals in accordance with the evaluation criteria. After evaluation of all Proposals in accordance with the criteria set forth in the Request for Proposals, the Agency will determine the Proposers in the Competitive Range. The Agency may increase the Competitive Range if the Agency's evaluation of Proposals establishes a natural break in the scores of Proposers indicating a number greater than the initial Competitive Range.

(C) The Agency shall establish a negotiation team tailored for the acquisition. The Agency's team may include legal, technical and negotiating personnel;

(D) In addition to the statement of Work and the Contract Price as it is affected by negotiating the statement of Work, the Agency shall only negotiate other terms and conditions expressly authorized for negotiation under the Request for Proposals. A Proposer shall only submit alternative terms and conditions to the terms and conditions the Agency expressly authorized for negotiation under the Request for Proposal.

(E) The Agency shall provide Written notice to all Proposers identifying Proposers in the Competitive Range. A Proposer that is not within the Competitive Range may protest the Agency's evaluation and determination of the Competitive Range in accordance with OAR 137-030-0104. All Proposals are open for public inspection subject to the Oregon Public Records Law.

(F) After the protest period provided in accordance with paragraph (5)(b)(E) expires, or after the Agency has provided a final response to any protest, whichever date is later, the Agency may begin negotiating with Proposers in the Competitive Range. The Agency's negotiation team shall not favor any particular Proposer. The Agency may negotiate Contract Price, designated terms and conditions and the statement of Work. However, the Agency may only negotiate Contract Price to the extent the Proposer would not be excluded from the Competitive Range based on the Agency's evaluation criteria set forth in the Solicitation Document. The Agency may only negotiate an alternative term or condition submitted by a Proposer if the alternative term or condition is reasonably related to the term or condition the Agency authorized as negotiable. The Agency shall not negotiate any other terms or conditions set forth in the Request for Proposals.

(G) The Agency may evaluate Offers negotiated with Proposers in the Competitive Range at any time during the negotiation process to determine if the Agency will:

- (i) Continue negotiating with a particular Proposer; or
- (ii) Terminate negotiations with a particular Proposer and continue negotiating with other Proposers in the Competitive Range; or
- (iii) Conclude negotiations with all remaining Proposers in the Competitive Range in accordance with this paragraph (5)(b)(G).

(H) The Agency may terminate negotiations with a Proposer in the Competitive Range at any time. If the Agency does not cancel the solicitation at the conclusion of the Agency's negotiation with all remaining Proposers in the Competitive Range, the Agency shall score the Proposals in the Competitive Range based upon the evaluation criteria in the Request for Proposals.

(I) The Agency shall provide Written notice of intent to award the Contract to all Proposers in the Competitive Range. An unsuccessful Proposer may protest the Agency's evaluation and determination of the Competitive Range in accordance with OAR 137-030-0104.

(J) Nothing in this section (5) shall restrict or prohibit the Agency from canceling the solicitation at any time in accordance with OAR 137-030-0115.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.005, ORS 279.007, ORS 279.015, ORS 279.027, ORS 279.029 & ORS 279.035

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0095

Low Tie Offers

(1) **Definition.** Low Tie Offers are low tie Responsive Bids from Responsible Bidders or high tie Responsive Proposals from Responsible Proposers that are identical in price, fitness, availability and quality.

(2) **Award.** If awarded, the Agency shall award the Contract based on the following order of precedence:

- (a) The Agency shall prefer goods or services that have been manufactured or produced in Oregon pursuant to ORS 279.021(1).
- (b) The Agency shall then prefer the Offer of the Offeror whose principal offices or headquarters are located in Oregon.
- (c) If a Tie Offer remains after the Agency applies subsections (2)(a) and (b), the Agency shall award the Contract by draw-

ing lots among any tied Oregon Offerors. Such Offerors shall be given notice and an opportunity to be present when the lots are drawn;

(d) If a Tie Offer remains after the Agency applies subsection (2)(a) and none of the tied Offerors are located in Oregon, the Agency shall award the Contract by drawing lots among any tied Offerors. Such Offerors shall be given notice and an opportunity to be present when the lots are drawn.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.021 & ORS 279.029

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0100

Rejection of Individual Bids or Proposals

(1) **General.** In accordance with ORS 279.035, an Agency may reject any Offer not in compliance with all prescribed solicitation procedures and requirements, and may reject for good cause any Offer upon the Agency's Written finding that it is in the public interest to do so.

(2) **Rejection.** The Agency shall reject an Offer upon the Agency's finding that:

(a) The Agency required mandatory prequalification and the Offeror has not been prequalified under ORS 279.039 or the Offeror has been Disqualified; or

(b) The Contract is for a Public Work and the Commissioner of the Bureau of Labor and Industries has declared the Offeror ineligible under ORS 279.361; or

(c) The Offer is contingent upon the Agency's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document, or the Offeror takes exception to terms and conditions (including Specifications), or an Offer that attempts to prevent public disclosure of matters in contravention of the terms and conditions of Solicitation Document or in contravention of applicable law; or

(d) The offered Work or goods fail to meet the Specifications of the Solicitation Document; or

(e) The Offeror is not responsible. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before awarding a Contract, the Agency must have information that indicates that the Offeror meets the applicable standards of responsibility. To be a Responsible Offeror, the Agency must determine that the Offeror:

(A) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to demonstrate the capability of the Offeror to meet all contractual responsibilities;

(B) Has a satisfactory record of contract performance. An Agency should carefully scrutinize an Offeror's record of contract performance if the Offeror is or recently has been materially deficient in contract performance. In reviewing the Offeror's performance, the Agency should determine whether the Offeror's deficient performance was expressly excused under the terms of contract, or whether the Offeror took appropriate corrective action. The Agency may review the Offeror's performance on both private and public contracts in determining the Offeror's record of contract performance. The Agency shall make its basis for determining an Offeror nonresponsible under this paragraph part of the solicitation file;

(C) Has a satisfactory record of integrity. An Offeror may lack integrity if an Agency determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to an Agency. An Agency may find an Offeror nonresponsible based on the lack of integrity of any Entity having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Entity). The standards for Conduct Disqualification under OAR 137-030-0110 may be used to determine an Offeror's integrity. The Agency's shall make its basis for determining that an Offeror is nonresponsible under this paragraph part of the solicitation file;

(D) Is qualified legally to contract with the Agency; and

(E) Has supplied all necessary information in connection with the inquiry concerning responsibility. If the Offeror fails to promptly supply information requested by the Agency concerning responsibility, the Agency shall base the determination of responsibility upon any available information, or may find the Offeror nonresponsible.

(f) The Contract is for a Public Improvement and the Construction Contractors Board lists the Offeror as not qualified; or

(g) The Offeror has not met the requirements of ORS 279.059(1) or 279.059(2) if required by the Solicitation Document

(h) The Offeror has not submitted properly executed Bid or Proposal security as required by the Solicitation Document; or

(i) The Offeror has failed to provide the certification required under section 4 of this rule; or

(j) Other circumstances relevant to the Offer, or Offeror, indicate that acceptance of the Offer may impair the integrity of the competitive procurement process.

(3) **Form of Business Entity.** For purposes of this rule, the Agency may investigate any Entity submitting an Offer so that previously disqualified Entities, or their officers and directors, or principal owners may not, by subterfuge, change of ownership, or other adjustments in formal appearance, avoid application of this rule or of the disqualification provisions of ORS 279.037 to 279.045 and OAR 137-030-0110.

(4) **Certification of Non-Discrimination.** The Offeror shall certify and deliver to the Agency Written certification, as part of the Offer, that the Offeror has not discriminated against minority, women or emerging small business enterprises in obtaining any required subcontracts.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.029, ORS 279.035, ORS 279.059 & ORS 279.111

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 3-1987, f. & ef. 5-18-87; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0102

Rejection of All Offers

(1) **Rejection.** An Agency may reject all Offers for good cause upon the Agency's Written finding it is in the public interest to do so. The Agency shall notify all Offerors of the rejection of all Offers, along with the good cause justification and finding.

(2) **Criteria.** The Agency may reject all Offers upon a Written finding that:

(a) The content of or an error in the Solicitation Document, or the solicitation process unnecessarily restricted competition for the Contract;

(b) The price, quality or performance presented by the Offerors is too costly or of insufficient quality to justify acceptance of the Offer;

(c) Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;

(d) Causes other than legitimate market forces threaten the integrity of the competitive procurement process. These causes include, but are not limited to, those that tend to limit competition such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct, and inadvertent or intentional errors in the Solicitation Document;

(e) The Agency cancels the solicitation in accordance with OAR 137-030-0115; or

(f) Any other circumstance indicating completion of the solicitation would not be in the public interest.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.035

Hist.: JD 3-1987, f. & ef. 5-18-87; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0104

Protest of Contractor Selection, Contract Award

(1) **Purpose.** An adversely affected Offeror must exhaust all avenues of administrative review and relief before seeking judicial

review of the Agency's Contractor selection or Contract award decision.

(2) **Notice of Competitive Range.** Unless otherwise provided in the RFP, the Agency shall provide Written notice to all Proposers of the Agency's determination of the Proposers included in the Competitive Range. The Agency's notice of the Proposers included in the Competitive Range shall not be final until the later of the following:

(a) 10 Days after the date of the notice, unless otherwise provided therein; or

(b) Until the Agency provides a Written response to all timely-filed protests that denies the protest and affirms the notice of the Proposers included in the Competitive Range.

(3) **Notice of Intent to Award.** Unless otherwise provided in the Solicitation Document, the Agency shall provide Written notice to all Offerors of the Agency's intent to award the Contract. The Agency's award shall not be final until the later of the following:

(a) 14 Days after the date of the notice, unless otherwise provided therein; or

(b) Until the Agency provides a Written response to all timely-filed protests that denies the protest and affirms the award.

(4) **Right to Protest Award.**

(a) An adversely affected Offeror may submit to the Agency a Written protest of the Agency's intent to award within 14 Days after issuance of the notice of intent to award the Contract, unless a different protest period is provided under the Solicitation Document.

(b) The Offeror's protest shall be in Writing and must specify the grounds upon which the protest is based.

(c) An Offeror is adversely affected only if the Offeror is eligible for award of the Contract as the Responsible Bidder submitting the lowest Responsive Bid or the Responsible Proposer submitting the best Responsive Proposal and is next in line for award, i.e., the protesting Offeror must claim that all lower Bidders or higher-scored Proposers are ineligible for award:

(A) Because their Offers were nonresponsive; or

(B) The Agency committed a substantial violation of a provision in the Solicitation Document or of an applicable procurement statute or administrative rule, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been the lowest Bidder or the highest-ranked Proposer.

(d) The Agency shall not consider a protest submitted after the time period established in this rule or such different period as may be provided in the Solicitation Document.

(5) **Right to Protest Competitive Range.**

(a) An adversely affected Proposer may submit to the Agency a Written protest of the Agency's decision to exclude the Proposer from the Competitive Range within 14 Days after issuance of the notice of the Competitive Range, unless a different protest period is provided under the Solicitation Document.

(b) The Proposer's protest shall be in Writing and must specify the grounds upon which the protest is based.

(c) A Proposer is adversely affected only if the Proposer is responsible and submitted a Responsive Proposal and is eligible for inclusion in the Competitive Range i.e., the protesting Proposer must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Proposers are removed from consideration, and that those ineligible Proposers are ineligible for inclusion in the Competitive Range because:

(A) Their Proposals were not responsive; or

(B) The Agency committed a substantial violation of a provision in the RFP or of an applicable procurement statute or administrative rule, and the protesting Proposer was unfairly evaluated and would have, but for such substantial violation, been included in Competitive Range.

(d) The Agency shall not consider a protest submitted after the time period established in this rule or such different period as may be provided in the Solicitation Document. A Proposer may not protest an Agency's decision to not increase the Competitive Range above the Competitive Range set forth in the RFP.

(6) **Authority to Resolve Protests.** The head of the Agency, or such person's designee, has the authority to settle or resolve a Written protest submitted in accordance with the requirements of this rule.

(7) **Decision.** If a protest is not settled, the head of the Agency, or such person's designee, shall promptly issue a Written decision on the protest. Judicial review of this decision will be available if provided by statute.

(8) **Award.** The successful Offeror shall promptly execute the Contract after the award is final. The Agency shall execute the Contract only after it has obtained all applicable required documents and approvals.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.029, ORS 279.031 & ORS 279.067

Hist.: JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0105

Negotiation With Bidders Prohibited

(1) **Bids.** Except as permitted by ORS 279.015(1)(h), an Agency shall not negotiate with any Bidder. After award of the Contract, the Agency and Contractor may only modify the Contract by change order or amendment to the Contract and in accordance with the exemption rules of the applicable public Contract review authority. *See e.g.*, OAR 125-310-0010 (formerly 125-310-0150).

(2) **Requests for Proposals.** An Agency may only negotiate with Proposers in accordance with OAR 137-030-0010 and 137-030-0090.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.005, ORS 279.015, ORS 279.023, ORS 279.027 & ORS 279.029

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0110

Disqualification of an Entity

(1) **Authority.** An Agency may disqualify an Entity from consideration of award of the Agency's Contracts after providing the Entity with notice and a reasonable opportunity to be heard in accordance with section (6) this rule.

(a) **Standards for Conduct Disqualification.** As provided in ORS 279.037, an Agency may disqualify an Entity for:

(A) Conviction for the commission of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.

(B) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the Entity's responsibility as a contractor.

(C) Conviction under state or federal antitrust statutes.

(D) Violation of a contract provision that is regarded by the Agency to be so serious as to justify Disqualification. A violation under this subsection (2)(d) may include but is not limited to material failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However, an Entity's failure to perform or unsatisfactory performance caused by acts beyond the Entity's control is not a basis for Disqualification.

(b) **Standards for DBE Disqualification.** As provided in ORS 200.065, 200.075 or 279.111, an Agency may disqualify an Entity's right to submit an Offer or to participate in a Contract (e.g. subcontractors) as follows:

(A) For a DBE Disqualification under ORS 200.065, the Agency may disqualify an Entity upon a finding that:

(i) The Entity fraudulently obtained or retained or attempted obtain or retain or aided another person to fraudulently obtain or retain certification as a disadvantaged, minority, women or emerging small business enterprise; or

(ii) The Entity knowingly made a false claim that any person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a Contract or subcontract or other benefit.

(iii) The Entity has been disqualified by another Agency pursuant to ORS 200.065.

(B) For a DBE Disqualification under ORS 200.075, the Agency may disqualify an Entity upon a finding that:

(i) The Entity has entered into an agreement representing that a disadvantaged, minority, women, or emerging small business enterprise, certified pursuant to ORS 200.055 ("Certified Enterprise"), will perform or supply materials under a Public Improvement Contract without the knowledge and consent of the Certified Enterprise; or

(ii) The Entity exercises management and decision-making control over the internal operations, as defined by ORS 200.075(1)(b), of any Certified Enterprise;

(iii) The Entity uses a disadvantaged, minority women or emerging small business enterprise to perform services under a contract or to provide supplies under a Public Improvement Contract to meet an established DBE/MBE/WBE/ESB goal, and such enterprise does not perform a commercially useful function, as defined by ORS 200.075(3), in performing its obligations under the contract.

(iv) If an Entity is Disqualified for a DBE Disqualification under ORS 200.075, the affected Agency shall not permit such Entity to participate in that Agency's Contracts.

(C) For a DBE Disqualification under ORS 279.111, an Agency may disqualify an Entity if the Agency finds that the Entity discriminated against minority, women, or emerging small business enterprises in awarding a subcontract under a prior contract with that Agency.

(2) **Notice of Intent to Disqualify.** The Agency shall notify the Entity in writing of a proposed Disqualification personally or by registered or certified mail, return receipt requested. This notice shall:

(a) State that the Agency intends to disqualify the Entity;

(b) Set forth the reasons for the Disqualification;

(c) Include a statement of the Entity's right to a hearing if requested in Writing within the time stated in the notice and that if the Agency does not receive the Entity's Written request for a hearing within the time stated, the Entity shall have waived its right to a hearing.

(d) Include a statement of the authority and jurisdiction under which the hearing will be held;

(e) Include a reference to the particular sections of the statutes and rules involved;

(f) State the proposed Disqualification period; and

(g) State that the Entity may be represented by legal counsel.

(3) **Hearing.** The Agency shall schedule a hearing upon the Agency receipt of the Entity's timely request. The Agency shall notify the Entity of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing prior to hearing.

(4) **Notice of Disqualification.** The Agency will notify the Entity in Writing of its Disqualification, personally or by registered or certified mail, return receipt requested. The notice shall contain:

(a) The effective date and period of Disqualification;

(b) The grounds for Disqualification; and

(c) A statement of the Entity's appeal rights and applicable appeal deadlines. For a Conduct Disqualification or a DBE Disqualification under ORS 279.111, the Disqualified Entity must notify the Agency in Writing within 3 business days after receipt of the Agency's notice of Disqualification if the Entity intends to appeal the Agency's decision.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 200.065, ORS 200.075, ORS 279.037, ORS 279.043, ORS 279.045 & ORS 279.111

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0115

Cancellation of Solicitation

(1) **Cancellation in the Public Interest.** An Agency may cancel a Solicitation for good cause if the Agency finds that cancellation is in the public interest. The Agency's reasons for cancellation shall be made part of the solicitation file.

(2) **Notice of Cancellation.** If the Agency cancels a solicitation prior to Opening, the Agency shall provide notice of cancellation in accordance with OAR 137-030-0015(1). Such notice of cancellation shall:

(a) Identify the Solicitation;

(b) Briefly explain the reason for cancellation; and

(c) If appropriate, explain that an opportunity will be given to compete on any resolicitation.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.035

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 3-1987, f. & ef. 5-18-87; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0120

Disposition of Offers if Solicitation Canceled

(1) **Prior to Opening.** If the Agency cancels a Solicitation prior to Opening, the Agency will return all Offers it received to Offerors unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the Agency will open the Offer to determine the source and then return it to the Offeror.

(2) **After Offer Opening.** If the Agency rejects all Offers, the Agency will retain all such Offers as part of the Agency's solicitation file.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.035

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0125

Documentation of Award

(1) **Basis of Award.** After award, the Agency shall make a record showing the basis for determining the successful Offeror part of the Agency's solicitation file.

(2) **Contents of Award Record.** The Agency's record shall include:

(a) Bids.

(A) Completed Bid tabulation sheet; and

(B) Written justification for any rejection of lower Bids.

(b) Proposals.

(A) The completed evaluation of the Proposals;

(B) Written justification for any rejection of higher scoring Proposals or for failing to meet mandatory requirements of the Request for Proposal;

(C) If the Agency permitted negotiations in accordance with 137-030-0010, the Agency's completed evaluation of the initial Proposals and the Agency's completed evaluation of final Proposals.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.039

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0130

Foreign Contractor

If the Contract Price exceeds \$10,000 and the Contractor is a Foreign Contractor, the Contractor shall promptly report to the Oregon Department of Revenue on forms provided by the Department of Revenue, the Contract Price, terms of payment, Contract duration and such other information as the Department of Revenue may require before final payment can be made on the Contract. A copy of the report shall be forwarded to the Agency. The Agency awarding the Contract shall satisfy itself that the above requirements have been complied with before it issues final payment on the Contract.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.021

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0135

Availability of Award Decisions

(1) **Contract documents.** To the extent required, the Agency shall deliver to the successful Offeror, a Signed purchase order, price agreement, or other Contract document(s), as applicable.

(2) **Notification to Unsuccessful Offerors.** An Entity may obtain tabulations of awarded Bids or evaluation summaries of Proposals for a nominal charge, in person or by submitting to the Agency a Written request accompanied by payment. Such request shall provide the Solicitation Document number and enclose a self-addressed, stamped envelope. In addition, many tabulations of Bids and Proposals awarded by the Oregon Department of Administrative Services and other participating Agencies are available on-line through the State of Oregon Vendor Information Program.

(3) **Availability of Solicitation Files.** The Agency shall make completed solicitation files available for public review at the Agency.

(4) **Copies from Solicitation Files.** Any Entity may obtain copies of material from solicitation files upon payment of a reasonable copying charge.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.027

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0140

Performance Security

(1) **Public Improvement Contracts.** Unless all members of the governing board or comparable authority of the Agency waives the required performance bond under ORS 279.029(5), or unless the Agency's Contract Review Authority exempts a Contract or classes of contracts from the required performance bond pursuant to ORS 279.033, the Contractor shall execute and deliver to the Agency a performance bond in a sum equal to the Contract Price for all Public Improvement Contracts in excess of \$10,000.

(2) **Other Public Contracts.** An Agency may require performance security for other public Contracts. Such requirements shall be expressly set forth in the Solicitation Document.

(3) **Requirement for Surety Bond.** The Agency shall accept only a performance bond furnished by a surety company authorized to do business in Oregon unless otherwise specified in the Solicitation Document (i.e. the Agency may accept a cashier's check or certified check in an amount equal to 100 percent of the Contract price if specified in the Solicitation Document).

(4) **Time for Submission.** The apparent successful Offeror must promptly furnish the required performance security upon the Agency's request. If the Offeror fails to furnish the security as requested, the Agency may reject the Offer and award the Contract to the Responsible Bidder with the next lowest Responsive Bid or the Responsible Proposer with the next highest-scoring Responsive Proposal, and, at the Agency's discretion, the Offeror shall forfeit its Bid or Proposal security.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.029(4) & (5) & ORS 279.033

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0145

Records Maintenance; Right to Audit Records

(1) Records Maintenance; Access.

(a) Contractors and subcontractors shall maintain all fiscal records relating to Contracts in accordance with generally accepted accounting principles ("GAAP"). In addition, Contractors and subcontractors shall maintain all other records necessary to clearly document:

(A) Their performance; and

(B) Any claims arising from or relating to their performance under a public Contract.

(b) Contractors and subcontractors shall make all records pertaining to their performance and any claims under a Contract (the books, fiscal records and all other records, hereafter referred to as "Records") accessible to the Agency at reasonable times and places, whether or not litigation has been filed as to such claims.

(2) **Inspection and Audit.** An Agency may, at reasonable times and places, have access to and an opportunity to inspect, examine, copy, and audit the Records of any Entity that has submitted cost or pricing data according to the terms of a Contract to the extent that the Records relate to such cost or pricing data. If the Entity must provide cost or pricing data under a Contract, the Entity shall maintain such Records that relate to the cost or pricing data for 3 years from the date of final payment under the Contract, unless a shorter period is otherwise authorized in Writing.

(3) **Records Inspection; Contract Audit.** The Agency, and its authorized representatives, shall be entitled to inspect, examine, copy, and audit any Contractor's or subcontractor's Records, as provided in section (1) of this rule. The Contractor and subcontractor shall maintain the Records and keep the Records accessible and available at reasonable times and places for a minimum period of 3 years from the date of final payment under the Contract or subcontract, as applicable, or until the conclusion of any audit, controversy or litigation arising out of or related to the Contract, whichever date is later, unless a shorter period is otherwise authorized in Writing.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.029(1), ORS 279.037 & ORS 279.056

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0150

Right to Inspect Plant

(1) **Time for Inspection.** The Agency may inspect the part of the plant or Contractor's or subcontractor's place of business that is related to the performance of any awarded Contract.

(2) **Access.** Offerors agree as a condition of submitting an Offer that the Agency's representative may enter an Entity's plant or place of business during normal business hours for the following purposes:

(a) Inspect and/or test supplies or services for the Agency's acceptance pursuant to the terms of the Offer;

(b) Investigate a minority business certification, or Offeror qualification in connection with an Offeror's application.

(3) **Contractual Provisions.** A Contract may provide that the Agency may inspect supplies and services at the Contractor's or subcontractor's facility and perform tests to determine if such supplies and services conform to the Solicitation Document or to the Contract requirements, and are acceptable. Such inspections and tests shall be conducted in accordance with the terms of the Contract.

(4) **Procedures.** The Agency may establish operational procedures governing the testing and trial use of equipment, materials and the application of resulting information and data to Specifications or procurements.

(5) Conduct of Inspections:

(a) The Agency, or authorized representative, will inspect or test so as not to unduly delay the Work of the Contractor or subcontractor. The inspector may not require a change in the Contract, including the Specifications without the Agency's Written authorization, unless otherwise specified in the Solicitation Document. The presence or absence of an inspector shall not relieve the Contractor or subcontractor from any requirement of the Contract;

(b) When an inspection is made in the plant or place of business of a Contractor or subcontractor, such Contractor or subcontractor shall provide without charge all reasonable facilities and assistance for the safety and convenience of the Agency or authorized representative performing the inspection or testing;

(c) The inspector shall perform inspection or testing of supplies and services at the plant or place of business of a Contractor

or subcontractor at reasonable times during normal business hours.

(6) **Inspection of Construction Projects.** The Agency or its authorized representative may perform on-site inspection of construction in accordance with the terms of the Contract.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.029(1) & ORS 279.037

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

137-030-0155

Substitute Contractor

If the Contractor provided a performance and payment bond, the Agency may afford the Contractor's surety the opportunity to provide a substitute Contractor to complete performance of the Contract. A substitute Contractor shall perform all remaining Contract Work and comply with all terms and conditions of the Contract, including the provisions of the performance and payment bond. Such substitute performance does not involve the award of a new Contract and shall not be subject to the competitive procurement provisions of ORS 279.005 to 279.111.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.027(3), ORS 279.029(4) & ORS 279.033

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98; DOJ 6-1999(Temp), f. & cert. ef. 10-22-99 thru 12-31-99

DIVISION 35

MODEL RULES FOR SCREENING AND SELECTION OF PERSONS TO PERFORM ARCHITECTURAL AND ENGINEERING CONTRACTS

137-035-0000

Purpose and Intent

(1) Pursuant to ORS 279.049, the Attorney General is responsible for preparing and maintaining model rules of procedure appropriate for use by all public contracting agencies governing the screening and selection of consultants to perform architectural, engineering or land surveying services. When adopted by public contracting agencies, the model rules are intended to result in the competitive selection of the most qualified consultant based on the consultant's demonstrated competence and qualifications to perform the professional services required and result in a contract at a fair and reasonable price.

(2) Reflecting the requirements of ORS 279.057(6), these rules distinguish between agencies of the State of Oregon, which are required to follow the screening and selection procedures set forth in ORS 279.057, and agencies of political subdivisions and public bodies created by intergovernmental agreement, which are not required to follow a qualifications based selection process unless that process is required as a condition of receiving federal grant funds.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.049 & ORS 279.057

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92; DOJ 7-1998, f. & cert. ef. 10-6-98

137-035-0010

Definitions

As used in OAR 137-035-0000 to 137-035-0080, unless the context requires otherwise:

(1) "Architect": A person defined by and described in ORS 671.010 to 671.220.

(2) "Compensation information": Pricing policies and proposals or other pricing information solicited and used by a public contracting agency to determine a consultant's compensation, including but not limited to a consultant's:

- (a) Costing procedures and/or pricing structure;
- (b) Hourly rates and fee schedules;
- (c) Overhead costs;

(d) Fee range, as a percentage of direct construction costs, on previous similar projects; and

(e) Proposed rates and fees under a particular cost proposal (including but not limited to direct salary and direct non-salary costs, overhead and profit).

(3) "Consultant":

(a) In the case of an agency of the State of Oregon, a registered architect, a registered professional engineer, or a registered professional land surveyor; or

(b) In the case of an agency of any political subdivision of the State of Oregon or any public body created by intergovernmental agreement, a registered architect or a registered professional engineer.

(4) "Consultant contract": A contract between a public contracting agency and a consultant.

(5) "Consultant services": Professional services of a consultant.

(6) "Proposal": A competitive written offer submitted in response to a public contracting agency's Request for Proposals.

(7) "Public contracting agency": An agency of the State of Oregon or an agency of a political subdivision thereof or a public body created by intergovernmental agreement, as the context requires.

(8) "Registered professional engineer": A person defined by and described in ORS 672.002 to 672.325.

(9) "Registered professional land surveyor": A person defined by and described in ORS 672.002 to 672.325.

(10) "Request for Proposals" or "RFP": A public contracting agency's written document soliciting competitive written proposals and setting forth the criteria and method to be used by the public contracting agency to select the best proposal. The document:

(a) Provides a general description of a proposed project or projects, including a proposed statement of work;

(b) Indicates the type of consultant services needed; and

(c) Requests prospective consultants to submit written proposals that address the specific requirements of the project or projects.

(11) "Request for Qualifications" or "RFQ": A public contracting agency's written document which:

(a) Provides a general description of a proposed project;

(b) Indicates the type of consultant services needed, including, if deemed necessary or appropriate, a description of particular services needed for part or all of a proposed project or projects; and

(c) Requests each prospective consultant to provide a written response setting forth the consultant's specific experience and qualifications for performing the type of services required.

(12) "Statement of Work": A written statement that describes the:

(a) Phases of work, major tasks, or areas of responsibility to be performed by the consultant;

(b) On an individual project or series of projects, or within a particular locale during a stated period of time. Such statement may be altered or modified during contract negotiations, but only as reasonably necessary to accurately describe the project approach and exact scope of services agreed to by the public contracting agency and the consultant.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.049 & ORS 279.057

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92; DOJ 7-1998, f. & cert. ef. 10-6-98

137-035-0020

List of Interested Consultants; Performance Record

(1) Consultants who are engaged in the lawful practice of their profession and interested in performing consultant services may submit annually a statement of qualifications and performance data to the office address provided by the public contracting agency. The public contracting agency will compile and maintain the information as a list of prospective consultants and will review and update this list at least once every two years.

(2) A record of each consultant's performance, including information gained during an exit interview, may be compiled and

maintained by the public contracting agency. A copy of such record shall be made available by the public contracting agency to the consultant upon request. Unless lawfully exempt, in whole or in part, from disclosure pursuant to ORS 192.410 to 192.505 (e.g., as a trade secret or other confidential information), a copy of the record may also be made available by the public contracting agency to other persons and organizations upon request.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.049

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92; DOJ 7-1998, f. & cert. ef. 10-6-98

137-035-0030

Use of Consultants; Selection Methods; Notice; Solicitation Provision

(1) A contract with a qualified consultant for consultant services, as defined in ORS 671.010(5), 671.310(3) and 672.005 to 672.007, respectively, may be entered into when:

(a) The required services cannot be performed within a reasonable time using the public contracting agency's own work force;

(b) The skills necessary to perform the required services are not available within the public contracting agency; or

(c) An impartial opinion or evaluation is necessary or appropriate.

(2) Formal. Consultant services may be obtained using the formal selection procedure set forth in OAR 137-035-0060. The formal procedure shall be used whenever the estimated cost of consultant services exceeds \$75,000.

(3) Informal. When the estimated cost of consultant services is equal to or less than \$75,000, the informal selection procedure set forth in OAR 137-035-0050 may be used.

(4) Direct Appointment. When the circumstances set forth in OAR 137-035-0040 are found to exist, the direct appointment procedure provided for in that rule may be used.

(5) Notice. Except where the circumstances stated in OAR 137-035-0040(2)(a) exist, requiring direct appointment of a qualified consultant and making timely notice impracticable, a public contracting agency shall provide timely *prior* notice pursuant to ORS 200.035 for *all* solicitations for consultant services with an estimated cost exceeding \$5,000. A public contracting agency using the direct appointment procedure pursuant to OAR 137-035-0040(2)(a) shall provide notice in accordance with ORS 200.035 as soon as it is reasonably practicable to do so.

(6) Solicitation Provision. All **RFPs** for consultant services shall, regardless of amount, include the following language: "**In accordance with ORS 279.555(2), consultants shall use recyclable products to the maximum extent economically feasible in the performance of the contract work set forth in this document**".

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.049 & ORS 279.057

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92; DOJ 7-1998, f. & cert. ef. 10-6-98

137-035-0040

Direct Appointment Procedure

(1) A qualified consultant may be appointed directly from:

(a) The public contracting agency's current list of consultants;

(b) Another public contracting agency's current list of consultants, pursuant to an interagency or intergovernmental agreement entered into in accordance with ORS Chapter 190; or

(c) Among all consultants offering the necessary consultant services that the public contracting agency reasonably can locate, following public advertisement.

(2) The direct appointment procedure may be used when:

(a) Circumstances which could not reasonably have been foreseen create a substantial risk of loss, damage, interruption of services or threat to the public health or safety and require the prompt performance of consultant services to remedy the situation; or

(b) The estimated cost of consultant services does not exceed \$10,000; or

(c) The project:

(A) Consists of work which has been substantially described, planned or otherwise previously studied or rendered in an earlier contract, and is in continuation of a project;

(B) The estimated cost of consultant services for such project does not exceed \$75,000; and

(C) The selection procedure used for the original project was the formal selection procedure set forth in OAR 137-035-0060 (or a substantially equivalent procedure if the consultant services for the original project were procured prior to adoption of these rules); or

(d) The consultant will be assisting legal counsel, through expert analysis, testing, testimony or otherwise, on a project which is, or is reasonably anticipated to be, the subject of a claim, lawsuit or other form of action, whether legal, equitable, administrative or otherwise.

(3) A direct appointment, pursuant to subsection (2)(a) or (b) of this rule, shall be competitive to the extent practicable and may be based on criteria which include but are not limited to:

(a) The consultant's availability, capabilities, staffing, experience, and compensation information; and

(b) The project's location.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.049 & ORS 279.057

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92; DOJ 7-1998, f. & cert. ef. 10-6-98

137-035-0050

Informal Selection Procedure

(1) The informal selection procedure may be used to obtain consultant services if the estimated cost of consultant services is equal to or less than \$75,000.

(2) A written solicitation inviting written proposals shall be sent to a minimum of five prospective consultants drawn from:

(a) The public contracting agency's current list of consultants;

(b) Another public contracting agency's current list of consultants, pursuant to an interagency or intergovernmental agreement entered into in accordance with ORS Chapter 190; or

(c) Among all consultants offering the necessary consultant services that the public contracting agency reasonably can locate.

(3) All proposals shall be reviewed and the three most qualified consultants selected and ranked.

(4) The informal selection procedure shall be competitive to the maximum extent practicable and the selection and ranking may be based on criteria which, in the case of an agency of a political subdivision of the State or a public body created by intergovernmental agreement, include but are not limited to a consultant's:

(a) Particular capability to perform the consultant services for the project being considered;

(b) Number of experienced staff available to perform the consultant services required by the project, including each consultant's recent, current, and projected workloads;

(c) Performance history on past projects for public or private clients;

(d) Project approach and design philosophy;

(e) Compensation information; and

(f) Geographic proximity to the project;

(g) The public contracting agency may also consider the volume of work, if any, previously awarded to each consultant, with the object of effecting an equitable distribution of contracts among qualified consultants, *provided such distribution does not violate the principle of selecting the most highly qualified consultant*.

(5) In the case of an agency of the State of Oregon, in addition to the criteria set forth in OAR 137-035-0050(4)(a) through (d), (f) and (g), the criteria for screening and selection may include consideration of a consultant's:

(a) Specialized experience, capabilities and technical competence that may be demonstrated by the proposed approach and methodology to meet the project requirements;

(b) Resources available to perform the work, including any specialized services, within the applicable time limits;

(c) Record of past performance, including but not limited to price and cost data from previous projects, quality of work, ability to meet schedules, cost control and contract administration;

(d) Ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;

(e) Availability to the project locale;

(f) Familiarity with the project locale; and

(g) Proposed project management techniques.

(6) The public contracting agency and the highest ranked consultant shall mutually discuss and refine the scope of services for the project and shall negotiate conditions, including but not limited to compensation level and performance schedule, based on the scope of services. Contract negotiations with the highest ranked consultant shall be directed toward obtaining written agreement on:

(a) The consultant's tasks and a performance schedule;

(b) The level of compensation and a maximum, not-to-exceed contract price which is fair and reasonable to the public contracting agency, as determined solely by the public contracting agency, taking into account the estimated value, scope, complexity, and nature of the consultant services.

(7) Negotiations may be formally terminated if they fail to result in a contract within a reasonable amount of time. Negotiations will then ensue with the second ranked consultant. This second round of negotiations may be formally terminated if it, too, fails to result in a contract within a reasonable amount of time. Negotiations with the third ranked consultant will then begin promptly. If this third round of negotiations fails to result in a contract within a reasonable amount of time, the solicitation may be formally terminated. Thereafter, the services of a qualified consultant may be solicited using the formal selection procedure set forth in OAR 137-035-0060, or, depending upon the circumstances, the direct appointment procedure provided for in OAR 137-035-0040.

(8) If the scope of a project is revised during negotiations so that the estimated cost of the consultant's services exceeds \$75,000, then the informal process shall be terminated and the services of a qualified consultant solicited using the formal selection procedure set forth in OAR 137-035-0060; provided, however, that negotiations with the informally selected consultant may continue if the public contracting agency makes written findings that contracting with the consultant will:

(a) Not encourage favoritism in the awarding of consultant contracts or substantially diminish competition for consultant contracts; and

(b) Will result in substantial cost savings to the public contracting agency.

(9) Notwithstanding the submission of proposals from potential consultants during an informal selection process, a public contracting agency may at any time during the solicitation process or during contract negotiations reject all consultant proposals and cancel the solicitation, without liability therefor, upon a finding by the public contracting agency that there is good cause for rejecting all proposals and that it would be in the public interest to cancel the solicitation. Further, a public contracting agency which solicits proposals shall under no circumstances be responsible for any consultant costs and expenses incurred in submitting responses to the solicitation. Each prospective consultant who responds to a public contracting agency's solicitation does so solely at the consultant's cost and expense and each solicitation shall so provide.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.049 & ORS 279.057

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92; DOJ 7-1998, f. & cert. ef. 10-6-98

137-035-0060

Formal Selection Procedure

(1) The formal selection procedure shall be used whenever the estimated cost of consultant services exceeds \$75,000.

(2) Responses shall be solicited through public advertisement and:

(a) An RFP; or

(b) An RFQ to establish a short list, followed by an RFP:

(A) The advertisement shall appear at least once in at least one newspaper of general circulation in the area where the project is to be located and in as many additional issues and publications as may be necessary or desirable to achieve adequate competition. Such other publications may include, but are not limited to, local newspapers, trade journals, and publications targeted to reach the minority, women and emerging small business enterprise audiences. The advertisement(s) shall be published a reasonable time before the deadline for responding but in any event no fewer than 14 calendar days before close of the solicitation. The advertisement(s) shall briefly describe:

(i) The project;

(ii) The consultant services sought;

(iii) Where copies of the solicitation may be obtained; and

(iv) The deadline for submitting a response.

(B) In addition, direct notice of the solicitation may be sent to all consultants on the agency's current list of consultants (or on a list of consultants available pursuant to an interagency or inter-governmental agreement).

(3) RFQ Procedures: When an RFQ is used to evaluate qualifications, screen potential consultants and establish a short list, the RFQ shall contain, at a minimum:

(a) The information listed in subsection (2)(b)(A)(i) through (iv) of this rule;

(b) A statement of the particular consultant qualifications required for the project;

(c) The evaluation criteria (including the weights or points applicable to each criterion); and

(d) The screening or evaluation method to be used. The RFQ may request any or all of the following:

(A) The information set forth in OAR 137-035-0020(1), unless it has already been obtained;

(B) The consultant's particular capability to perform the consultant services required for the project, and the consultant's recent, current, and projected workloads;

(C) The number of the consultant's experienced staff available to perform the consultant services required by the project, including such personnel's specific qualifications and experience;

(D) A list of similar projects completed by the consultant with references concerning past performance, including copies of any performance records maintained pursuant to OAR 137-035-0020(2);

(E) Any other information which is deemed reasonably necessary to evaluate consultant qualifications.

(e) In the case of an agency of the State, the criteria for screening and selection may include consideration of, and the RFQ may request information regarding the factors listed in OAR 137-035-0050(5).

(4) An RFQ consultant screening and evaluation committee of no fewer than two individuals shall be established to review, score and rank the consultants according to the solicitation criteria and the results of any oral interviews. The committee may be composed of members who, collectively, have experience in areas such as architecture, engineering, land surveying, construction, and public contracting. Members may be appointed from qualified professional employees of the public contracting agency or other agencies, and if authorized by agency procedure, may include private practitioners of architecture, engineering, land surveying or related professions. One public contracting agency member of the committee shall be designated as the chairperson.

(5) Following screening and evaluation, a short list of at least three qualified consultants shall be established; provided, however, that if four or fewer potential consultants respond to the RFQ, then:

(a) A short list of fewer than three qualified consultants may be established; or

(b) The RFQ may be canceled and an RFP issued; provided, further, that no person or firm shall be eligible for placement on an RFQ consultant short list during the period in which any of the person's or firm's principals, partners or associates are participating as members of the public contracting agency's consultant screening and evaluation committee. Except where the RFQ is canceled, every consultant who is placed on a short list shall thereafter receive a copy of the RFP and have an opportunity to submit a proposal. Notwithstanding the foregoing, issuance of an RFQ shall under no circumstances make a public contracting agency responsible for any consultant costs and expenses incurred in submitting responses to the RFQ. All potential consultants who respond to an RFQ do so solely at the consultant's cost and expense and each RFQ shall so provide.

(6) Any reasonable screening or evaluation method may be used to establish a short list of qualified consultants, including, but not limited to:

(a) Requiring potential consultants to achieve a threshold score to be placed on a short list;

(b) Placing the three, or more, highest scoring consultants on a short list; or

(c) Placing on a short list only those consultants who possess certain essential qualifications or experience, whose practice is limited to a particular subject area, or who practice in a particular geographic locale or region, provided that such factors are material, would not unduly restrict competition, and were announced as dispositive in the RFQ. Thereafter, an RFP shall be issued in accordance with the procedures set forth in subsections (7) through (16) of this rule to each of the consultants placed on the short list.

(7) RFP Procedures: The RFP, whether or not preceded by an RFQ, shall describe or contain the following information:

(a) General background information, including a description of the project and the specific consultant services sought, the estimated construction cost, and the time period in which the project is to be completed;

(b) The evaluation process and the criteria which will be used to select the consultant, including the weight or points applicable to each criterion;

(c) Whether interviews are anticipated;

(d) The closing date and time of the solicitation and the delivery location for consultant proposals;

(e) Reservation of the right to seek clarifications of each consultant's proposal;

(f) In the case of an agency of a political subdivision of the State or a public body created by intergovernmental agreement, reservation of the right to negotiate a final contract which is in the best interest of the public contracting agency, considering cost effectiveness, or in the case of an agency of the State, reservation of the right to negotiate a final contract under which the compensation paid to the consultant is fair and reasonable to the public contracting agency as determined solely by said agency;

(g) The level of consultant time and effort required for the project, provided that responses are solicited and utilized to ascertain a proposer's understanding of the workscope, alternative approaches to accomplishing the work or resources available to perform the work, and that, in the case of an agency of the State, compensation information is neither directly nor indirectly requested or inferred from such responses; and

(h) Reservation of the right to reject any or all proposals if there is good cause therefor and, further, reservation of the right to cancel the solicitation if doing so would be in the public interest.

(8) The RFP, whether or not preceded by an RFQ, should also describe or contain the following information, when applicable:

(a) Special contract requirements, including, but not limited to, DBE/MBE/WBE/ESB participation goals or good faith efforts and federal requirements where federal funds are involved;

(b) A sample of the contract the consultant will be expected to execute; and

(c) Any other information which is reasonably necessary to evaluate, rank and select consultants.

(9) The RFP shall require each consultant's proposal to provide the information required in OAR 137-035-0060(3)(d) or OAR 137-035-0060(3)(e) for responses to an RFQ (unless the RFP follows an RFQ and such information was previously supplied to the public contracting agency), and may also require each consultant's proposal to contain:

(a) A description of the consultant's proposed project approach, including an estimate of the amount of time that the consultant will need to complete each major task, and a preliminary schedule for performing major elements;

(b) Except when the public contracting agency is an agency of the State the consultant's compensation information;

(c) The availability of any required special resources or equipment; and

(d) The identity of any proposed subconsultants and the portions of the work to be performed by subconsultants.

(10) A pre-qualification or pre-proposal meeting may be held for all interested consultants to discuss the proposed project and the required consultant services. Attendance at such a meeting, if held, may be mandatory.

(11) An RFP consultant selection committee of no fewer than two individuals shall be established to review, score and rank the consultants' responses to the RFP according to such criteria as those listed in OAR 137-035-0060(12). If the RFP follows an RFQ, the members of the RFP consultant selection committee may be the same individuals who served on the public contracting agency's RFQ consultant screening and evaluation committee. If considered necessary or desirable, the RFP consultant selection committee may elect to interview the consultants. The committee may be composed of members who, collectively, have experience in areas such as architecture, engineering, land surveying, construction and public contracting. Members may be appointed from highly qualified professional employees of the public contracting agency or other agencies, and if authorized by the public contracting agency's procedure, may include private practitioners of architecture, engineering, land surveying or related professions. One public contracting agency member of the committee shall be designated as the chairperson. Provided, however, that no person or firm shall be eligible for award of a consultant contract during the period in which any of the person's or firm's principals, partners or associates are participating as members of the public contracting agency's consultant screening and evaluation committee or as members of its consultant selection committee.

(12) The RFP consultant selection committee shall review, score and rank all responsive proposals according to criteria which may include, but are not limited to, the following:

(a) Availability and capability to perform the work;

(b) Experience of key staff on comparable project(s);

(c) Demonstrated ability to successfully complete similar projects on time and within budget, including whether there is evidence of satisfactory performance as provided in OAR 137-035-0020(2);

(d) References and recommendations from past clients, public and private;

(e) Consultant's performance history in:

(A) Meeting deadlines;

(B) Submitting accurate estimates;

(C) Producing high quality work; and

(D) Meeting financial obligations.

(f) Status and quality of any required licensing or certification;

(g) Consultant's knowledge and understanding of the project as shown in the consultant's:

(A) Approach to the project's staffing and scheduling needs; and

(B) Proposed solutions to any perceived design and constructability problems.

(h) Except when the public contracting agency is an agency of the State, consultant's compensation requirements;

(i) Results from oral interviews, if conducted;

(j) Design philosophy and project approach; and

(k) Any other criteria that are deemed to be relevant to the project, including, where the nature and budget of the proposed project so warrant, a design competition between competing consultants. Each of the evaluation criteria shall be listed in the RFP and shall be of equal weight, or worth the same number of points, unless the RFP provides otherwise and states the weights or points applicable to each criterion.

(13) Contract negotiations with the highest ranked consultant shall be directed toward obtaining written agreement on:

(a) The consultant's tasks and a performance schedule;

(b) A maximum, not-to-exceed contract price which is consistent with the consultant's proposal and fair and reasonable to the public contracting agency, taking into account the estimated value, scope, complexity, and nature of the consultant services.

(14) Negotiations may be formally terminated if they fail to result in a contract within a reasonable amount of time. Negotiations will then ensue with the second ranked consultant. This second round of negotiations may be formally terminated if it, too, fails to result in a contract within a reasonable amount of time. Negotiations with the third ranked consultant will then begin promptly. If this third round of negotiations fails to result in a contract within a reasonable amount of time, the solicitation may be formally terminated. Thereafter, the services of a qualified consultant may be obtained, depending upon the circumstances, through the direct appointment procedure provided for in OAR 137-035-0040.

(15) Notwithstanding the submission of proposals and the recommendations of the RFP consultant selection committee, a public contracting agency may at any time during the solicitation process or during contract negotiation reject all consultant proposals and cancel the solicitation, without liability therefor, upon a finding by the public contracting agency that there is good cause for rejecting all proposals and that it would be in the public interest to cancel the solicitation. Further, unless consultant compensation is expressly provided for in the solicitation document, under no circumstances shall a public contracting agency which issues an RFP be responsible for any consultant costs and expenses incurred in submitting responses to the solicitation. Except where the solicitation document expressly provides for consultant compensation, all prospective consultants who respond to a public contracting agency's RFP do so solely at the consultant's cost and expense and each RFP shall so provide.

(16) If a project for which a consultant has been selected and awarded a contract becomes inactive or is materially altered or terminated, whether due to project phasing, insufficient appropriations, or other reasons, the public contracting agency may, if the project is reactivated or continued after material alteration, retain the same consultant to complete the project if the public contracting agency makes written findings that retaining the consultant will:

(a) Not encourage favoritism in the awarding of consultant contracts or substantially diminish competition for consultant contracts; and

(b) Will result in substantial cost savings to the public contracting agency.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.049 & ORS 279.057

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92; DOJ 7-1998, f. & cert. ef. 10-6-98

137-035-0070

Protest Procedures

(1) Solicitation protest. Unless a different deadline is specified in the solicitation document, prospective consultants may submit a written protest, or request for change, of particular solicitation provisions, specifications or contract terms and conditions to the public contracting agency no later than seven calendar days prior to the close of the solicitation. Such protest or request for change shall include the reasons for the protest or request, and any proposed changes to the solicitation provisions, specifications or contract terms and conditions. No protest against selection of a

consultant or award of a consultant contract, because of the content of the solicitation provisions, specifications, or contract terms and conditions, shall be considered after the deadline established for submitting such protest.

(2) Selection protest. Every consultant who submits a proposal in response to an RFP shall be copied with the selection notice sent to the highest ranked consultant. Unless a different deadline is specified in the RFP, a consultant who has submitted a proposal and claims to have been adversely affected or aggrieved by the selection of a competing consultant shall have seven calendar days after the date of the notice of selection to submit a written protest of the selection to the public contracting agency. To be adversely affected or aggrieved, a protester must claim that the protester was the highest ranked consultant eligible for selection, i.e., the protester must claim that *all* higher ranked consultants were ineligible for selection because their proposals were nonresponsive or the consultants nonresponsive. A public contracting agency shall not consider a selection protest submitted after the time period established in this section, unless a different deadline is provided in the RFP.

(3) The head of the public contracting agency, or designee, shall have the authority to settle or resolve a written protest submitted in accordance with OAR 137-035-0070(1) or OAR 137-035-0070(2). The head of the public contracting agency, or designee, shall promptly issue a written decision on the protest.

(4) Judicial review of a public contracting agency's disposition of a written protest submitted in accordance with OAR 137-035-0070(1) or OAR 137-035-0070(2) may be available pursuant to the provisions of ORS 183.484.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.049

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92; DOJ 7-1998, f. & cert. ef. 10-6-98

137-035-0080

Prohibited Fee Provisions, Purchases

(1) Except as otherwise required by law, no consultant contract shall be awarded which contains fee provisions or fee schedules that are based on or limited to:

(a) Cost-plus-a-percentage-of-cost; or

(b) A percentage of construction or project costs.

(2) Except in:

(a) Cases of emergency as defined in ORS 279.011(4); or

(b) The particular instances noted below, no building materials, supplies or equipment for any building, structure or facility constructed by or for a public contracting agency shall be sold by or purchased from any person or firm employed as a consultant by the public contracting agency to provide consultant services for such building, structure or facility. The prohibition stated in this OAR 137-035-0080(1) shall not apply:

(A) Where a consultant is providing architectural or engineering services under a contract with a public contracting agency to provide:

(i) Construction manager/general contractor services; or

(ii) Design build services; or

(B) Where that portion of the consultant contract relating to the acquisition of building materials, supplies or equipment was awarded pursuant to applicable law governing the award of such contracts.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.049

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92; DOJ 7-1998, f. & cert. ef. 10-6-98

DIVISION 40

PUBLIC IMPROVEMENT CONTRACTS

137-040-0000

Application

In addition to the requirements set forth in Division 30 of these rules, the following rules apply to public improvement Contracts. The requirements in Division 40 are intended to be comple-

mentary to those in Division 30, with the rules in Division 40 supplementing the Division 30 requirements, where necessary, to meet the Agency's needs when letting and administering Contracts for public improvements. In the event of ambiguity or the need for interpretation, the more specific requirements of the rules in Division 40 take precedence on a public improvement Contract over the more general requirements of the rules in Division 30.

Stat. Auth.: ORS 279.049
Stats. Implemented: ORS 279.049
Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0005

Competitive Procurement - General

Public improvement contracts shall be awarded by competitive Bidding, except as otherwise allowed or required in ORS 279.015, 279.029(2), 279.053, 279.056 or 279.059(2). See OAR 137-040-0500 to 137-040-0590 for Alternative Contracting Methods.

Stat. Auth.: ORS 279.049
Stats. Implemented: ORS 279.015
Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0010

Public Notice

(1) **Trade newspaper advertisement.** In addition to the requirements of OAR 137-030-0015 as applicable, Agency solicitations for public improvements having an estimated cost in excess of \$125,000 shall be advertised in at least one trade newspaper of general state-wide circulation. (ORS 279.025)

(2) **Notice of requirement for Asbestos Abatement License.** Pursuant to the requirements of ORS 279.025(2)(j), ORS 468A.760, and OAR 137-030-0015(2)(j), when the Agency requests Bids or Proposals for a public improvement project, it shall first determine whether the project requires a Contractor licensed under ORS 468A.720 to work with asbestos or asbestos-containing material. The Agency shall include in the solicitation advertisement a statement whether performance of the Contract requires a Contractor licensed to do asbestos abatement Work under ORS 468A.720.

(3) Prevailing wage rate notice.

(a) If the Contract is for a "public work" subject to ORS 279.348 to 279.380 or the Davis Bacon Act (40 USC § 276a et seq.) the Agency shall include in the public notice a statement that no Bid or Proposal will be received or considered by the Agency unless the Bid or Proposal contains a statement by the Bidder or Proposer that Bidders or Proposers shall comply with the requirements of the prevailing wage laws in ORS 279.350 or 40 USC § 276a.

(b) This notice requirement also applies in the event the solicitation is for a public improvement that is being constructed, reconstructed or renovated for use by a state Agency under a lease-purchase agreement or under any other agreement whereby ultimate state ownership is contemplated or expected (ORS 276.071).

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 279.049
Stats. Implemented: ORS 279.025 & ORS 468A.760
Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0015

Bid or Proposal Evaluation and Award

(1) **General.** A public improvement Contract, if awarded, shall be awarded to the lowest, responsive and responsible Bidder or the best, responsive and responsible Proposer. (See OAR 137-030-0090 and rules for Alternative Contracting Methods at OAR 137-040-0500 to 137-040-0590).

(2) **Special requirements.** The Solicitation Documents shall set forth any special requirements and criteria which will be used to determine the lowest, responsive and responsible Bidder or best, responsive and responsible proposer. No Bid or Proposal

shall be evaluated for any requirement or criterion that is not disclosed in the Solicitation Documents or Agency regulation.

(3) **Bid Evaluation and Award.** The evaluation format for competitive Bid pricing can be lump sum, unit price or a combination of the two.

(a) **Lump sum.** If the Bid form includes a lump sum base Bid, plus additive or deductive alternates, the total Bid price, for the purpose of comparing Bids, shall be the total sum computed from adding or deducting alternates, as selected by the Agency, to the base Bid. If the Bid form requires a lump sum Bid, without additive or deductive alternates, or if the Agency has selected no additive or deductive alternates for award, Bids shall be compared on the basis of lump sum prices, or lump sum base Bid prices, as applicable.

(b) **Unit price.** If the Bid includes unit prices and extensions for estimated quantities, the total Bid price, for the purpose of comparing Bids, will be the total sum computed from multiplying estimated quantities by the unit prices entered on the Bid form by the Bidder, with due adjustments being made for additive or deductive alternates, if any, selected for award. In case of a conflict between a unit price and the corresponding extended amount, the unit price shall govern, as provided in OAR 137-030-0075(2)(b).

(c) **Combination lump sum and unit price.** The Agency may select a combination of factors for purposes of Bid evaluation and Contract award and use the methods described in (a) and (b) to compute and compare Bids.

(4) **Proposal Evaluation and Award.** If an Alternative Contracting Method is authorized by the Agency's public Contract review authority pursuant to ORS 279.015(2) and 279.015(6) for use in procuring a public improvement, Proposals shall be evaluated to determine which proposer offers the best solution to the Agency in accordance with the evaluation criteria set forth in the Solicitation Documents and in accordance with any applicable Agency rules. See OAR 137-040-0550.

(5) **No assignment or transfer of Contract rights.** A Contractor shall not assign, sell, or transfer rights, nor delegate responsibilities, under a public Contract, either in whole or in part, without first obtaining the Agency's prior Written consent. Such Written consent shall not relieve a Contractor of any obligations under a public Contract, and any transferee shall be considered the agent of the Contractor and bound to abide by all provisions of the public Contract. Except in the event of a novation, if the Agency consents in Writing to an assignment, sale, or transfer of the Contractor's rights and responsibilities, the Contractor shall remain ultimately liable to the Agency for complete performance of the public Contract as if no such assignment, sale, or transfer had occurred.

Stat. Auth.: ORS 279.049
Stats. Implemented: ORS 279.029 & ORS 279.049
Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0020

Contract Cancellation, Contractor Termination Procedures

(1) **Termination due to circumstances beyond the control of the Contractor.** (ORS 279.324, 279.326, 279.328, 279.330, 279.332):

(a) **Reasons for termination.** The Agency may, in its sole discretion, by a Written order or upon Written request from the Contractor, terminate the Contract or a portion thereof if any of the following occur:

(A) The Contractor is prevented from completing the Work for reasons beyond the control of the Agency; or

(B) The Contractor is prevented from completing the Work for reasons beyond the control of the Contractor; or

(C) For any reason considered by the Agency to be in the public interest (other than a labor dispute or any third party judicial proceeding relating to the Work filed in regards to a labor dispute). These reasons may include, but are not necessarily limited to, nonavailability of materials, phenomena of nature of catastrophic proportions or intensity, executive orders of the President

related to national defense, congressional or state acts related to funding; or

(D) Any third party judicial proceeding relating to the Work other than a suit or action filed in regards to a labor dispute; and

(E) If the circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the public improvement.

(b) **Payment when Contract is terminated.** When the Contract, or any portion thereof, is terminated before completion of all items of Work in the Contract, payment will be made, based on the Contract Price, for the actual items of Work completed under the Contract, or by mutual agreement, for items of Work partially completed. No claim for loss of anticipated profits will be allowed;

(c) **Responsibility for completed Work if Contract terminated.** Termination of the Contract or a portion thereof shall not relieve the Contractor of responsibility for the Work completed, nor shall it relieve the surety of its obligation for any just claims arising from the Work performed.

(2) **Termination of the Contract or the Contractor's performance for default (ORS 279.333):**

(a) **Declaration of default.** The Agency may, after giving the Contractor and its surety seven (7) Days Written notice and an opportunity to cure deficient performance, terminate the Contractor's performance for any reasonable cause, including but not limited to those set forth in subsection (2)(a)(A) to (F) of this rule. Upon such termination, the Agency may immediately take possession of the premises and of all materials, tools and appliances thereon as well as all other materials, whether on the premises or not, on which the Contractor has received partial payment. The Agency may finish the Work by whatever method it may deem expedient;

(A) If the Contractor should repeatedly refuse or fail to supply an adequate number of skilled workers or proper materials to carry on the Work as required by the Contract documents, or otherwise fail to pursue the Work in a timely manner; or

(B) If the Contractor should repeatedly fail to make prompt payment to subcontractors or for material or labor, or should disregard laws, ordinances or the instructions of the Agency or its representative; or

(C) If the Contractor should voluntarily or involuntarily seek protection under the United States Bankruptcy Code and its Debtor in Possession or Trustee for the estate fails to assume the Contract within a reasonable time; or

(D) If the Contractor should make a general assignment for the benefit of the Contractor's creditors; or

(E) If a receiver should be appointed on account of the Contractor's insolvency; or

(F) If the Contractor is otherwise in material breach of any part of the Contract.

(b) **Required response to declaration of default.** If a default is declared and the Contractor's performance terminated, the Contractor or the surety shall provide the Agency with immediate and peaceful possession of all of the materials, tools and appliances located on the premises, as well as all other materials whether on the premises or not, on which the Contractor has received any progress payment. Further, the Contractor shall not be entitled to receive any further payment until the Work is completed. On the completion of the Work, the Agency shall determine the total amount of compensation the Contractor would have been entitled to receive for the Work, under the terms of the Contract, had the Contractor completed the Work. If, the expense incurred by the Agency exceeds the unpaid balance, the amount of the excess shall be paid to the Agency by the Contractor or the surety;

(c) **Expense of completion.** The expense incurred by the Agency shall be as determined and certified by the Agency;

(d) **Substitution of Contractor.** As provided in OAR 137-030-0155(4), termination of the Contractor and substitution through the Contractor's surety of another Contractor to complete the Work does not constitute the award of a new public Contract

and shall not be subject to the provisions of ORS 279.005 to 279.111.

(e) **Refusal to perform.** In addition to and apart from the above-mentioned right of the Agency to terminate the Contractor's performance, the Contract may be canceled by the Agency for any willful failure or refusal on the part of the Contractor and its surety to perform faithfully the Contract according to all of its terms and conditions; however, in such event neither the Contractor nor the surety shall be relieved from damages or losses suffered by the Agency on account of the Contractor's breach of Contract;

(f) **Remedies are cumulative.** The Agency may, at its discretion, avail itself of any or all of the above rights or remedies and invoke any one of the above rights or remedies without prejudice and without precluding the Agency from subsequently invoking any other right or remedy set forth above, elsewhere in the Contract, or available at law or in equity.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.326 - ORS 279.333

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0025

Retainage

(1) **Retainage of five (5) percent.** Unless the charter of the Agency contains provisions requiring retainage by the Agency of more than five (5) percent of the Contract Price of the Work completed, the amount to be retained from any given progress payment will not exceed five (5) percent of the payment. If the Contract Work is 50 percent completed and the Work is progressing satisfactorily, the Agency may, at its discretion, reduce or eliminate the retainage on the remaining progress payments. Any reduction or elimination of retainage shall be allowed only upon Written application of the Contractor, which application shall include Written approval of the Contractor's surety; except that when the Contract Work is 97-1/2 percent completed, the Agency may, at its discretion and without application by the Contractor, reduce the retained amount to 100 percent of the value of the Contract Work remaining to be done. Upon receipt of Written application by the Contractor, the Agency shall respond in Writing within a reasonable time. If retainage has been reduced or eliminated, the Agency reserves the right in protecting its interests to reinstate at any time retainage from further progress payments.

(2) **Alternatives to cash retainage.** In lieu of cash retainage to be held by the Agency, the Contractor may select one of the following options:

(a) **Deposit of securities:**

(A) The Contractor may deposit bonds or securities as set forth below with the Agency or in any bank or trust company to be held for the benefit of the Agency. In such event, the Agency shall reduce the retainage in an amount equal to the value of the bonds and securities. This reduction in retainage will be made in the progress payments made subsequent to the time the Contractor deposits the bonds and securities;

(B) Bonds and securities deposited or acquired in lieu of retainage, as permitted by this section, shall be of a character approved by the Director of the Oregon Department of Administrative Services, including but not limited to:

(i) Bills, certificates, notes or bonds of the United States.

(ii) Other obligations of the United States or its Agencies.

(iii) Obligations of any corporation wholly owned by the Federal Government.

(iv) Indebtedness of the Federal National Mortgage Association.

(C) At the time the Agency determines that all requirements for the protection of the Agency's interest have been fulfilled, all bonds and securities deposited as above provided will be released to the Contractor.

(b) **Deposit in interest-bearing accounts.** Upon Written request of the Contractor, the Agency shall deposit any amounts withheld as retainage in an interest-bearing account in a bank, savings bank, trust company or savings association for the benefit of the Agency. Earnings on such account shall accrue to the Contractor.

tor. When the Agency is an Agency of the State of Oregon, the account shall be established through the State Treasurer;

(c) **Deposit of surety bond.** The Agency may, at its discretion, allow the Contractor to deposit a surety bond in a form acceptable to the Agency in lieu of all or a portion of funds retained, or to be retained. The Contractor shall accept like bonds from subcontractors and suppliers when the Agency allows surety bonds for retainage.

(3) **Recovery of costs.** If the Agency incurs additional costs as a result of the exercise of any of the options for retainage described herein, the Agency may recover such costs from the Contractor by reduction of the final payment. As Work on the Contract progresses, the Agency shall, upon request, inform the Contractor of all accrued costs.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.420 & ORS 279.435

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0030

Progress Payments

(1) **Request for progress payments.** At a regular time each month, the Contractor shall, if required by the Contract documents, submit to the Agency a request for payment based upon an estimate of the amount of Work completed and of the value of such completed Work. This request may also include, at the Agency's discretion, an estimate of the amount of value of acceptable material to be incorporated in the completed Work which has been delivered and acceptably stored. Upon verification and approval of the Agency, the sum of these values will be referred to as the "value of completed Work". With these estimates as a base, the Agency will make a progress payment to the Contractor, which shall be equal to:

(a) The value of completed Work;

(b) Less those amounts which have been previously paid;

(c) Less other amounts that may be deductible or owing and due to the Agency for any cause; and

(d) Less the appropriate amount of retainage.

(2) **Progress payments do not mean acceptance of Work.**

Progress payments shall not be construed as an acceptance or approval of any part of the Work and shall not relieve the Contractor of responsibility for defective workmanship or material.

(3) **Estimates for progress payments.** The estimates upon which progress payments are based are not represented to be accurate estimates, and all quantities shown therein are subject to correction in the final estimate. If the Contractor uses such estimates as a basis for making payments to subcontractors, this is at the Contractor's own risk, and the Contractor shall bear all loss that may result.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.435

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0035

Final Inspection

(1) **Notification of Completion.** When the Contractor determines that all construction Work on the project has been completed, the Contractor shall notify the Agency in Writing. Within 15 Days of receiving Contractor's notice, the Agency shall make an inspection of the project and project records. If, at such inspection, all construction provided for and ordered under the Contract is complete and satisfactory to the Agency, such inspection shall constitute the final inspection.

(2) **Instructions to complete the Work.** If, however, at any inspection, the Agency finds that any Work, in whole or in part, is unsatisfactory, or finds that all certifications, bills, forms and documents have not been submitted properly, the Agency shall, within 15 Days of receiving Contractor's notice, provide instructions to the Contractor on outstanding requirements to complete the project. When the Contractor determines that it has fully complied with, and executed the instructions, the Contractor shall noti-

fy the Agency in Writing. The Agency shall make another inspection within 15 Days after such notice, or other determination whether all certifications, bills, forms and documents have been submitted properly, and this inspection shall constitute the final inspection, provided the aforementioned outstanding requirements and construction Work have been completed satisfactorily. If the Work or all documentation has not been completed satisfactorily, this procedure shall be repeated (within 15 Days after the Agency receives a second, or succeeding, completion notice from the Contractor) until it has been completed satisfactorily.

(3) **Acknowledgment of acceptance.** When the Agency finds that all Work required under the Contract has been completed satisfactorily, the Agency shall acknowledge acceptance of the Work by providing the Contractor with Written notice of acceptance within 15 Days after receiving the Contractor's first, second, or succeeding, completion notice, as applicable.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.435(7)

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0040

Final Estimate and Final Payment

(1) **Submission of final estimate.** As soon as practicable after final inspection of the Work under the Contract, if unit prices were applicable, the Agency shall prepare a final estimate of the quantities of the various classes of Work performed. Following a determination of the total amount due the Contractor, and following final acceptance of the Work by the Agency, pursuant to the provisions of OAR 137-040-0035, final payment shall be made to the Contractor.

(2) **Set-off of prior payments.** All prior partial estimates and payments shall be subject to correction in the final estimate and payment.

(3) **Interest.** Beginning 30 Days after the date of final acceptance of the project by the Agency, the Agency shall pay to the Contractor interest at the rate established by state statute on the final payment due the Contractor. See ORS 279.435(7).

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.435

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0045

Claims For Unpaid Labor or Supplies

(1) **Right of action.** As provided in ORS 279.526, an Entity, claiming to have supplied labor or materials for Work on a public improvement Contract including any Entity having direct contractual relationship with the Contractor furnishing the bond or direct contractual relationship with any subcontractor, or an assignee of such Entity, or an Entity claiming moneys due the State Accident Insurance Fund Corporation, the State Department of Employment Trust Fund or the Department of Revenue in connection with the performance of the Contract, for which the Entity has not been paid by the prime Contractor or any subcontractor, has a right of action on the Contractor's bond. This right arises if the Entity has not been paid in full and has given Written notice of a claim, as prescribed in ORS 279.528, within 120 Days of last providing labor or furnishing materials, or within 150 Days of providing labor or furnishing materials if the claim is for a required contribution to a fund of any employee benefit plan.

(2) **Notice of claim:**

(a) To initiate a claim against the Contractor's bond, an Entity shall file a notice of claim substantially similar to the form and in the manner prescribed in ORS 279.528. Such notice must be given to the Contractor and the Agency, if the Contract is with a state Agency, or the clerk or auditor of the Agency which let the Contract if the Agency is other than a state Agency.

(b) Any notice of claim shall include at a minimum the following information:

(A) Name and address of the claimant;

(B) Name of prime Contractor;

(C) Title of project and Contract date;

- (D) Name of the Agency;
- (E) Name of bonding company (may be obtained from Agency);
- (F) Name of Contractor or subcontractor to whom labor or material supplied.

(3) **Response to notice of claim.** Upon receipt of such notice of claim, the Agency shall:

- (a) Send acknowledgment to claimant;
- (b) Send copy of notice to prime Contractor;
- (c) File copy of Notice with bonding (surety) company.

(4) **Referral to surety company.** If the Contract has been completed and all funds disbursed to the prime Contractor, all claims shall be referred to the surety company for resolution. The Agency shall not arrange for second payments directly to subcontractors or suppliers for Work already paid for by the Agency.

(5) **Discretionary payment of claim.** If the Contract is still in force, the Agency may, in accordance with ORS 279.314, pay a valid claim to the Entity furnishing the labor or services and charge the amount of the payment against funds due or to become due to the Contractor under the Contract.

(6) **Liability for claim.** If the Agency chooses to make such a payment as provided in ORS 279.314, the Contractor or the Contractor's surety shall not be relieved from obligation with respect to any unpaid claims.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.314 & ORS 279.526 - ORS 279.542

Hist.: JD 3-1984, f. 9-27-84, cf. 10-1-84; JD 3-1987, f. & cf. 5-18-87; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; DOJ 7-1998, f. & cert. ef. 10-6-98

Alternative Contracting Methods

137-040-0500

Purpose

These rules are intended to provide guidance to public contracting Agencies on the interrelationship between ORS Chapter 279 and OAR Chapter 137, Divisions 30, 35 and 40, regarding the use of Alternative Contracting Methods for Public Improvement Contracts. Those methods include, but are not limited to Design/Build and Construction Manager/General Contractor (CM/GC) forms of contracting. These rules also specify the circumstances under which Competitive Negotiation or Non-Competitive Negotiation may be utilized (e.g., when all Bids exceed an Agency's cost estimate).

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.049

Hist.: DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0510

Definitions

The following definitions shall apply to Oregon Administrative Rules 137-040-0500 to 137-040-0590, unless the context requires otherwise:

(1) **"Alternative Contracting Methods"** means innovative techniques for obtaining Public Improvement Contracts, utilizing processes other than the traditional method of design-bid-build with award based solely on price (in which a final design is issued with formal Bid documents, construction services are obtained by sealed Bid awarded to the lowest responsive, responsible bidder, and the project is built in accordance with those documents). In industry practice, such methods commonly include variations of Design/Build and CM/GC forms of contracting, which are specifically addressed in these rules, as well as other developing techniques such as Performance Contracting and Cost Plus Time Contracting which are addressed as a group under these rules as forms of Competitive Negotiation.

(2) **"Competitive Negotiation"** means a method of contracting in which Proposal evaluation and Contract award result from an open and competitive procedure, typically through the Request For Proposal process, in which factors other than price are considered in Contractor selection.

(3) **"Construction Manager/General Contractor"** (CM/GC) means a form of Competitive Negotiation which results

in a Public Improvement Contract for a Construction Manager to undertake design phase involvement; constructability reviews; perform value engineering, scheduling, estimating and subcontracting services; establish a Guaranteed Maximum Price to complete the Contract Work; act as General Contractor; coordinate and manage the building process; provide general Contractor expertise; and act as a member of the project team along with the Agency, architect/engineers and other consultants. Also refers to a Contractor under this form of Contract, sometimes known as the "Construction Manager at Risk".

(4) **"Design/Build"** means a form of Competitive Negotiation which results in a Public Improvement Contract in which the construction Contractor also provides or obtains specified design services, participates on the project team with the Agency, and manages both design and construction. In this form of Contract a single entity provides the Agency with all of the services necessary to both design and construct the project.

(5) **"Guaranteed Maximum Price" (GMP)** means the total maximum price provided to the Agency by the Contractor, and accepted by the Agency, that includes all reimbursable costs of and fees for completion of the Contract Work, as defined by the Contract documents, except for material changes in the scope of Work. It may also include particularly identified contingency amounts.

(6) **"Non-Competitive Negotiation"** means a method of contracting in which Contract award results from Contract discussions with only one individual or firm.

(7) **"Public Improvement"** has the meaning provided by statute at ORS 279.011(8).

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.049

Hist.: DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0520

Use of Alternative Contracting Methods

(1) **Competitive Bidding Exemptions.** ORS Chapter 279 requires a competitive Bidding process for Public Improvement Contracts unless a statutory exemption applies, a class of Contracts has been exempted or an individual Contract has been exempted in accordance with ORS 279.015 and any applicable Agency rules. Alternative Contracting Methods are therefore an exception to customary public contracting practices in Oregon, and their use must be justified in accordance with the public contracting law and these rules. See OAR 137-040-0530 regarding required Findings.

(2) **Competitive Negotiation, Exceptions.** Each of these Alternative Contracting Methods requires an open and competitive procurement through Competitive Negotiation, as further described in these rules. Exceptions require specific legal authority, as set forth in OAR 137-040-0580.

(3) **Post-Project Evaluation.** ORS 279.103 requires that the Agency prepare a formal post-project evaluation of Public Improvement projects in excess of \$100,000 for which the competitive Bidding process was not used. The purpose of this evaluation is to determine whether it was actually in the Agency's best interest to use an Alternative Contracting Method. The evaluation must be delivered to the Director of DAS or the local Contract review board as applicable within 30 Days of the date the Agency "accepts" the public improvement project, which event is typically defined in the Contract documents. In the absence of such definition, acceptance of the Project occurs on the latter of the date of final payment or the date of final completion of the Work. ORS 279.103 describes the timing and content of this evaluation, with three required elements:

(a) Financial information, consisting of cost estimates, any Guaranteed Maximum Price, changes and actual costs.

(b) A narrative description of successes and failures during design, engineering and construction.

(c) An objective assessment of the use of the Alternative Contracting Method as compared to the exemption findings.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.015, ORS 279.049 & ORS 279.103

Hist.: DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0530**Findings**

(1) When findings are required under ORS 279.015(2) to exempt a Contract or class of Contracts from competitive Bidding requirements, the “substantial cost savings” criterion at ORS 279.015(2)(b) requires consideration of the type, cost, amount of the Contract, number of Entities available to Bid and “such other factors as may be deemed appropriate”.

(2) Likewise, the statutory definition of “findings” at ORS 279.011(5) means the justification for an Agency conclusion that includes, “but is not limited to”, information regarding eight identified areas.

(3) Accordingly, when the Contract or class of Contracts under consideration for an exemption contemplates the use of Alternative Contracting Methods, the “substantial cost savings” requirement may be addressed by a combination of:

(a) Specified findings which address the factors and other information specifically identified by statute; and

(b) Additional findings which address industry practices, surveys, trends, past experiences, evaluations of completed projects required by ORS 279.103 and related information regarding the expected benefits and drawbacks of particular Alternative Contracting Methods. To the extent practicable, such findings should relate back to the specific characteristics of the project or projects at issue in the exemption request.

(4) The criteria at ORS 279.015(2)(a) that it is “unlikely” that the exemption will “encourage favoritism” or “substantially diminish competition” are more easily addressed in contemplating the use of Alternative Contracting Methods since the findings may specify the manner in which an RFP process will be utilized, that the procurement will be formally advertised, competition will be obtained through competitive negotiation, and award made based upon identified selection criteria.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.015(2) & ORS 279.049

Hist.: DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0540**Pricing Mechanisms**

(1) Competitive Negotiation at its simplest may result in a firm fixed price (lump sum) Contract, as in the case of competitive Bidding but where factors other than price are considered in Contract award. Alternatively, a cost reimbursement Contract may be negotiated (e.g., a cost plus fixed fee Contract in which additional costs beyond those estimated are reimbursable while the fee does not increase for the original Work scope).

(2) Economic incentives or disincentives may be included to reflect stated Agency purposes related to time of completion, safety or other public contracting objectives, including total least cost mechanisms such as life cycle costing.

(3) A Guaranteed Maximum Price (GMP) is used as the pricing mechanism for CM/GC where a total Contract Price is provided in the design phase in order to assist the Agency in determining whether the project scope is within the Agency's budget, and allowing for design changes during preliminary design rather than after final design Work has been completed.

(a) If this collaborative process is successful, the Contractor shall propose a final GMP, which may be accepted by the Agency and included within the Contract.

(b) If this collaborative process is not successful, and no mutually agreeable resolution on GMP can be achieved with the contractor, then the public agency shall terminate the contract with the contractor, subject to provisions defined in the contract documents. The public agency may then proceed to negotiate a new contract (and GMP) with the firm that was next ranked in the original selection process, or employ another suitable means for continuing the project under ORS Chapter 279.

(4) When cost reimbursement Contracts are utilized, regardless of whether a GMP is included, the Agency shall provide for audit control which will effectively verify rates and ensure that costs are reasonable, allowable and properly allocated.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.049

137-040-0550**Competitive Negotiation, Generally**

Agencies may utilize Competitive Negotiation, in which Proposal evaluation and award follow established rules for an RFP process, allowing flexibility in both Proposal evaluation and Contract negotiation, but only in accordance with state law and Agency rules.

(1) **Proposal Evaluation.** Factors in addition to price may be considered in the selection process, but only as set forth in the RFP. Proposal evaluation shall be as objective as possible. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors shall:

(a) Be reasonable estimates based on information available to the Agency;

(b) Treat all Proposals equitably;

(c) Recognize that public policy requires that public improvements be constructed at the least overall cost to the Agency. ORS 279.023(1).

(2) Evaluation Factors.

(a) In basic negotiated construction contracting, where the only reason for an RFP is to consider factors other than price, those factors may consist of firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service and related matters which affect cost or quality.

(b) In CM/GC contracting, in addition to (a) above, those factors may also include the ability to respond to the technical complexity or unique character of the project, coordination of multiple disciplines, the time required to commence and complete the improvement, and related matters which affect cost or quality.

(c) In Design/Build contracting, in addition to (a) and (b) above, those factors may also include design professional qualifications, specialized experience, preliminary design submittals, technical merit, design/builder team experience and related matters which affect cost or quality.

(3) **Contract Negotiations.** Contract terms may be negotiated to the extent allowed by the RFP and these rules, provided that the general Work scope remains the same and that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Document. Terms which may be negotiated consist of details of Contract performance, methods of construction, timing, assignment of risk in specified areas, fee and other matters which affect cost or quality.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.049

Hist.: DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0560**Design/Build**

(1) **General.** The Design/Build form of contracting, as defined at OAR 137-040-0510(4), has technical complexities which are not readily apparent. Agencies shall only utilize this contracting method with the assistance of knowledgeable staff and/or consultants who are experienced in its use. In order to utilize the Design/Build process the Agency must be able to reasonably anticipate the following benefits:

(a) Obtaining, through a Design/Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control, and required documentation as a fully integrated function;

(b) Integrating value engineering suggestions into the design phase, as the construction Contractor joins the project team early with design responsibilities under a team approach, with the potential of reducing Contract changes;

(c) Reducing the risk of design flaws, misunderstandings and conflicts inherent in construction Contractors building from designs in which they have had no opportunity for input, with the potential of reducing Contract claims; and

(d) Shortening project time as construction activity (early submittals, mobilization, subcontracting and advance Work) commences prior to completion of a "Biddable" design, or where a design solution is still required (as in complex or phased projects).

(e) Obtaining innovative design solutions through the collaboration of the Contractor and design team, which would not otherwise be possible if the Contractor had not yet been selected.

(2) **Authority.** Agencies may utilize the Design/Build form of contracting only in accordance with the requirements of these rules. See particularly OAR 137-040-0520 on "Use of Alternative Contracting Methods".

(3) **Selection.** Design/Build selection criteria include those factors set forth above in OAR 137-040-0550(2)(c).

(4) **QBS Inapplicable.** Because the value of construction services predominates the Design/Build form of contracting, and the Agency is not issuing a personal service Contract, the qualifications based selection (QBS) process mandated by ORS 279.057 for state Agencies is not applicable. See ORS 279.057(1) and 279.057(6).

(5) **Licensing.** Where the Design/Build Contractor is not a licensed or registered design professional, the Design/Build process contemplates that state licensing and registration requirements related to architectural and engineering services may be fulfilled by design professionals at the time of entering into subcontracts. Under this approach, Design/Build Contractors are not required to fulfill design licensing or registration requirements at the time of submitting original Proposals. In order to clearly establish that relationship the Contract must:

(a) Delineate services to be provided by the Design/Build Contractor, versus those services to be obtained through design professionals;

(b) Separate the method and/or amount of compensation to be provided to design professionals, versus that provided to the Design/Build Contractor; and

(c) Specifically identify the licensed design professionals by individual or firm names.

(6) **Contract Requirements.** Agencies shall conform their Design/Build contracting practices to the following requirements:

(a) **Design Services.** The level or type of design services required must be clearly defined within the procurement and Contract documents, along with a description of the level or type of design services previously performed for the project. The services to be performed shall be clearly delineated as either design Specifications or performance standards, and performance measurements must be identified.

(b) **Professional Liability.** The Contract documents shall clearly identify the liability of design professionals with respect to the Design/Build Contractor and/or owner, as well as requirements for professional liability insurance.

(c) **Risk Allocation.** The Contract documents shall clearly identify the extent to which the owner requires an express indemnification from the Design/Build Contractor for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty Work claims.

(d) **Warranties.** The Contract documents shall clearly identify any express warranties made to the owner on characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction or both), including any warranty that a design will be produced which meets the stated project performance and budget guidelines.

(e) **Privity of Contract.** The Contract documents shall clearly identify any third party beneficiary arrangements by which privity of Contract may be established between the owner and design professional when the design professional is not otherwise under Contract directly with the owner.

(f) **Incentives.** The Contract documents shall clearly identify any economic incentives and/or disincentives, the specific criteria which apply and their relationship to other financial elements of the Contract.

(g) **Honoraria.** If provided for in the RFP, honoraria or stipends may be provided for early design submittals from quali-

fied finalists during the solicitation process on the basis that the Agency is benefitted from such deliverables.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.049 & ORS 279.057

Hist.: DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0570

Construction Manager/General Contractor (CM/GC)

(1) **General.** The CM/GC form of contracting, as defined at OAR 137-040-0510(3) is a technically complex project delivery system. Agencies shall only utilize this contracting method with the assistance of knowledgeable staff and/or consultants who have a demonstrated capability of managing the CM/GC process in the necessary disciplines of engineering, construction scheduling and cost control, accounting, legal, public contracting and project management. In order to utilize the CM/GC method the Agency must reasonably anticipate that use of the process will:

(a) Successfully result in a collaborative or team effort between the owner Agency, project designers and the general Contractor (who is required to be particularly suited to a project and involved early in the development process); and

(b) Be particularly advantageous due to the complexity of the project (such as Work involving occupied structures, unusual coordination or technical complexities), projects with accelerated schedules, multimillion dollar projects, historic renovations and other uncertainties.

(2) **Authority.** Agencies may utilize the CM/GC form of contracting only in accordance with the requirements of these rules. See particularly OAR 137-040-0520 on "Use of Alternative Contracting Methods".

(3) **Selection.** CM/GC selection criteria include those factors set forth above in OAR 137-040-0550(2)(b).

(4) **Basis for Payment.** The CM/GC process adds specified Construction Manager services to traditional General Contractor services, requiring full Contract performance within a negotiated Guaranteed Maximum Price (GMP). The basis for payment is reimbursable direct costs as defined under the Contract, plus a fee constituting full payment for Work and services rendered, which together shall not exceed the GMP. See GMP definition at OAR 137-040-0510(5).

(5) **Contract Requirements.** Agencies shall conform their CM/GC contracting practices to the following requirements:

(a) **Setting the GMP.** The GMP shall be set at an identified time consistent with industry practice, such as between the Schematic Design Phase and the Design Development Phase, and shall define with particularity both what is included and excluded from the GMP. A set of drawings and specifications shall be produced establishing the GMP scope.

(b) **Adjustments to the GMP.** The Contract documents shall clearly identify the standards or factors under which changes or additional Work will be considered outside of the Work scope and warrant an increase in the GMP, as well as criteria for decreasing the GMP. The GMP shall not be increased without a concomitant increase to the scope defined at the establishing of the GMP.

(c) **Cost Savings.** The Contract documents shall clearly identify the disposition of any cost savings resulting from completion of the Work below the GMP; that is, under what circumstances, if any, the CM/GC might share in those cost savings, or whether they accrue only to the owner's benefit. (Note that unless there is a clearly articulated reason for sharing such cost savings, they should accrue to the Agency.)

(d) **Cost Reimbursement.** The Contract documents shall clearly identify what items or categories of items are eligible for cost reimbursement within the GMP, including any category of "General Conditions" (a general grouping of direct costs which are not separately invoiced, subcontracted or included within either overhead or fee), and may also incorporate a mutually agreeable cost reimbursement standard.

(e) **Audit.** Cost reimbursements shall be made subject to final audit adjustment, and the Contract documents shall establish an audit process to ensure that Contract costs are allowable, properly allocated and reasonable.

(f) Fee. Compensation for the CM/GC's services shall be paid on the basis of a fee which is inclusive of profit, overhead and all other indirect or non-reimbursable costs. Costs determined to be included within the fee should be expressly defined wherever possible. The fee, first expressed as a proposed percentage of all reimbursable costs, shall be identified during and become an element of the selection process. It shall subsequently be expressed as a fixed amount when reimbursable costs are established within the GMP.

(g) Incentives. The Contract documents shall clearly identify any economic incentives, the specific criteria which apply and their relationship to other financial elements of the Contract (including the GMP).

(h) Controlled Insurance Programs. For projects anticipated to exceed \$75 Million, the Contract documents shall clearly identify whether an Owner Controlled or Contractor Controlled Insurance Program is anticipated or allowable. If so, those documents shall clearly identify (1) anticipated cost savings from reduced premiums, claims reductions and other factors, (2) the allocation of cost savings, and (3) safety responsibilities and/or incentives.

(i) Subcontractor Selection. The Contract documents shall clearly describe the methods by which the CM/GC shall publicly receive, open and record sealed Bids or price quotations, and competitively select subcontractors to perform the Contract Work based upon price, as well as the mechanisms by which the owner may waive those requirements. The documents shall also describe completely the methods by which the CM/GC and its affiliated or subsidiary entities may compete to perform the Work, including, at a minimum, advance notice to the public of the CM/GC's intent to compete and a public Opening of Bids or quotations by an independent party.

(j) Subcontractor Approvals and Protests. The Contract documents shall clearly establish whether the Agency must approve subcontract awards, and to what extent, if any, the Agency will resolve procurement protests of subcontractors and suppliers. The related procedures and reporting mechanisms shall be established with certainty, including whether the CM/GC acts as the owner's "agent" in this process and whether the CM/GC's subcontracting records are considered to be public records. In any event, the Agency shall retain the right to monitor the subcontracting process in order to protect Agency interests.

(k) Socio-Economic Programs. The Contract documents shall clearly identify conditions relating to any required socio-economic programs (such as Affirmative Action or Prison Inmate Labor Programs), including the manner in which such programs affect the CM/GC's subcontracting requirements, the enforcement mechanisms available, and the respective responsibilities of the CM/GC and owner.

(6) DAS Rule (State Agencies). State Agencies having independent statutory authority or that have been granted delegated purchasing authority from the Department of Administrative Services (DAS) may seek exemptions from DAS for the use of CM/GC in accordance with OAR 125-310-0220. Also see ORS 279.015.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.049

Hist.: DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0580

Non-Competitive Negotiation, Generally

Because non-competitive negotiation requires additional justification and legal authority beyond the exemption from competitive Bidding requirements, specific statutory or rule authority must be identified by the Agency in order to negotiate a Contract outside of the usual competitive process. Examples include lack of competition (such as a sole source), emergency Contracts, and Contracts negotiated with the lowest responsive and responsible Bidder where all responsive Bids exceed the Agency's cost estimate as authorized by ORS 279.015(1)(h) and OAR 137-040-0590.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.049

Hist.: DOJ 7-1998, f. & cert. ef. 10-6-98

137-040-0590

Negotiation When Bids Exceed Cost Estimate

(1) General. In accordance with ORS 279.015(1)(h), if all responsive and responsible Bids on a competitively Bid Project exceed the Agency's Cost Estimate, prior to Contract award the Agency may negotiate Value Engineering and Other Options with the lowest responsive and responsible Bidder in an attempt to bring the project within the Agency's Cost Estimate.

(2) Definitions. The following definitions apply to this administrative rule:

(a) Cost Estimate: The Agency's most recent pre-bid, good faith assessment of anticipated Contract costs, consisting either of an estimate of an architect, engineer or other qualified professional, or confidential cost calculation worksheets, where available, and otherwise consisting of formal planning or budgetary documents.

(b) Other Options: Those items generally considered appropriate for negotiation in the competitive Proposal process, relating to the details of Contract performance as specified in OAR 137-040-0550, but excluding any material requirements previously announced in the solicitation process which would likely affect the field of competition.

(c) Project: A Contract for a Public Improvement as defined by ORS 279.011(8).

(d) Value Engineering: Those proposed changes to the plans, Specifications, or other Contract requirements which may be made, consistent with industry practice, under the original Contract by mutual agreement in order to take advantage of potential cost savings without impairing the essential functions or characteristics of the public improvement. Cost savings include those resulting from life cycle costing, which may either increase or decrease absolute costs over varying time periods.

(3) Rejection of Bids. In determining whether "all responsive and responsible Bids" exceed the Cost Estimate, only those Bids which have been formally rejected by the Agency in accordance with public contracting law shall be excluded from consideration.

(4) Scope of Negotiations. Negotiations shall not result in Contract award if the scope of the Project is significantly changed from the original Contract Bid, ORS 279.015(1)(h)(B). The scope is considered to have been significantly changed if the pool of competition would likely have been affected by the change; that is, if other Bidders would have been expected to participate in the Bidding process had the change been made during the solicitation process rather than during negotiation. This rule shall not be construed to prohibit resolicitation of trade subcontracts.

(5) Discontinuing Negotiations. The Agency may discontinue negotiations at any time, and shall do so if it appears to the Agency that the apparent low Bidder is not negotiating in good faith or fails to share cost and pricing information upon request. Failure to rebid any portion of the project, or to obtain subcontractor pricing information upon request, shall be considered a lack of good faith.

(6) Limitation. Negotiations may only be undertaken with the lowest responsive and responsible Bidder pursuant to ORS 279.015(1)(h)(A). That statute does not provide any additional authority to further negotiate with Bidders next in line for Contract award.

(7) Public Records. ORS 279.015(1)(h)(C) shall not be construed as creating any additional public records where that result is not otherwise contemplated by the Public Records law, ORS Chapter 192. Records of a Bidder used in Contract negotiations under that statute may not become public records unless they are also submitted to the Agency.

Stat. Auth.: ORS 279.049

Stats. Implemented: ORS 279.015(1) & ORS 279.049

Hist.: DOJ 7-1998, f. & cert. ef. 10-6-98

DIVISION 45

REVIEW OF PUBLIC CONTRACTS

137-045-0010

Definitions

The following definitions shall apply to all Oregon Administrative Rules contained in OAR 137, Division 045, unless the context requires otherwise:

(1) "Act" means chapter 869, Oregon Laws 1997, codified in part at ORS 291.045 and 291.047.

(2) "Agency" means any state officer, board, commission, department, institution, branch, or agency that is subject to the Act whose costs are paid wholly or in part from funds held in the State Treasury, but does not include the Legislative Assembly, or the courts and their officers and committees.

(3) "Agency Contract Administration" means an action undertaken by an Agency in accordance with the terms of the Public Contract that does not change any of the terms and conditions of the Public Contract.

Examples of agency contract administration include: (i) a notice to proceed or the exercise of an option, whereby the Agency causes the Public Contract to be implemented in accordance with its terms and (ii) extensions for time of performance as set forth in OAR 125-020-0530 or cost overruns in accordance with OAR 125-020-0540. A change of contractor name that requires an amendment, modification, or assignment of a Public Contract is not agency contract administration.

(4) "Agreement to Agree" means a written document of understanding negotiated between an Agency and contractor that (i) contains contract clauses applying to future contracts between the parties during its term and (ii) contemplates separate future contracts that will incorporate by reference or attachment the required and applicable clauses agreed upon in the Agreement to Agree. In order to qualify for the work order/purchase order exemption pursuant to OAR 137-045-0050(12), supplies or services must be identified within the underlying Agreement to Agree, by any method that is both commercially reasonable and in accordance with industry standards, including, but not limited to, technical specifications, time, place, manufacturer, quality, quantity, form or manner of delivery, or any combination of the foregoing.

(5) "Architecture and Engineering Services Contract" means a Public Contract contemplating services described in OAR 125-065-0040(4).

(6) "Change Order" means a written order signed by the parties to a Public Improvement Contract directing the contractor to make a change (or changes) that:

(a) Is within the general scope of the Last Reviewed Contract; and

(b) Is implemented in accordance with the change provisions of the Last Reviewed Contract; and

(c) Does not modify the Last Reviewed Contract's terms and conditions except to reflect a change in the consideration, technical specifications, time, place, manufacturer, quality, quantity, form or manner of delivery, or any combination of the foregoing, of services or goods provided under the Public Improvement Contract.

(7) "Department" means the Oregon Department of Justice.

(8) "Emergency" means a circumstance that, in the judgment of the Agency director or, in the director's absence, the director's designee:

(a) Could not have been reasonably foreseen by the director or designee; and

(b) Creates a substantial risk of loss of funds, loss or damage to property, or threat to the public health or safety; and

(c) Requires prompt establishment, execution, and performance of a Public Contract in order to preserve public safety, public funds or property, or the uninterrupted provision of government services. To qualify for the exemption for Emergency Contracts under OAR 137-045-0050(7), the circumstances must require execution of the contract in fewer than 5 business days after the date the director or designee is made aware of any of the foregoing risks.

(9) "Emergency Contract" means a Public Contract entered into in an Emergency.

(10) "Exempted Amendment" means an amendment that has not been reviewed and was not subject to review pursuant to 137-045-0050(2), but does not include any amendment preceding an amendment that has been reviewed and approved for legal sufficiency.

(11) "Exemption Request" means an Agency's request that a designated class of Public Contracts be exempted from the Department's legal sufficiency review and approval requirement.

(12) "Grant" means a federal, state or other grant agreement pursuant to which an Agency, as an eligible recipient, receives funding or other property, subject to the conditions set forth in the grant. "Grant" also means a subgrant through which an Agency merely passes through the grant funds received, in whole or in part, without modifying any of the terms or conditions of the original grant, except as related to Agency administration and oversight of the grant conditions.

(13) "Information Technology Contract" means a Public Contract for the acquisition or disposal of hardware, software, or services for data processing, office automation, or telecommunications. "Telecommunications" means matters regarding 1-way and 2-way transmission of information over a distance by means of electro-magnetic and or electro-optical systems.

(14) "Interagency Agreement" means any agreement between Agencies.

(15) "Last Reviewed Contract" means the Public Contract, including amendments, if any, that was most recently reviewed and approved for legal sufficiency under these rules as required by the Act. Amendments included under this definition are all amendments preceding and including the most recently reviewed amendment.

(16) "Personal Services Contract" for Agencies subject to the provisions of ORS chapter 279, means any Public Contract designated as a personal services contract by the Department of Administrative Services under administrative rules promulgated pursuant to ORS 279.051. For those Agencies not subject to the provisions of ORS chapter 279, the Department will apply the principles established by the Department of Administrative Services in administrative rules promulgated pursuant to ORS 279.051 in determining whether a contract is for personal services.

(17) "Procurement Document" means an Invitation to Bid, Request for Proposals, Request for Quotations, or similar solicitation document, including, when available, the underlying or sample Public Contract. However, Request for Statements of Qualification, Prequalification of Bidders, Request for Product Prequalification, or similar document which does not customarily include a sample Public Contract are not Procurement Documents.

(18) "Public Contract" means any written contract, including any amendments, entered into by an Agency for the acquisition, disposition, purchase, lease, sale or transfer of rights of real or personal property, public improvements, or services. As defined herein, Public Contracts include Personal Services Contracts. Public Contract does not include an Interagency Agreement or documents such as, without limitation, a deed, a UCC filing, a bill of sale, a deed of trust, a mortgage, or an instrument that is executed by the debtor solely for the purpose of establishing or evidencing a security interest in connection with a particular transaction.

(19) "Public Improvement Contract" means any Public Contract for construction, reconstruction, or renovation on real property by or for an Agency.

(20) "Statement of Work" means all terms and conditions of a Public Contract that specifically describe types of services or work to be performed, or goods to be delivered by either the contractor, its subcontractor(s), or the Agency, as applicable, including any related technical specifications, deadlines, or deliverables.

(21) "Variable Delivery Contract" means a Public Contract that, during the term of the Public Contract, provides for delivery of supplies or services, or both, as specified by purchase orders or work orders. In order to qualify as a Variable Delivery Contract, supplies or services must be identified within the underlying Public Contract, by any method that is both commercially reasonable and in accordance with industry standards, including but not limited to, technical specifications, time, place, manufacturer, quality,

quantity, form or manner of delivery, or any combination of the foregoing.

Stat. Auth.: ORS 291.047 & OL 1997, Ch. 869
 Stats. Implemented: ORS 291.045, ORS 291.047 & OL 1997, Ch. 869
 Hist.: JD 4-1997(Temp), f. & cert. ef. 10-3-97; JD 5-1997(Temp), f. & cert. ef. 10-17-97; 137-045-0010(Temp) repealed by DOJ 3-1998, f. & cert. ef. 4-1-98; DOJ 3-1998, f. & cert. ef. 4-1-98

137-045-0015

Legal Sufficiency Approval

(1) The following rules are adopted to provide guidance to Agencies regarding criteria used for, and factors excluded from, the Department's legal sufficiency review and approval. The extent to which these criteria may apply to specific contracts will necessarily vary depending upon the nature, complexity, and risk associated with each contract or class of contracts. Legal sufficiency review and approval pursuant to these rules does not affect any other applicable review or approval requirement, including without limitation, review of interstate agreements pursuant to ORS 190.430.

(2) Department approval for legal sufficiency is provided solely for the purpose of determining compliance with the Act. Approvals are based upon individual determinations of the Assistant Attorney General conducting the review and shall not preclude the state from later asserting any legally available claim or defense.

(3) If legal sufficiency approval is legally required for a particular contract, such approval shall be noted in written form by an Assistant Attorney General; approval shall be either affixed directly to the contract or set forth in a separate memorandum that identifies the contract with particularity.

(4) An Assistant Attorney General's approval does not endorse any underlying business or policy decisions reflected in a contract, and the Department will not withhold legal sufficiency approval based solely upon matters of business practice lawfully within the authority and discretion of Agency administrators or contracting officials.

(5) To the extent applicable to a particular transaction, approval for legal sufficiency means that the reviewing Assistant Attorney General finds that:

(a) The subject matter, promised performance and legal consideration of the contract are within the Agency's statutory authority; and

(b) The contract, on its face, contains all the essential elements of a legally binding contract, including descriptions of consideration (money, performance, or forbearance) and the times at which performance, payment, and completion are required; and

(c) The contract complies with State of Oregon statutes and administrative rules regulating the contract, and that all provisions required by the laws of this state have been included; and

(d) The contract includes any certification required by Oregon law, and a requirement that the contractor execute such certificates; and

(e) The contract does not violate any State of Oregon constitutional limitation or prohibition, such as the creation of unlawful "debt" under section 7, Article XI, of the Oregon Constitution, or impermissibly bind a future Legislative Assembly to fund the contract; and

(f) The statement of work or comparable provisions, and business or commercial terms are sufficiently clear and definite under the circumstances applicable to the Public Contract so as to provide a reasonable standard by which to measure compliance with the contract; and

(g) The contract gives to the state the ability to terminate the contract, as well as mechanisms to declare defaults and to pursue subsequent remedies.

(6) Approval for legal sufficiency does not include:

(a) Consideration of facts or circumstances that are not apparent on the face of the contract, unless the reviewing Assistant Attorney General has actual knowledge of those facts or circumstances; or

(b) A determination that the individual signing the contract on behalf of the Agency possesses lawful authority to do so (If the

Agency has a question concerning delegation of signature authority, the question should be raised and resolved before the contract is executed.); or

(c) A determination that the technical provisions or specifications used in the contract that are particular to a profession, trade or industry reflect the Agency's intentions or are appropriate to further the Agency's stated objectives; or

(d) A determination by the Department that the contract is a good business deal for the Agency, weighing relative risks and benefits (The Agency remains responsible for risk assessment and the decision whether to proceed with a contract despite exposure to risks.); or

(e) A determination that any particular remedy, whether or not expressly set forth in the contract, will be available to the Agency in the event the contractor fails to perform (The reviewing Assistant Attorney General may address the availability of specific remedies by advance arrangement with the requesting Agency.); or

(f) A stylistic or grammatical review, including spelling, punctuation and the like, unless such errors affect the substantive meaning of the contract. The reviewing Assistant Attorney General may address matters of this nature as time allows; however, these issues are primarily the responsibility of the Agency submitting a document for review.

(7) Contracts with the federal government, Native American tribes, and with foreign jurisdictions, including interstate and international agreements for which legal sufficiency approval is required, may be subject to laws and regulations which conflict with these rules or which have additional requirements. In such cases, the Department may proceed with review and approval for legal sufficiency under procedures that it deems appropriate for those particular transactions.

(8)(a) The Attorney General may exempt a Public Contract under OAR 137-045-0015(7) from the standard legal sufficiency review and approval upon a determination by the Attorney General that:

(A) The monetary risk to the Agency and the State of Oregon is *de minimis*;

(B) The subject matter, promised performance and legal consideration of the Contract are within the Agency's statutory authority;

(C) The Contract does not require the Agency to do anything contrary to any other state law, including without limitation assumption of debt in violation of Article XI, Section 7 of the Oregon Constitution.

(b) Factors applicable to the determination whether the monetary risk is *de minimis* under subsection (8)(a)(A) of this rule include, but are not limited to:

(A) Whether the Contract provides for federal, tribal or other foreign jurisdiction contribution or reimbursement of funds to the Agency and the extent to which such contribution or reimbursement contributes to overall cost of the program that is the subject matter of the contract (e.g. the lower the contribution or reimbursement to the Agency, the higher the risk);

(B) Whether the Contract requires payment of funds by the Agency to the contractor.

(C) The history of the relationship between the Agency and the contractor.

(c) The Attorney General may revoke an exemption granted under this rule at any time upon written notice to the Agency that it is in the best interest of the state that such exemption be revoked.

Stat. Auth.: ORS 291.045 & 291.047

Stats. Implemented: ORS 291.045 & ORS 291.047

Hist.: DOJ 3-1998, f. & cert. ef. 4-1-98; DOJ 5-1999(Temp), f. 9-14-99, cert. ef. 9-15-99 thru 3-13-00

137-045-0020

Mixed Contracts

A mixed contract requires the contractor to render certain services and also to provide the Agency with other kinds of services, goods or products. The classification of a mixed contract as

a Personal Services Contract, Architecture and Engineering Services Contract, Information Technology Contract, or other kind of Public Contract will depend on the predominant purpose of the mixed contract, as determined by whether the majority of the payments under the mixed contract will be paid on account of a particular kind of service (personal, architecture and engineering, information technology, or otherwise) or on account of the acquisition of goods or products.

Stat. Auth.: ORS 291.047 & OL 1997, Ch. 869

Stats. Implemented: ORS 291.045, ORS 291.047 & OL 1997, Ch. 869

Hist.: JD 4-1997(Temp), f. & cert. ef. 10-3-97; JD 5-1997(Temp), f. & cert. ef. 10-17-97; 137-045-0020(Temp) repealed by DOJ 3-1998, f. & cert. ef. 4-1-98; DOJ 3-1998, f. & cert. ef. 4-1-98

137-045-0030

Review of Public Contracts and Procurement Documents

(1) An Agency must obtain the Department's review and approval of a Public Contract for legal sufficiency unless the Public Contract does not call or provide for monetary payment in excess of the applicable threshold set forth in the Act. For purposes of making this determination, a Public Contract calls or provides for payments in excess of the applicable threshold amount if:

(a) The Public Contract expressly provides that the Agency will make or receive monetary payments that exceed the applicable threshold over the term of the Public Contract; or

(b) The Public Contract expressly provides for a guaranteed maximum price or a maximum not to exceed amount that exceeds the applicable threshold; or

(c) At the time the parties enter into the Public Contract, they intend to amend the Public Contract to provide for monetary payment, or provide for a guaranteed maximum price or maximum not to exceed amount, that the parties anticipate will exceed the applicable threshold over the term of the Public Contract; or

(d) At any time during the term of the Public Contract, an amendment or any other contractual change is made that increases the consideration under the Public Contract to an amount that exceeds the applicable threshold; or

(e) Based on historical or other data available to the contracting Agency at the time of entering into the Public Contract, the contracting Agency determines that the Public Contract can reasonably be expected to exceed the applicable threshold.

(2) If the anticipated Public Contract is reasonably expected to require review and approval for legal sufficiency, as set forth in this rule, an Agency must also submit to the Department for review any associated Procurement Document for review at least 10 business days prior to the date on which the procurement of goods or services will be publicly advertised or, if no advertisement is being made, then at least 10 business days prior to the date on which the Procurement Document is to be released, unless a shorter time frame is authorized by the reviewing Assistant Attorney General. This requirement for review of Procurement Documents may be waived in writing by the Attorney in Charge (AIC) of the Business Transactions Section at the AIC's sole discretion. Such waiver does not affect the requirement for legal sufficiency review and approval of any resulting Public Contract.

(a) Where review of a Procurement Document is required, the review shall be conducted to assure that the contract language within the Procurement Document appears on its face to be legally sufficient, or could reasonably be made legally sufficient through the addenda process.

(b) Upon review of a Procurement Document, the reviewing Assistant Attorney General shall either authorize release of the document or require changes necessary for compliance with these rules. The Assistant Attorney General's authorization to release may be conditioned upon required changes being made through the addenda process, and such authorization does not ensure subsequent legal sufficiency approval of the contract contemplated by the procurement and any accepted response.

Stat. Auth.: ORS 291.047 & OL 1997, Ch. 869

Stats. Implemented: ORS 291.045, ORS 291.047 & OL 1997, Ch. 869

Hist.: JD 4-1997(Temp), f. & cert. ef. 10-3-97; JD 5-1997(Temp), f. & cert. ef. 10-17-97; 137-045-0030(Temp) repealed by DOJ 3-1998, f. & cert. ef. 4-1-98; DOJ 3-1998, f. & cert. ef. 4-1-98

137-045-0040

Reinstated Contracts

A Personal Services Contract that is reinstated in accordance with OAR 125-020-0550 is exempt from the requirement for legal sufficiency review and approval under the Act.

Stat. Auth.: ORS 291.047 & OL 1997, Ch. 869

Stats. Implemented: ORS 291.045, ORS 291.047 & OL 1997, Ch. 869

Hist.: JD 4-1997(Temp), f. & cert. ef. 10-3-97; JD 5-1997(Temp), f. & cert. ef. 10-17-97; 137-045-0040(Temp) repealed by DOJ 3-1998, f. & cert. ef. 4-1-98; DOJ 3-1998, f. & cert. ef. 4-1-98

137-045-0050

Class Exemptions

The Attorney General has determined that the degree of risk assumed by Agencies is not materially reduced by legal review and approval of individual Public Contracts within the classes of Public Contracts listed below. The Attorney General exempts from the requirement for legal sufficiency review and approval under the Act the classes of Public Contracts listed below:

(1) Agency Contract Administration. Agency Contract Administration is exempt.

(2) Amendments. An amendment to a Public Contract subject to the review and approval requirement is exempt if:

(a) The underlying Public Contract was approved for legal sufficiency; and

(b) The aggregate increase in consideration under the current amendment and all Exempted Amendments to the Public Contract is less than ten percent (10%) of the total payments under the Last Reviewed Contract; and

(c) The terms and conditions of the Last Reviewed Contract, including but not limited to the Statement of Work, are not modified or amended by the amendment, except to reflect a change in consideration, technical specifications, time, place, manufacturer, quality, quantity, form or manner of delivery, or any combination of the foregoing, of services or goods provided under the Last Reviewed Contract.

(3) Bonds and Certificates of Participation. Public Contracts related to the issuance of a bond or a certificate of participation are exempt, if issued or authorized by the Oregon State Treasurer and if approved by bond counsel appointed in accordance with applicable law, such as ORS 288.523, who has issued an authorized opinion for the benefit or use of the bond or certificate of participation purchasers with respect to the enforceability of the bond or certificate of participation obligations.

(4) Certain Investment Agreements. A Public Contract related to the purchase, sale, lease, or loan of investments executed, by or on behalf of state administered trust funds or such funds' title holding corporations, by private investment managers with legally and contractually delegated discretion to make investments on behalf of state administered trust funds or such funds' title holding corporations is exempt.

(5) Change Orders. A Change Order is exempt, but only so long as any increase in consideration effected by the Change Order does not exceed ten percent (10%) of the total amount of consideration payable under the Last Reviewed Contract. This exemption does not include an increase in the guaranteed maximum price under a Construction Manager/General Contractor form of contract.

(6) Class Exemption Requests. Certain classes of Public Contracts are exempt from the Department's review and approval for legal sufficiency pursuant to an Exemption Request under OAR 137-045-0060, in accordance with the terms of the exemption granted by the Attorney General.

(7) Emergency Contracts.

(a) An Emergency Contract that is otherwise subject to review and approval under the Act, arising out of or relating to an Emergency, is exempt, provided that the term of the contract does not exceed 30 days. To the extent practicable, the Agency shall submit the Emergency Contract to the Department for review and

comment prior to entering into the contract, or as soon as possible thereafter.

(b) Upon entering into an Emergency Contract, the Agency shall provide to the Department:

(A) Written findings that describe the Emergency that required immediate action by the Agency; and

(B) A copy of the executed Emergency Contract.

(c) If the Agency intends or requires the contractor to continue work beyond the term of the Emergency Contract, the Agency must provide to the Department for legal sufficiency review, unless otherwise exempt, the Emergency Contract as amended or a new Public Contract, not later than 10 business days before the Emergency Contract expires.

(8) Employment Agreements. A collective bargaining agreement negotiated under applicable federal or state laws, or a notice of appointment provided in accordance with OAR Chapter 580, Division 021, is exempt.

(9) Grants. A Grant is exempt provided that any subgrant as described in 137-045-0010(12) shall contain a clause stating that:

"any recipient of grant funds, pursuant to this agreement with the state, shall assume sole liability for that recipient's breach of the conditions of the Grant, and shall, upon recipient's breach of grant conditions that requires the state to return funds to the grantor, hold harmless and indemnify the state for an amount equal to the funds received under this agreement; or if legal limitations apply to the indemnification ability of the recipient of grant funds, the indemnification amount shall be the maximum amount of funds available for expenditure, including any available contingency funds or other available non-appropriated funds, up to the amount received under this agreement."

(10) Membership Agreements. A Public Contract that calls for the payment of dues or fees in consideration of membership in a club, institution, or association is exempt.

(11) Public Interest. A Public Contract, including any amendments, that is otherwise legally sufficient is exempt from strict compliance with the review and approval process of ORS 291.047 if:

(a) The Director of the affected Agency submits to the Department a written statement:

(A) Finding that the Agency acted in good faith, but based upon an oversight or mistaken belief that the requirements of ORS 291.047 did not apply, did not obtain the Department's legal sufficiency review; and

(B) Finding that strict compliance with the timing requirements for approval under ORS 291.047 would lead to an unjust result and reflect unfavorably on the fairness of the public contracting process and explaining the basis of that finding; and

(C) Providing a detailed statement of the reasons that approval for legal sufficiency was not obtained in a timely manner; and

(b) The Department makes the following additional findings:

(A) The requirements of subsection (a) have been properly fulfilled; and

(B) Except for timing issues relating to approval under ORS 291.047, the contract, including any amendments, is otherwise legally sufficient.

(12) Purchase Orders or Work Orders under a Variable Delivery Contract or Agreement to Agree. A purchase order or work order issued pursuant to a Variable Delivery Contract or Agreement to Agree is exempt, provided the underlying Variable Delivery Contract or Agreement to Agree has been approved by the Department as a Variable Delivery Contract or Agreement to Agree. A Variable Delivery Contract or Agreement to Agree shall also be approved by the Department for legal sufficiency unless otherwise exempt from the requirements of the Act. For a Variable Delivery Contract or Agreement to Agree first effective on or after April 15, 1998, the purchase order or work order issued shall be in a form approved by the Department.

(13) Shrink-Wrap Licenses. A shrink-wrap license for commercially available software is exempt.

Stat. Auth.: ORS 291.047 & OL 1997, Ch. 869

Stats. Implemented: ORS 291.045, ORS 291.047 & OL 1997, Ch. 869

Hist.: JD 4-1997(Temp), f. & cert. ef. 10-3-97; JD 5-1997(Temp), f. & cert. ef. 10-17-97; 137-045-0050(Temp) repealed by DOJ 3-1998, f. & cert. ef. 4-1-98; DOJ 3-1998, f. & cert. ef. 4-1-98

137-045-0060

Class Exemption Requests

The Attorney General may exempt certain classes of Public Contracts from the requirements for review and approval under the Act, upon determining that the degree of risk assumed by the requesting Agency under the submitted class of contracts, or portion thereof, will not be materially reduced by the Department's review of individual contracts within the class. Agencies must submit an Exemption Request as follows:

(1) A requesting Agency must submit a written Exemption Request to the Attorney-in-Charge, Business Transactions Section, General Counsel Division, not less than 30 days prior to the date upon which the Agency desires such exemption to be effective unless a shorter time period is permitted by the Attorney-in-Charge. The Exemption Request must be accompanied by:

(a) Citation to the requesting Agency's statutory authority for procuring and entering into the Public Contracts represented by the class; and

(b) A description of the nature of the business to be transacted under the submitted class of Public Contracts; and

(c) A description of the circumstances in which the class of Public Contracts will be used; and

(d) Forms of contracts used for this class of Public Contracts and any form of amendment to be used in connection with the class; and

(e) A description of the Agency's approval process and signatures required for the Public Contracts contained in the class; and

(f) A statement by the Agency that:

(A) The transactions in which the Public Contracts in the class are used are substantially the same from transaction to transaction; and

(B) The terms and conditions set forth in the form of Public Contract submitted to the Department do not vary from transaction to transaction, other than technical specifications, manufacturer, quantity, quality, time, place, form or manner of delivery or performance, or any combination of the foregoing; and

(C) The Agency will not modify the terms and conditions of the form of Public Contract, other than as specifically provided for in OAR 137-045-0060(1)(f)(B) above, without the Department's review and approval for legal sufficiency, nor will the Agency use such Public Contract other than in transactions described in the Exemption Request.

(2) The requesting Agency shall submit any other information that the Department requests in connection with the Exemption Request.

(3) The director of the requesting Agency and the chief contracts officer of the Agency must sign each Exemption Request.

(4) The requesting Agency must submit 3 copies of the Exemption Request together with the above documentation to:

Attorney-in-Charge
Business Transactions Section
General Counsel Division
Department of Justice
1162 Court Street, NE
Salem, OR 97310

(5) In the event of approval by the Attorney General of an Exemption Request, or any portion thereof, the Department will provide the Agency with a written exemption under the Act, subject to any conditions or limitations the Attorney General deems appropriate, including, but not limited to the duration of the exemption, restrictions on the use of the submitted sample of Public Contract and any terms and conditions the Department may determine are appropriate.

(6) The Attorney General may review an exemption granted under the Act and may revoke or modify such exemption at any time upon written notice to the Agency that review of individual Public Contracts within the class will materially reduce the risk assumed by the state under such Public Contracts or that it is otherwise in the best interest of the state that such exemption be revoked or modified.

Stat. Auth.: ORS 291.047 & OL 1997, Ch. 869

Stats. Implemented: ORS 291.045, ORS 291.047 & OL 1997, Ch. 869

Hist.: JD 4-1997(Temp), f. & cert. ef. 10-3-97; JD 5-1997(Temp), f. & cert. ef. 10-17-97; 137-045-0060(Temp) repealed by DOJ 3-1998, f. & cert. ef. 4-1-98; DOJ 3-1998, f. & cert. ef. 4-1-98

DIVISION 50

SUPPORT ENFORCEMENT

Procedural Rules

137-050-0300

Agency Represented by Officer or Employee

(1) Support Enforcement Division employees are authorized to appear on behalf of the agency in the following types of hearings:

- (a) Administrative Child Support Adjudications pursuant to ORS 416.425(1)(a) and 416.427;
- (b) Administrative hearings pursuant to ORS 25.610(6)(b) and 293.250(d);
- (c) Hearings regarding the suspension of occupational licenses, certificates, or registrations pursuant to ORS 25.765;
- (d) Hearings regarding the establishment, modification and enforcement of interstate child support orders pursuant to ORS 110.330 to 110.441.

(2) The Attorney General has separately given Oregon Laws 1987, Chapter 833, §1(7) written consent to officers of employers or representing the agency.

(3) The Agency representative shall not present legal argument in contested cases hearings or give legal advice to an agency:

- (a) Legal argument for purposes of the Oregon Laws 1987, Chapter 833, §1(8) limitation include legal argument on:
 - (A) The jurisdiction of the agency to hear the contested case;
 - (B) The constitutionality of a statute or a rule or the application of a constitutional requirement to an agency;
 - (C) The application of court precedent to the facts of the particular contested case proceeding.
- (b) "Legal argument" *does not include*, and therefore agency representatives may argue:
 - (A) The application of the facts to the statutes or rules directly applicable to the issues in the contested case;
 - (B) Comparison of prior actions of the agency conducting the proceeding;
 - (C) The literal meaning of the statutes or rules directly applicable to the issues in the contested case;
 - (D) Objection to the relevancy, materiality or repetitiveness of evidence or the correctness of procedures being followed.

Stat. Auth.: ORS 183.450

Stats. Implemented: ORS 183.450

Hist.: JD 6-1987, f. & ef. 10-16-87; JD 4-1995, f. 2-27-95, cert. ef. 3-1-95

137-050-0320

Definitions

(1) OAR 137-050-0490 constitutes the formula for determining child support awards as required by ORS 25.275. For purposes of OAR 137-050-0320 to 137-050-0490, unless the context requires otherwise the following definitions shall apply:

(2) "Joint child" means the dependent child who is the son or daughter of both the mother and the father involved in the support proceeding. In those cases where support is sought from only one parent of a child, a joint child is the child for whom support is sought.

(3) "Nonjoint child" means the legal child of one, but not both of the parents subject to this determination. Specifically excluded from this definition are stepchildren.

(4) "Gross income" means:

- (a) The gross income of the parent calculated pursuant to OAR 137-050-0340 and 137-050-0350;
- (b) The potential income of the parent calculated pursuant to OAR 137-050-0360 in certain cases where the parent is unemployed or employed on less than a full time basis;
- (c) A combination of gross income and potential income as calculated under subsections (a) and (b) of this rule; or

(d) The temporary income of the parent calculated pursuant to OAR 137-050-0365.

(5) "Adjusted gross income" means gross income less the deductions for pre-existing child support obligations as allowed by OAR 137-050-0400 and the deductions for nonjoint children as allowed by OAR 137-050-0400 and either the addition or deduction of court ordered spousal support as allowed by OAR 137-050-0390.

(6) "Basic child support obligation" means the support obligation determined by applying the parent's adjusted gross income, or if there are two parents, their combined adjusted gross income, to the scale in the manner set out in OAR 137-050-0490.

(7) "Total child support obligation" means the basic child support obligation determined pursuant to OAR 137-050-0490 plus the following additions:

- (a) Child care costs as allowed by OAR 137-050-0420; and
 - (b) Medical expenses as allowed by OAR 137-050-0430.
- Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290
Stats. Implemented: ORS 25.270 – ORS 25.290
Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; JD 4-1994, f. 10-4-94, cert. ef. 10-15-94; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99; DOJ 4-1999, f. 8-27-99, cert. ef. 9-1-99

137-050-0330

Computation of Individual Child Support Obligations

(1) To determine the amount of support owed by a parent, follow the procedure set forth in subsections (1)(a) through (1)(h) of this rule.

- (a) Determine "gross income" of each parent.
- (b) Determine "adjusted gross income" of each parent, and if there are two parents, the combined "adjusted gross income."
- (c) If there are two parents, determine the percentage contribution of each parent to the combined adjusted gross income by dividing the combined adjusted gross income into each parent's adjusted gross income.
- (d) Determine the "basic child support obligation."
- (e) Determine the "total child support obligation."
- (f) Determine each parent's child support obligation by multiplying the percentage figure from subsection (1)(c) of this rule by the "total child support obligation."
- (g) Adjust the child support obligation determined in subsection 1 (a) through (f) of this rule in consideration of health insurance costs as provided in OAR 137-050-0410.
- (h) Determine whether the shared physical custody rule, OAR 137-050-0450, or the split custody rule, OAR 137-050-0460, apply. If they do, then apply them and adjust each parent's child support obligation pursuant to the applicable rule.
- (i) Determine whether the social security benefits rule, OAR 137-050-0405, applies. If it does, then apply it and adjust each parent's child support obligation pursuant to the applicable rule.

(2)(a) The amount of child support to be paid as determined in subsections (1)(a) through (1)(h) of this rule is presumed to be the correct amount. This presumption may be rebutted by a finding that the amount is unjust or inappropriate based upon the criteria set forth in subsections (2)(a)(A) through (2)(a)(P) of this rule. Both the presumed correct amount and the new amount, in variance from the guidelines, shall be recited as part of findings which explain the reason for the variance.

- (A) Evidence of the other available resources of the parent;
- (B) The reasonable necessities of the parent;
- (C) The net income of the parent remaining after withholdings required by law or as a condition of employment including, but not limited to the parent's mandatory contribution to a retirement plan as a condition of employment;
- (D) A parent's ability to borrow;
- (E) The number and needs of other dependents of a parent;
- (F) The special hardships of a parent including, but not limited to, any medical circumstances or extraordinary visitation travel related costs, if any, of a parent affecting the parent's ability to pay child support;
- (G) The needs of the child including, but not limited to extraordinary child care costs due to special needs;

(H) The desirability of the custodial parent remaining in the home as a full-time parent or working less than full-time to fulfill the role of parent and homemaker;

(I) The tax consequences, if any, to both parents resulting from spousal support awarded and determination of which parent will name the child as a dependent; the formula presumes the custodial parent will have the tax exemption allowed for the child or children;

(J) The financial advantage afforded a parent's household by the income of a spouse or another person, or persons, with whom the parent lives in a relationship similar to husband and wife or domestic partnership;

(K) The financial advantage afforded a parent's household by benefits of employment including, but not limited to, those provided by a family owned corporation or self-employment;

(L) Evidence that a child who is subject to the support order is not living with either parent or is a "child attending school" as defined in ORS 107.108;

(M) Prior findings in a Judgment, Order, Decree or Settlement Agreement that the existing support award was made in consideration of other property, debt or financial awards;

(N) The net income of the parent remaining after payment of financial obligations mutually incurred;

(O) The tax advantage or adverse tax effect of a party's income or benefits;

(P) The return of capital.

(b) If the child support presumption is rebutted pursuant to subsection (2)(a) of this rule, a written finding or a specific finding on the record must be made that the amount is unjust or inappropriate. That finding must recite the amount that under the guidelines is presumed to be correct, and must include the reason why the order varies from the guidelines amount. A new support amount may be calculated by determining an appropriate dollar value to be attributed to the specific criteria upon which the finding was based and by making an appropriate adjustment in the amounts used in subsections (1)(b) and (1)(d) of this rule.

(3) Although a monetary obligation is computed for each parent, only the non-custodial parent will be ordered to pay support except in shared custody and split custody cases.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; JD 3-1992, f. 3-3-92, cert. ef. 5-1-92; JD 7-1993, f. 11-3-93, cert. ef. 11-4-93; JD 4-1994, f. 10-4-94, cert. ef. 10-15-94; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99; DOJ 4-1999, f. 8-27-99, cert. ef. 9-1-99

137-050-0335

Implementation of Changes to Child Support Guidelines

New rules, repealed rules, and amendments to the rules that constitute the formula for determining child support awards, found at OAR 137-050-0320 through 137-050-0490, shall be applied to the computation of child support obligations on actions in which the initiating motion or petition is filed with the court or a notice or motion is signed by an authorized representative of the administrator after the effective date of these rules.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

Hist.: JD 4-1994, f. 10-4-94, cert. ef. 10-15-94; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99; DOJ 4-1999, f. 8-27-99, cert. ef. 9-1-99

137-050-0340

Gross Income

(1) Except as excluded below, gross income includes income from any source including, but not limited to, salaries, wages, commissions, advances, bonuses, dividends, severance pay, pensions, interest, honoraria, trust income, annuities, return on capital, social security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, prizes, including lottery winnings, and alimony or separate maintenance received.

(2) Gross income may be calculated on either an annual or monthly basis. Weekly income shall be translated to monthly income by multiplying the weekly income by 4.33.

(3) If the custodial parent of a joint child is a recipient of Temporary Assistance for Needy Families (TANF), the gross income attributed to that parent shall be the amount which could be earned by full-time work (40 hours a week) at the state minimum wage.

(4) Excluded and not counted as income is any child support payment.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 4-1994, f. 10-4-94, cert. ef. 10-15-94; JD 1-1996, f. 4-12-96, cert. ef. 5-1-96; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99; DOJ 4-1999, f. 8-27-99, cert. ef. 9-1-99

137-050-0350

Income from Self-Employment or Operation of a Business

(1) For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, gross income is defined as gross receipts minus costs of goods sold minus ordinary and necessary expenses required for self-employment or business operation. Specifically excluded from ordinary and necessary expenses for purposes of OAR 137-050-0320 to 137-050-0490 are amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by the Administrator, Court, or Hearings Officer to be inappropriate or excessive for determining gross income for purposes of calculating child support.

(2) Expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business shall be counted as income if they are significant and reduce personal living expenses.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99; DOJ 4-1999, f. 8-27-99, cert. ef. 9-1-99

137-050-0360

Potential Income

(1) If a parent is unemployed, employed on less than a full-time basis or there is no direct evidence of any income, child support shall be calculated based on a determination of potential income. For purposes of this determination, there shall be a rebuttable presumption that a parent can be gainfully employed on a full-time basis.

(2) Determination of potential income shall be made according to one of two methods, as appropriate:

(a) Determine employment potential and probable earnings level based on the parent's recent work history, occupational qualifications, or prevailing job opportunities and earnings levels in the community; or

(b) Notwithstanding any other provision of this section, the amount of potential income attributed to a parent will not be less than full-time work (40 hours a week) at the current state minimum wage.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99

137-050-0365

Temporary Income

If a parent subject to this determination is receiving income of a temporary nature such as, but not limited to, unemployment compensation or worker's compensation, that parent's income for purposes of this determination may be either: potential income pursuant to rule 137-050-0360; or, if the presumption of that rule is rebutted, the actual amount of the temporary income. The temporary income is defined as income that is not anticipated to continue for more than six months.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

Hist.: JD 4-1994, f. 10-4-94, cert. ef. 10-15-94; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99; DOJ 4-1999, f. 8-27-99, cert. ef. 9-1-99

137-050-0370

Income Verification

Income statements of the parents shall be verified with documentation of both current and past income where available. Suitable documentation of current earnings includes pay stubs, employer statements, the records of the Oregon Employment Department, or receipts and expenses if self-employed. Documentation of current income shall be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290
 Stats. Implemented: ORS 25.270 – ORS 25.290
 Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99

137-050-0390

Spousal Support

The amount of any pre-existing or concurrently entered court-ordered spousal support shall be deducted from the gross income of the parent obligated to pay such spousal support whether the spousal support is to be paid to the other parent or any other person. The amount of any pre-existing or concurrently entered court-ordered spousal support to be received by a parent from the other parent or any other person shall be included in determining the adjusted gross income of the parent entitled to receive such spousal support.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290
 Stats. Implemented: ORS 25.270 – ORS 25.290
 Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 1-1996, f. 4-12-96, cert. ef. 5-1-96; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99

137-050-0400

Nonjoint Children

(1) When either or both parents of the joint child subject to this determination are legally responsible for a nonjoint child who resides in that parent's household, or a nonjoint child to whom or on whose behalf a parent owes child support under a court or administrative order, a credit for this obligation shall be calculated pursuant to this rule. The credit does not apply to custodial parents receiving TANF if that parent's gross income is calculated using OAR 137-050-0340(3).

(2) Subtract from a parent's gross income the amount of any spousal support a court orders that parent to pay, and add to a parent's gross income any spousal support the parent is entitled to receive as allowed by OAR 137-050-0390.

(3) Determine the number of nonjoint children in the parent's immediate household, and the number of nonjoint children to whom the parent has been ordered to pay support by prior court or administrative order. The result is "total nonjoint children."

(4) Using the scale set down in 137-050-0490, determine the basic child support obligation for the nonjoint child or children by using the income of the parent for whom the credit is being calculated and adjusting that income for spousal support, if applicable, according to subsection (2) of this rule, and using the number of "total nonjoint children" in subsection (4) of this rule.

(5) Subtract from the parent's income derived in subsection (2) of this rule the amount obtained as the basic child support obligation for the "total nonjoint children" in subsection (4) of this rule.

(6) A parent's gross income plus or minus any spousal support per OAR 137-050-0390, minus nonjoint childcare credit per OAR 137-050-0400, is the parent's adjusted gross income for calculation of basic child support under OAR 137-050-0490.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290
 Stats. Implemented: ORS 25.270 – ORS 25.290
 Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; JD 4-1994, f. 10-4-94 cert. ef. 10-15-94; JD 1-1996, f. 4-12-96, cert. ef. 5-1-96; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99; DOJ 4-1999, f. 8-27-99, cert. ef. 9-1-99

137-050-0405

Social Security or Veteran's Benefit Payments Received on Behalf of the Child

To determine how to treat social security benefit income under Title II of the Social Security Act or apportioned veteran's benefits that are received on behalf of a child because either parent receives social security or veteran's retirement benefits or social security or veteran's disability benefits, follow the procedure set out in this rule.

(1) Determine "adjusted gross income" of each parent, and if there are two parents, the combined "adjusted gross income."

(2) Add the monthly social security or apportioned veteran's benefit received on behalf of the child to the combined adjusted gross income.

(3) Using the amount calculated in subsection (2) of this rule, determine the combined child support order from the scale in OAR 137-050-0490.

(4) Subtract the amount of monthly social security or apportioned veteran's benefit the parent receives on behalf of the child from the combined child support order amount calculated pursuant to subsection (3) of this rule.

(5) Determine the percentage contribution of each parent pursuant to OAR 137-050-0330(1)(c). In determining the percentage contribution of each parent use the combined adjusted gross income pursuant to subsection (1) of this rule which is the combined adjusted gross income before the social security benefit amount is added.

(6) Determine each parent's child support obligation by multiplying the percentage figure from subsection (5) of this rule by the adjusted total child support obligation from subsection (4) of this rule.

(7) Notwithstanding the result of the calculation made pursuant to subsection (6) of this rule, the presumption found in OAR 137-050-0470 (\$50 minimum) continues to apply.

(8) For purposes of this rule, "apportioned veteran's benefit" is the amount the Veterans Administration deducts from the veteran's award and disburses to the child or his or her representative payee. The apportionment of veteran's benefits is determined by the Veterans Administration and is governed by 38 CFR 3.450 through 3.458.

[Publications: The publications referenced in this rule are available for review at the agency.]

Stat. Auth.: ORS 180.340, ORS 25.270 – ORS 25.290 & 1999 OL, Ch. 1030
 Stats. Implemented: ORS 25.270 – ORS 25.290 & 1999 OL, Ch. 1030
 Hist.: DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99; DOJ 7-1999, f. 10-29-99, cert. ef. 11-1-99

137-050-0410

Health Insurance

(1) If the assignee or custodial parent has elected to have health insurance included in the order, and it is not a shared or split custody case, the Administrator, Hearings Officer or Court shall follow the procedure set out in subsections (1)(a), (1)(b), (2) and (3) of this rule. In the case of shared or split custody, proceed to subsection (5) of this rule.

(a) Determine whether health insurance is available to the obligor on a group basis or through his or her employer or union at reasonable cost. Health insurance is considered reasonable in cost if it is employment related insurance or other group health insurance, regardless of service delivery mechanism unless the group insurance is not accessible to the child or obligee, and the cost to cover the subject child or children does not exceed the monthly child support obligation determined under the formula provided by ORS 25.275 and 25.280.

(b) Determine the cost to the obligor of carrying health insurance coverage for only the obligor's joint and nonjoint children, if it can be determined, prorated for the total number of children covered.

(2) In every case where an obligee or assignee of support rights has elected to have the subject child named as a beneficiary on the health insurance plan available to the obligor through his or her employment or union, or through other group plan, it shall be ordered. When the obligor provides health insurance coverage for the child or children, the amount of the child support order shall be reduced by an amount equal to the obligee's pro rata share of the obligor's out-of-pocket costs of health insurance for the child,

which is determined by the obligee's proportionate share of the combined income of the parents. No reduction shall be allowed for the cost attributable to covering the obligor or obligor's spouse or domestic associate under such insurance.

(3) When an obligor does not provide health insurance for the subject children and such insurance is provided by an obligee, the obligor's child support obligation shall be increased by an amount which represents the obligor's pro rata share of the obligee's out-of-pocket costs of the health insurance.

(4) When the support obligation of a parent is determined for a child who is not in the custody of the other parent, and assuming that only the income of the parent against whom support is ordered is considered, the entire cost of any insurance for that child provided by the obligated parent shall be deducted from the amount of the support ordered with respect to that parent.

(5) In the case of shared or split custody, either one or both of the parents may provide the health insurance, if available. Refer to the shared custody rule 137-050-0450 or the split custody rule 137-050-0460 for instructions on how to allocate these costs.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; JD 7-1993, f. 11-3-93, cert. ef. 11-4-93; JD 4-1994, f. 10-4-94 cert. ef. 10-15-94; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99; DOJ 4-1999, f. 8-27-99, cert. ef. 9-1-99

137-050-0420

Child Care Costs

An amount equal to the annualized monthly child care costs, including government child care subsidies, less the federal and state child care credit payable on behalf of joint children, which are due to employment or job search of either parent, or the physical custodian of the children, shall be added to the basic obligation. Such childcare costs shall be reasonable; that is, such costs shall not exceed the level required to provide quality care for the child or children from a licensed source. Child care costs required for active job search and child care costs required to allow the custodial parent to obtain training or education necessary to obtain a job are allowable on the same basis as costs required in connection with employment. In the case of shared custody, follow the instructions in rule 137-050-0450; and in the case of split custody, follow the instructions in rule 137-050-0460, regarding the allocation of these costs.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; JD 16-1992, f. 10-20-92, cert. ef. 11-2-92; JD 4-1994, f. 10-4-94 cert. ef. 10-15-94; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99; DOJ 4-1999, f. 8-27-99, cert. ef. 9-1-99

137-050-0430

Medical Expenses

The basic child support obligation may be increased by a reasonable amount which recognizes recurring medical costs on behalf of joint children by the custodial parent. Such an increase is allowable only to the extent that such medical costs are not eligible for payment by health or other insurance. Recurring medical costs are defined as those costs which are reasonably expected to occur regularly and periodically in the future based on documented past experience or on substantial evidence of future need.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 1-1994, f. 1-26-94, cert. ef. 2-1-94; JD 4-1994, f. 10-4-94 cert. ef. 10-15-94; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99

137-050-0450

Shared Physical Custody

Shared Physical Custody is defined as a situation when by agreement of the parents in writing or by court order one parent has physical custody not more than 65 percent of the time and the other parent has physical custody not less than 35 percent of the time. When the parents are sharing physical custody as defined in this section, the amount of support to be paid shall be calculated pursuant to this rule.

(1) Determine combined adjusted gross income.

(2) Determine basic child support from the scale set down in OAR 137-050-0490.

(3) Multiply the basic child support amount by 1.50.

(4) Determine the percentage of overnights the child will be in the physical custody of each parent.

(5) Pro rate the basic child support amount for each parent by multiplying the support amount determined in subsection (3) of this rule by the percentage of time the child will be in that parent's custody.

(6) Determine: the total out of pocket expenses paid by each parent for health insurance; the total paid by each parent for child care as defined in OAR 137-050-0420; and the total paid by each parent for any recurring medical costs as defined in OAR 137-050-0430.

(7) Add the total costs/expenses paid by each parent determined in subsection (6) of this rule to the prorated child support amount determined in subsection (5) of this rule for that parent.

(8) Determine each parent's percentage contribution to the combined adjusted gross income. To calculate this percentage, divide each parent's adjusted gross income by the combined adjusted gross income.

(9) Multiply the income percentage determined in subsection (8) of this rule and allocated to each parent by the total support and costs/expenses amount calculated in subsection (7) of this rule and assigned to the other parent. The result of this calculation is two support amounts; each amount reflecting an amount owed by one parent to the other.

(10) The court or administrator may, but need not, net out the obligations obtained in subsection (9) of this rule by subtracting the smaller obligation from the larger, and require the parent with the larger obligation to pay the difference between the two amounts.

(11) When calculating shared custody, rule 137-050-0470 (\$50 minimum) does not apply.

(12) If the parent who is to pay support has physical custody less than 35 percent of the overnights, a credit may be given against the parent's support obligation upon a showing that the parent has physical custody more than 25 percent of the total overnights and that the parent's direct contribution to the support of the child significantly reduces the cost of support to the other parent.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; JD 11-1990(Temp), f. 12-20-90, cert. ef. 1-1-91; JD 2-1991, f. & cert. ef. 3-1-91; JD 4-1994, f. 10-4-94 cert. ef. 10-15-94; JD 5-1994(Temp), f. 10-17-94, cert. ef. 10-18-94; JD 7-1994(Temp), f. & cert. ef. 11-8-94; JD 2-1995, f. 1-31-95, cert. ef. 2-1-95; JD 1-1996, f. 4-12-96, cert. ef. 5-1-96; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99; DOJ 4-1999, f. 8-27-99, cert. ef. 9-1-99

137-050-0460

Split Custody

(1) Split custody is defined as a situation where there is more than one joint child and in which each parent has physical custody of at least one of the children.

(2) When split custody is involved, the calculation of child support shall be as follows:

(a) Add together the adjusted gross income of each parent. Adjusted gross income is defined in OAR 137-050-0320(5).

(b) Determine the basic child support obligation from the Scale set down in OAR 137-050-0490.

(c) Divide the number of children with each parent by the total number of joint children. Assign to each parent the resulting percentage.

(d) Pro rate the basic child support amount for each parent by multiplying the support amount determined in subsection (2)(b) of this rule by the percentage of children determined in subsection (2)(c) of this rule for that parent.

(e) Determine: the total out-of-pocket expenses paid by each parent for health insurance; the total paid by each parent for child care as defined in OAR 137-050-0420; and the total paid by each

parent for any recurring medical costs as defined in OAR 137-050-0430.

(f) Add the total costs/expenses paid by each parent determined in subsection (2)(e) of this rule to the pro rated child support amount determined in subsection (2)(d) of this rule for that parent.

(g) Determine each parent's percentage contribution to combined adjusted gross income. To calculate this percentage, divide each parent's adjusted gross income by the combined adjusted gross income.

(h) Multiply the income percentage determined in subsection (2)(g) of this rule and allocated to each parent by the total support and costs/expenses amount calculated in subsection (2)(f) of this rule and assigned to the other parent. The result of this calculation is two support amounts; each amount reflecting an amount owed by one parent to the other.

(i) The court or administrator may, but need not, net out the obligations obtained in subsection (2)(h) of this rule by subtracting the smaller obligation from the larger, and require the parent with the larger obligation to pay the difference between the two amounts.

(j) When calculating split custody, rule 137-050-0470 (\$50 minimum) does not apply.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; JD 4-1994, f. 10-4-94 cert. ef. 10-15-94; JD 5-1994(Temp), f. 10-17-94, cert. ef. 10-18-94; JD 7-1994(Temp), f. & cert. ef. 11-8-94; JD 2-1995, f. 1-31-95, cert. ef. 2-1-95; JD 1-1996, f. 4-12-96, cert. ef. 5-1-96; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99; DOJ 4-1999, f. 8-27-99, cert. ef. 9-1-99

137-050-0470

Minimum Order

Notwithstanding the amount of the gross income of either parent subject to a determination under OAR 137-050-0320 through 137-050-0490, it shall be a rebuttable presumption that the noncustodial parent has an ability to pay at least \$50 per month as child support for the benefit of a joint child or children.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99

137-050-0490

The Scale Used in Child Support Determinations

(1) Table 1 shall be used in any judicial or administrative proceeding to establish or modify a support obligation under ORS Chapters 107, 108, 109, 110, 416, 419(B) & (C) and determinations pursuant to OAR 137-050-0320 through 137-050-0490.

(2) Where one parent has physical custody of a child and support is sought against the other parent, or when the shared or split custody rules apply, the combined adjusted gross income of the parents should be used.

(3) Where a child is not in the custody of one of the parents and a support order is sought against one or each of them individually, a parent's adjusted gross income, not the adjusted gross income of both, should be used.

(4) For combined adjusted gross incomes exceeding \$10,000 per month, the presumed basic child support obligations shall be as for parents with combined adjusted gross income of \$10,000 per month. A basic child support obligation in excess of this level may be demonstrated for those reasons set forth in OAR 137-050-0330.

(5) For the seventh child and each additional child thereafter, add to the amount for six children an amount equal to 6.6 percent of the amount for six children.

[ED. NOTE: The Table referenced in this rule is not printed in the OAR Compilation. Copies are available from the agency.]

Stat. Auth.: ORS 25.275 & ORS 25.280

Stats. Implemented: ORS 25.275 & ORS 25.280

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; JD 4-1994, f. 10-4-94 cert. ef. 10-15-94; DOJ 1-1999, f. 1-15-99, cert. ef. 3-1-99

137-050-0505

Correction of Mistakes in Orders

(1) Clerical mistakes in final orders issued by the administrator pursuant to ORS 416.400 to 416.470 and errors therein arising from oversight or omission may be corrected by the administrator at any time within 60 days of the issuance of the order. The corrected order shall be clearly marked "Corrected Order" and shall contain notice to the parties of appeal rights as provided by ORS 416.427.

(2) The corrected order shall be served on the parties by regular mail at the address of record established for the proceeding under which the order being corrected was issued, or at any other address which a party has subsequently provided to the Child Support Program.

Stat. Auth.: ORS 416.415 & ORS 416.455

Stats. Implemented: ORS 416.415 & ORS 416.455

Hist.: JD 6-1992, f. 4-1-92, cert. ef. 4-15-92

137-050-0510

Regarding the Initiation of Action Under ORS 416.400 to 416.470 to Establish Paternity When More than One Possible Father Has Been Named

(1) In any action to establish paternity initiated under ORS 416.400 to 416.470, when the mother of the child or children for whom paternity is being established states that the father of the child or children could be more than one man, the Support Enforcement Division (SED) may initiate action against those men who are named by the mother as possible fathers as provided for in this rule.

(2) If mother is able to name one of the possible fathers as the most likely father based upon the date of conception, the physical characteristics the child shares with that man, or other factors, and information sufficient to effect personal service upon that man is apparently available, the Support Enforcement Division may initiate action against that man only.

(3) If mother cannot identify one of the men who may be the father as the most likely father, the Support Enforcement Division may gather additional information, including information from the mother and from any physician or other licensed health care provider of obstetrical care to mother, which may assist the mother in identifying the most likely father.

(4) If mother remains unable to identify one of the possible fathers as the most likely father, the Support Enforcement Division may initiate legal action against any one or more possible fathers, as named by mother, upon whom SED can apparently effect personal service based on the information it has available.

(5) The Support Enforcement Division shall provide notice to any possible father described in this rule and served in an action to establish paternity that the mother of the child for whom the Division seeks to establish paternity has named another man or men as a possible father unless that other man (or men) has been excluded by blood tests.

(6) The Support Enforcement Division will enter no order establishing paternity with respect to a man who has not been named by mother as the most likely father unless the provisions of either subsection (a) or (b) of this section apply:

(a) The man has been subjected to blood tests which have not excluded him as a possible father of the child in question; or

(b) All other men named by mother as possible fathers have been excluded as possible fathers by blood tests.

(7) Notwithstanding any other provision of this rule, its requirements do not apply when there is conclusive presumption of paternity pursuant to ORS 109.070 or when one of the possible fathers is entitled to reasonable notice under ORS 109.096.

Stat. Auth.: ORS 416.430

Stats. Implemented: ORS 416.430

Hist.: JD 4-1991(Temp), f. 9-9-91, cert. ef. 10-1-91; JD 10-1991, f. 12-4-91, cert. ef. 1-1-92

137-050-0540

Hearings Officer Order Regarding Arrears — ORS 416.429

(1) If a parent objects to the enforcement of an order under ORS 416.429 on the basis that the amount of arrearage is incor-

rect, a hearings officer may determine the correct amount of the arrearage, if any, and issue an order enforcing both the newly determined arrearage and the current support obligation.

(2) The amount of arrearages as stated on the Notice of Intent to Enforce an Order issued under ORS 416.429 shall be presumed to accurately state the arrearages. The presumption may be rebutted by evidence of errors in calculation, by a showing that payments were made for which credits were not appropriately recorded, or any other evidence which demonstrates that the arrearage amount sought is incorrect.

(3) The hearings officer may enter an order providing for the enforcement of current support only, pending further proceedings to determine the correct amount of arrears.

Stat. Auth.: ORS 416.429

Stats. Implemented: ORS 416.429

Hist.: JD 13-1991, f. 12-30-91, cert. ef. 12-31-91

137-050-0550

Modification of a Support Order to Zero

(1) The Support Enforcement Division may, upon its own initiative, or upon the request of a party, initiate the necessary action to modify a child support obligation to zero when one of the conditions listed in subsections (a) and (b) of this section apply:

(a) The child or children for whose benefit the support was ordered no longer are in the physical custody of the obligee;

(b) The family is reconciled (that is, the obligor, obligee and child or children live together as an intact family).

(2) No order modifying a support obligation to zero shall be taken ex parte.

(3) Nothing in this rule prohibits the modification to zero of any order for the reason that the obligor receives cash public assistance payments as provided for in ORS 25.245.

Stat. Auth.: ORS 25.080(4)(e)

Stats. Implemented: ORS 25.080(4)(e)

Hist.: JD 13-1991, f. 12-30-91, cert. ef. 12-31-91

137-050-0570

Immediate Enforcement of Arrears, Including State Debt

(1) The Administrator may take action to enforce and collect upon a child support order entered pursuant to ORS 416.400 to 416.470, including arrearages, from the date of issuance of the order.

(2) "Action to enforce and collect" as used in this rule and in ORS 416.415(9), 416.427(4) and 416.429(5) includes, but is not limited to income withholding as provided for by ORS 25.050, 25.310, 25.460 to 25.530, 416.445 and 419.513.

(3) "Arrearages", as used in this rule and in ORS 416.415(9) and 416.427(4) includes any amounts owed as state debt and ordered pursuant to ORS 416.415(8)(c), 416.427, or 416.430 and filed under ORS 416.440.

(4) For purposes of action to enforce and collect it shall be immaterial whether or not "arrearages" exist because they represent payments which were due on a monthly basis and not made, or because they were entered in a lump sum amount as state debt.

Stat. Auth.: ORS 416.415(9)

Stats. Implemented: ORS 416.415(9)

Hist.: JD 4-1992, f. 3-5-92, cert. ef. 3-16-92

137-050-0580

Establishing an Order for State Debt

(1) Whenever the Support Enforcement Division of the Department of Justice issues a notice and finding of financial responsibility, and if the Department of Human Resources is paying or has paid public assistance to or for the benefit of a child for whom child support is sought, the Administrator shall set state debt, for purposes of the statement required by ORS 416.415(2)(c), in accordance with the provisions of sections (2) through (4) of this rule.

(2) The amount of state debt stated in the notice shall be calculated by multiplying the number of months the Department of Human Resources has paid public assistance for the child or children for whom support is sought, times the amount of future

monthly child support contained in the statement required by ORS 416.415(2)(b). There is no limit to the number of months of public assistance for which a state debt judgment may be sought.

(3) In determining the amount of state debt pursuant to this rule, it shall be immaterial that the amount of assistance paid in a particular month for the benefit of the child or the child and caretaker was less than the amount of monthly support contained in the statement required by ORS 416.415(2)(b), provided that the amount of state debt does not exceed that pro-rata percentage of total assistance paid to the family, including the caretaker, which the children of the parent for whom the determination is being made represent as a percentage of all the children in the family who received assistance, and not reimbursed.

(4) SED may issue a Notice and Finding of Financial Responsibility which contemplates the establishment of a state debt judgment only. That is, it shall be sufficient for the issuance of such notice only that DHR has at some time in the past made a payment of public assistance as defined in ORS 416.410(1). Nothing in this rule requires that the establishment of state debt also requires the concurrent establishment of an order for current child support.

(5) The Administrator adopts the attached work sheet for the calculation of state debt under this rule. A completed copy of the worksheet adopted by this rule, or a copy of a worksheet substantially similar to the worksheet adopted by this rule, shall be attached to each order for state debt entered under the provisions of ORS Chapter 416.

Stat. Auth.: ORS 416.410

Stats. Implemented: ORS 416.410

Hist.: JD 12-1992, f. 5-14-92, cert. ef. 7-1-92; JD 19-1992, f. 11-13-92, cert. ef. 1-15-93

137-050-0590

Reopening of Paternity Cases

(1) When a party claims that a man established as the father of a child, or ordered to pay child support for a child, is in fact not the biological father of the child, the Support Enforcement Division may open or reopen the issue of paternity when all of the provisions of subsections (a) through (e) of this section apply:

(a) The Support Enforcement Division initiated the action which established paternity or ordered support;

(b) All parties have been contacted and agree to the reopening of the issue and to parentage testing;

(c) Parentage (genetic) tests have not been conducted;

(d) The order is one year old or less;

(e) Neither party asserts that the conclusive presumption of paternity created by ORS 109.070 applies.

(2) An order establishing paternity or ordering support will not be vacated, dismissed or set aside under this rule unless parentage tests exclude the man in question as the father of the child. Except for cases described in section (3) of this rule, SED shall not submit for the court's approval any order granting relief which requires repayment to the debtor of money paid by that debtor under the order.

(3)(a) Notwithstanding the provisions of sections (1) and (2) of this rule, the Support Enforcement Division may reopen the issue of paternity when, in its judgment, facts indicate that jurisdiction was not properly established, correct procedures were not followed or fraud was committed by one of the parties. In such an event, the issue of paternity may be reopened without regard to the age of the order. In such an event, the provisions of subsections (b) and (c) of this section apply;

(b) All parties must be given notice of SED's intent to reopen the issue at least 14 days before the issue is reopened. If notice is given and all parties consent to the reopening, the Support Enforcement Division may cause parentage tests to be conducted;

(c) If a party fails to respond or objects to the reopening, then both parties must be served with a motion to set aside the order, such motion to be supported by an affidavit setting forth the reasons.

(4) No order granting relief under this rule shall be effective without the approval of the circuit court under the authority of ORS 416.465 or ORCP 71.

Stat. Auth.: ORS 416.465

Stats. Implemented: ORS 416.465

Hist.: JD 15-1992, f. 8-20-92, cert. ef. 10-1-92

137-050-0595

Form Prescribed by the Administrator for Modification — ORS 416.425

(1) Any form of motion to modify a support order under ORS 416.425 shall be deemed to be approved by the Administrator as to form if it complies with the criteria set forth in subsections (a) through (c) of this section, or has been provided by the Administrator under section (2) of this rule:

(a) The motion shall be in writing and include the appropriate caption and case number;

(b) The motion shall set out the reasons for the modification;

(c) The motion shall state the telephone number and address of the moving party.

(2) The Administrator shall provide, upon request, a blank form of a motion to modify, which indicates on its face that it has been approved by the administrator, e.g., “SED Approved Form”.

(3) Nothing in this rule requires the exclusive use of any particular form of motion to modify in a proceeding under ORS 416.425, provided however that the form used complies with the criteria set forth in section (1) of this rule, or has been provided by the Administrator under section (2) of this rule.

Stat. Auth.: ORS 416.425

Stats. Implemented: ORS 416.425

Hist.: JD 7-1992, f. 4-1-92, cert. ef. 4-15-92

137-050-0600

Effective Date of Modification Under ORS 416.425

(1) In any proceeding to modify a support order under ORS 416.425, the modification may be effective on or at any time after the date the motion to modify was filed. The date of filing is the date the motion to modify was prepared, if the motion is prepared by the Administrator. If the motion is prepared by a person or entity other than the Administrator, the date of filing is the date the motion is served upon the Administrator as required in ORS 415.425.

(2) For purposes of this rule “Administrator” means the Administrator of the Support Enforcement Division, an Oregon district attorney, or the administrator’s or district attorney’s authorized representative.

Stat. Auth.: ORS 416.425

Stats. Implemented: ORS 416.425

Hist.: JD 8-1992, f. 4-3-92, cert. ef. 5-1-92; Administrative Correction 11-29-97

137-050-0610

Paternity Establishment Procedures

(1) In any case referred by the Department of Human Resources (whether because of an assignment of support rights or by application for IV-D services) to establish paternity of a child, the provisions of sections (1) to (8) of this rule apply when the Support Enforcement Division of the Department of Justice is the entity which provides the paternity establishment services pursuant to ORS 25.080.

(2) When the case referred involves a child who is not yet born, the Support Enforcement Division will take no action to establish paternity or to provide locate services until such time as the child is born.

(3)(a) In all cases in which a child was conceived in Oregon, the Support Enforcement Division will initiate legal proceedings to establish paternity under ORS Chapter 416;

(b) “Past Support” for the child, as defined in ORS 109.155, and not owed to the state, cannot currently be requested using ORS Chapter 416;

(c) Notwithstanding the provisions of subsection (b), “state debt”, as defined in ORS 416.410, shall be established as provided by ORS Chapter 416 and OAR 137-050-0580.

(4) In all cases in which a party alleges facts, which if true, conclusively establish paternity under ORS 109.070, and if a man other than the man who is alleged to be conclusively presumed as the legal father has been named by a party as a possible biological father of the child in question, the Support Enforcement Division will certify the case to the appropriate circuit court for a determination of whether the conclusive presumption found in ORS 109.070 applies.

(5) In all cases in which the mother states that more than one man could be the natural father of the child and parentage tests have excluded a man as the father of the child, the provisions of subsections (a) and (b) of this section apply:

(a) If there is only one remaining untested possible natural father, that man is constructively included as the father by virtue of the other man’s exclusion as the father;

(b) If there are more than one remaining untested possible natural fathers, the Support Enforcement Division will initiate action against each man, either simultaneously or one at a time, to attempt to obtain parentage tests which either exclude or include the man.

(6) In all cases in which the mother states that more than one man could be the natural father of the child and parentage tests have included a man as the father of the child at a cumulative paternity index of at least 99, any other untested possible father(s) will be considered to be constructively excluded by virtue of the first man’s inclusion.

(7)(a) The Support Enforcement Division will initially pay the costs of parentage tests, and will seek reimbursement of those costs, but may agree to waive the costs;

(b) If an alleged father fails to appear as ordered for parentage tests, but the mother and child have appeared for blood drawing, reimbursement will be sought from the alleged father for the costs incurred;

(c) The maximum amount allowed to be entered as a parentage test judgment against a party is the amount SED agrees to pay a parentage testing laboratory under contract;

(d) A judgment for blood test costs reimbursement will not be sought in any case in which any of the provisions of paragraphs (A) through (D) of this subsection apply:

(A) Against any person excluded as a possible father of a subject child;

(B) In any case in which the mother stated that more than one man could be the father of the child, and has been unable to name a most likely alleged father, and the man tested has not objected to the entry of an order establishing paternity;

(C) In any case in which the alleged father has applied for IV-D services and requested paternity establishment in accordance with OAR 137-050-0560;

(D) Against any person found to be the legal father for costs attributable to the testing of blood for other alleged fathers in any case in which the mother states that more than one man could be the father of the child.

(8) The Support Enforcement Division may dismiss or terminate a proceeding to establish paternity after notice to the parties that the case is being considered for dismissal or termination and that comments or objections should be made within ten days. Cases being considered for dismissal or termination must be forwarded for approval to the Administration office of the Support Enforcement Division, together with the complete case file, a memo explaining the facts of the case and why it should be dismissed or terminated, along with any comments received from the parties. However, approval of the dismissal or termination may be made by the Support Enforcement Division branch office if any of the provisions of subsections (a) through (e) of this section apply:

(a) No form of public assistance is being provided and the obligee or applicant for services requests dismissal or termination;

(b) Contact with the mother or applicant for services has been lost;

(c) One or more of the parties is deceased;

(d) The mother or applicant for services is uncooperative and no form of public assistance is being provided;

(e) The obligee is uncooperative and sanctions have been applied to or requested for the public assistance grant.

Stat. Auth.: ORS 25.080, ORS 416.415 & ORS 416.430

Stats. Implemented: ORS 25.080, ORS 416.415 & ORS 416.430

Hist.: JD 5-1993, f. 9-10-93, cert. ef. 10-1-93

137-050-0625

Order Establishing Paternity for Failure to Comply with Order for Parentage Test

(1) In an action to establish paternity initiated pursuant to ORS 416.415, the Administrator may serve simultaneously with the Notice and Finding of Financial Responsibility and administrative order for parentage tests.

(2) An administrative order for parentage tests may require either the mother of the child(ren) in question or a person who is a possible father of the child(ren) to file a denial of paternity in order to receive a parentage test, or it may provide for the drawing of blood prior to the party filing a responsive answer to the allegation of paternity.

(3) The administrator shall enter an order establishing paternity based upon a party's failure to appear for parentage testing, provided that all parties have been served with a Notice and Finding of Financial Responsibility and with an order requiring parentage tests if:

(a) The mother of the subject child(ren) has named the male party who failed to appear for parentage tests in a sworn statement as a possible father of the child(ren) in question; or

(b) A male party has claimed in a sworn statement to be the father of the child(ren) in question and the mother and her child(ren) have failed to appear for such tests.

(4) An order establishing paternity based on a failure to submit to parentage tests may be entered:

(a) Whether or not a responsive answer has been filed; and

(b) Whether or not corroboration exists to support a sworn statement of a party naming a male party as a father or possible father of the child(ren) in question, provided that the male party has either:

(A) Been named in a sworn statement by the mother as a possible father of the child; or

(B) Has named himself in a sworn statement as the father of the child.

Stat. Auth.: ORS 109.252

Stats. Implemented: ORS 109.252

Hist.: JD 3-1993, f. & cert. ef. 7-27-93

137-050-0630

Methods of Employer Reporting

(1) Employers subject to the reporting requirements of Chapter 381, Oregon Laws, 1995 and other employers who choose to report voluntarily may transmit the information required by that Act by any one of the methods specified in subsections (a) through (e) of this section.

(a) By mailing to the Support Enforcement Division, Employer Reporting Program, Suite 175, 1495 Edgewater NW, Salem, OR 97304, a completed copy of a form created for this purpose by the Support Enforcement Division.

(b) By mailing to the Support Enforcement Division at the address specified in subsection (a) of this section any document or computer printout, or copy thereof, created or selected by the employer which carries the name and social security number of the employee and the name, address and state employer identification number of the employer. For purposes of this rule the state employer identification number of the employer means the employer's Oregon Tax Identification Number.

(c) By facsimile transmission ("FAX") of any document authorized by this rule to the Support Enforcement Division of the Department of Justice at telephone number 1-800-360-3330 or 1-503-986-6161.

(d) By mailing a magnetic tape or diskette, formatted as specified by the Support Enforcement Division, to the Support Enforcement Division, Employer Reporting Program, 1495 Edgewater NW, Suite 175, Salem, OR 97304.

(e) By any other method approved by the Support Enforcement Division.

(2) The Support Enforcement Division will provide reporting forms and pre-addressed, postage paid labels or envelopes to employers who request them to report by any of the reporting methods specified in subsections (1)(a) through (e) of this rule.

(a) An employer may make the request in writing addressed to Support Enforcement Division, Employer Reporting Program, Suite 175, 1495 Edgewater, NW, Salem, OR 97304.

(b) An employer may make the request by telephone to number 503-378-6766.

(c) An employer may make the request by facsimile ("FAX") transmission to number 1-800-360-3330 or 1-503-986-6161.

(3) Nothing in this rule authorizes the employer to report any information to the Support Enforcement Division which is not required by Chapter 381, Oregon Laws, 1995.

(4) Nothing in this rule authorizes the employer to report the required information in a manner that does not protect the confidentiality of the information transmitted. For instance, a postcard that does not physically conceal the transmitted information would not protect the confidentiality of the information and is, therefore, not authorized by this rule.

(5) The Support Enforcement Division shall provide, by mail, to affected employers the information the employer will need to comply with this rule.

Stat. Auth.: ORS 180.340

Stats. Implemented: Ch. 381, OL 1995

Hist.: JD 9-1993, f. 11-3-93, cert. ef. 11-4-93; JD 9-1995, f. & cert. ef. 10-27-95

DIVISION 76

CRIME VICTIMS' COMPENSATION

137-076-0000

Authority for Rules

These rules are adopted under the Department of Justice's authority contained in ORS 147.205(3).

Stat. Auth.: ORS 147.205(3)

Stats. Implemented:

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

137-076-0005

Scope of Rules

These rules implement ORS 147.005 through 147.365 related to the compensation of crime victims.

Stat. Auth.: ORS 147.205(3)

Stats. Implemented:

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

137-076-0010

Definitions

As used in ORS 147.005 through 147.365, unless the context requires otherwise:

(1) "Program" means the Crime Victims' Compensation Program.

(2) "Administrator" or "Program Director" means the Administrator or Program Director of the Crime Victims' Compensation Program as designated by the Attorney General of the State of Oregon.

(3) "Failure to Cooperate" means any act or omission by a victim that prejudices a law enforcement agency in the timely investigation of a crime or which causes the agency to abandon its investigation, or which prejudices a prosecuting official in a timely prosecution of the crime or causes or contributes to a decision by the official to abandon prosecution.

(4) "Good Cause for Failure to Cooperate" exists when the victim receives express or implied threats that cooperation will result in death or serious physical injury to the victim or another person.

(5) "Good Cause for Failure to Notify the Appropriate Law Enforcement Officials within 72 Hours After the Perpetration of

the Crime” means physical or mental trauma causing an inability to report the crime as required.

(6) “Substantially Attributable to the Victim’s Wrongful Act” means directly or indirectly attributable to an intentional and unlawful act from which there can be a reasonable inference that, had the act not been committed, the crime complained of likely would not have occurred.

(7) “Wrongful Act” includes but is not limited to participating, either directly or indirectly, in the cultivation, purchase, sale, manufacture or possession of a controlled substance as defined by ORS 475.991 to 475.995 and 167.225.

(8) “Substantial Provocation” means a voluntary act from which there can be a reasonable inference that, had the act not occurred, the crime likely would not have occurred.

(9) “Contribution” means a voluntary action by the victim which, directly or indirectly, produced the victim’s injury. In determining whether contribution exists, the Department may consider all relevant circumstances of the behavior of the victim that may have contributed to the victim’s injury or death, including but not limited to gestures, words, prior conduct and the use of alcohol or controlled substances.

Stat. Auth.: ORS 147.205(3)

Stats. Implemented: ORS 147.015(2), ORS 147.015(3), ORS 147.015(5) & ORS 147.125(1)(c)

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 1-1987(Temp), f. & ef. 1-8-87; JD 2-1992, f. & cert. ef. 3-2-92; JD 18-1992, f. 10-30-92, cert. ef. 11-2-92

137-076-0015

Authority of Administrator and Program Director

Any orders issued by the Administrator or Program Director of the Program in carrying out the Department of Justice’s authority to administer ORS Chapter 147 and the rules adopted pursuant thereto are considered orders of the Department of Justice and Attorney General of the State of Oregon.

Stat. Auth.: ORS 147.205(3)

Stats. Implemented: ORS 147.205 - ORS 147.227

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

137-076-0020

Definition of Reasonable Expenses

(1) As used in this rule, “necessary services” are those services necessary for the treatment of physical and/or psychological injury suffered by the victim as a direct result of a crime.

(2) For purposes of ORS 147.035, reasonable hospital expenses shall be limited to expenses for necessary services provided by licensed hospitals and by other health care facilities licensed to provide services that may otherwise be supplied by hospitals.

(3) For purposes of ORS 147.035, reasonable medical expense shall be limited to ambulance expenses and expenses for necessary services provided by persons licensed under ORS Chapters 677 and 679. Medical treatment provided by any other medical provider is not reimbursable unless at the time treatment began it was approved by and provided under the supervision of a physician licensed under ORS Chapters 677 and 679, and further that the other medical provider is licensed under the provisions governing that provider’s profession.

(4) For purposes of ORS 147.035, reasonable psychiatric, psychological or counseling expenses are limited to expenses for necessary services provided by psychiatrists or physicians licensed under ORS Chapter 677, or psychologists, licensed clinical social workers, licensed professional counselors, or licensed marriage and family therapists licensed under ORS Chapter 675.

(5) For purposes of ORS 147.035, compensable rehabilitation expenses shall be limited to expenses for necessary services to provide physical rehabilitation or vocational training.

Stat. Auth.: ORS 147.205(3)

Stats. Implemented: ORS 147.025 & ORS 147.035

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92; JD 18-1992, f. 10-30-92, cert. ef. 11-2-92

137-076-0025

Lost Earnings Compensation

(1) Net lost earnings shall be computed on the basis of the victim’s actual documented net earnings determined as of the date of the compensable injury. Dependency benefits shall be computed on the basis of the deceased victim’s documented net earnings at the time of death. Possible future earnings shall not be considered as a basis for lost earnings compensation. Benefits can also be paid for subsequent periods of disability, such as surgeries. The rate of the loss should be recalculated to reflect the victim’s present net earnings and should be paid at the higher rate if different. No earnings may exceed the \$200 per week maximum.

(2) Lost earnings compensation shall accrue only during the period of medical disability as confirmed by a medical practitioner licensed under ORS Chapters 677 and 679.

(3) Where a replacement person is hired to fulfill the duties of an injured victim and the cost of this replacement person is a direct financial cost to the victim, such documented replacement cost shall be used as the basis for lost earnings compensation, but in no instance shall the compensation exceed the maximum weekly amount of \$200 or an aggregate of \$10,000. If a victim was not working at the time of the criminal incident but has a history of annual earnings, such as seasonal work, contracting, or temporary assignments, he/she may still be eligible for lost wages/support if the program receives proper documentation to support the net earnings. For this purpose the program must have either W-2’s or an income tax return that reflects earnings for the preceding twelve month period. This figure will then be used to reflect annual income/support and provide a basis for calculating the disability period.

(4) Loss of support compensation shall be based on the victim’s documented net earnings at the time of death. The net amount shall be divided by the number of dependents, including the victim. The result shall be based on the number of survivors, not to exceed the maximum weekly amount of \$200.

(5) Loss of support compensation shall include the documented loss of child support. Loss of child support shall be based on the amount of child support received by the child at the time of the victim’s death.

(6) Dependency compensation benefits shall be paid to dependent children under 18, dependent spouse of a deceased victim until remarriage, and any relative who was a financial dependent of the deceased victim at the time of the death of the victim.

(7) Where a deceased victim and surviving spouse both have income at the time of the criminal occurrence resulting in the death of one spouse, the independent income of each spouse shall be used to determine dependency benefits.

Stat. Auth.: ORS 147.205(3)

Stats. Implemented: ORS 147.035

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92; JD 2-1997, f. & cert. ef. 7-9-97

137-076-0030

Time Within Which an Application for Compensation Must be Filed or Good Cause Shown for an Extension of the Time Within Which an Application for Compensation Must be Filed

(1) An application for compensation shall be filed in the office of the Program, Oregon Department of Justice, either in person or by mail, and shall be deemed filed when received by the Department.

(2) “Good cause for failure to file an application for compensation within six months of the date of the crime” shall include lack of knowledge of the Program, failure of an investigating officer to provide information as provided for in ORS 147.365, or mental or physical trauma sustained by the victim rendering the victim incapable of filing the application for compensation in a timely fashion.

Stat. Auth.: ORS 147.205(3)

Stats. Implemented: ORS 147.015

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92; JD 2-1997, f. & cert. ef. 7-9-97

137-076-0032

Abandonment of Application for Compensation

If an applicant fails to respond within 60 days to inquiries and communications by the Program, the Program shall send a notice by certified mail, return receipt requested, to the applicant's last known address informing the applicant that the application for compensation will be closed as abandoned. If the applicant does not respond within 30 days of the mailing of the letter, the application for compensation shall be closed. Upon an applicant's request, the application for compensation may be reopened for good cause within one year from the date the application for compensation is closed.

Stat. Auth.: ORS 147.205(3)
Stats. Implemented: ORS 147.105
Hist.: JD 2-1992, f. & cert. ef. 3-2-92; JD 2-1997, f. & cert. ef. 7-9-97

137-076-0034

Closure of Application for Compensation

An applicant may request that the application for compensation be withdrawn or closed without a decision. This request must be in writing. The application cannot thereafter be reopened.

Stat. Auth.: ORS 147.205(3)
Stats. Implemented: ORS 147.015, ORS 147.135
Hist.: JD 2-1992, f. & cert. ef. 3-2-92; JD 2-1997, f. & cert. ef. 7-9-97

137-076-0040

Payment of Benefits

(1) Lost earnings compensation benefits or dependency benefits shall be computed as a daily amount and paid monthly based on a five-day week, Monday through Friday.

(2) In no instance shall lump sum compensation awards be made unless the total of the lump sum award has already been accrued.

Stat. Auth.: ORS 147.205(3)
Stats. Implemented: ORS 147.035(1)(a)(B) & ORS 147.035(1)(b)(C)
Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

137-076-0043

Submission of Bills

(1) For purposes of ORS 147.035, all requests for payment of expenses connected to a compensation file for crime related injuries must be received by the Crime Victims' Assistance Section within sixty days after the date of file closure. These expenses should be in the form of an itemized billing statement.

(2) If a provider is unable to submit actual billings within the sixty day period, the provider must submit to the program within the sixty day period a written notice of intent to submit billings along with documentation of the reason for the late submission. The department will determine if good cause exists to extend the sixty day period.

(3) No payment will be authorized for any treatment provided to the victim/applicant after the date of file closure, except in a situation where completion of a specific medical or dental procedure will extend beyond the three year period. The cost of these procedures and the duration of the treatment must be submitted to the department and be approved prior to the date of file closure before payment can be authorized. No payment will be authorized for additional expense beyond the approved amount unless such additional expenses occur prior to the date of file closure.

(4) All bills submitted to the department for payment consideration must be submitted timely and no later than one year from the date of service. Failure to submit bills to the department within a year from the date of service may result in denial of payment.

Stat. Auth.: ORS 147.205(3)
Stats. Implemented: ORS 147.035
Hist.: JD 2-1997, f. & cert. ef. 7-9-97

137-076-0045

Emergency Award

In the event an emergency award or overpayment is made and it is later determined that the application for compensation is not compensable or that there has been an overpayment, the Department of Justice shall have a right to commence a civil action for the recovery of such monies.

Stat. Auth.: ORS 147.205(3)
Stats. Implemented: ORS 147.055

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92; JD 2-1997, f. & cert. ef. 7-9-97

137-076-0050

Payment of Dependency Awards for Minors

In the event that a dependency compensation award is allowed to a minor child that is residing with a natural parent who is also the spouse of the deceased victim and entitled to a dependency award, the award for the minor child shall be paid directly to the surviving spouse.

Stat. Auth.: ORS 147.205(3)
Stats. Implemented: ORS 147.165
Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

137-076-0055

Fraudulent Information

Any claimant who intentionally misrepresents information upon which the Program materially relies to determine or pay benefits shall forfeit the right to compensation and the application for compensation shall be denied with prejudice.

Stat. Auth.: ORS 147.205(3)
Stats. Implemented: ORS 147.255
Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92; JD 2-1997, f. & cert. ef. 7-9-97

137-076-0060

Third Party Claims

If the Program, after investigation and payment of benefits, determines that another party, other than the assailant, may have legal responsibility for the injuries sustained by the victim, the Program may, in its discretion, bring an action against said party for the recovery of the amount of monies that the Program has expended on behalf of the victim. In the event such an action is brought, the victim shall be joined as a complaining party and any recovery made that is in excess of the amount of benefits that the Program has awarded to the victim shall accrue to the victim.

Stat. Auth.: ORS 147.205(3)
Stats. Implemented: ORS 147.345
Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

137-076-0065

Negotiated Settlements

If the victim is successful in a claim or legal action against the assailant or another party and is able to recover monetary damages, the Program shall be subrogated for the full amount of payments made by the Program. However, the Program may, at its sole discretion, waive all or part of its recovery, if it is determined to be in the best interests of the Program and the victim.

Stat. Auth.: ORS 147.205(3)
Stats. Implemented: ORS 147.345
Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

DIVISION 78

CRIME VICTIMS/WITNESS ASSISTANCE

137-078-0000

Purpose

ORS 147.259 and 147.265 ("the Act" herein) provides authority to the Attorney General or the designee thereof to approve for funding those victim/witness assistance attorneys maintained and administered by district or city attorneys that in the determination of the Attorney General or designee will provide certain comprehensive services. OAR 137-078-0005 through 137-078-0050 provide procedures and criteria under which such approval determinations are made.

Stat. Auth.: ORS 147
Stats. Implemented: ORS 147.227
Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0005

Designee

The designee of the Attorney General under the Act is the Administrator of the Office of Special Compensation Programs of the Oregon Department of Justice.

Stat. Auth.: ORS 147

Stats. Implemented: ORS 147.227

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0010

Duration of Approval

(1) Programs will continue approved for funding indefinitely subject to the availability of assessment revenues, OAR 137-078-0050 and this rule:

(a) The program Director shall, at the time of submission of the annual report under OAR 137-078-0045, state whether or not the approved program will continue in operation for the fiscal year ending June 30;

(b) Any deletion of a specific service from an approved program requires a new approval, based upon a new program application, for continued funding. The addition of services to an approved program does not require a new approval or new program application for continued funding.

(2) Programs temporarily approved for funding will receive funding for up to a 12-month period, with an end date of June 30. A new program application must be submitted each year for temporary approval in order to continue funding.

Stat. Auth.: ORS 147

Stats. Implemented: ORS 147.227

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0015

Operational Status and Funding

(1) A program to be approved shall be in operation at the time application for approval is made or shall be able to begin operation of a victim/witness assistance program within 30 days after granting of approval.

(2) A program approved for funding will be eligible to receive returned monies collected during the month in which approval was granted and for subsequent months.

Stat. Auth.: ORS 147

Stats. Implemented: ORS 147.227

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0020

Temporary Approval

(1) Temporary approval may be obtained when it is demonstrated in the application that it would not be practical at the then current time for the district or city attorney to establish a program that provides each of the comprehensive service categories specified under OAR 137-078-0030(1) through (11), and if it is demonstrated that OAR 137-078-0030(1), (3), (10) and (11) will be accomplished as well any three of OAR 137-078-0030(4), (5), (6), (7), (8) and (9).

(2) Applications for temporary approval shall contain a time table for implementing those additional service categories under rule 137-078-0030 that cannot be provided at the beginning of the funding period.

(3) Temporary approvals shall carry the condition that continued approval is contingent upon implementation of the time table for additional services, and that temporary approval for subsequent years will be contingent upon the addition of services to satisfy at least one more service category each year until all service categories under OAR 137-078-0030 are satisfied by the program.

Stat. Auth.: ORS 147

Stats. Implemented: ORS 147.227

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0025

Application Process

The application for program approval shall be made upon a form supplied by the Oregon Department of Justice, Office of Special Compensation Programs, and shall include the following information:

(1) Face Sheet — The program title, program director, financial officer and signature of the district or city attorney shall be included on the face sheet.

(2) Program Narrative — The program narrative is the applicant's detailed statement about the program. The following information shall be included:

(a) An introduction giving a brief description of the county or city which the victim/witness assistance program will serve. The description shall include:

(A) Crime victimization rates in the county/city, including crimes against persons and property crimes;

(B) County/city population; and

(C) Number of courts.

(b) A description or list of existing community resources and how these resources will interact with the victim/witness assistance program;

(c) The objectives of the program as to each of the program services to be provided and an implementation plan specifying the specific services that will be provided to meet those objectives. Specific services to be provided shall be consistent with those set forth under the service categories in OAR 137-078-0030.

(3) Appendix — Items which serve to further clarify the narrative, but are too long to be contained in the text, are included in the Appendix portion of the application.

Stat. Auth.: ORS 147

Stats. Implemented: ORS 147.227

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0030

Program Content

The Victim/Witness Assistance Program shall provide comprehensive services to victims and witnesses of all types of crime, with particular emphasis on serious crimes against persons and property, and shall not restrict services only to victims or witnesses of a particular type of crime. The comprehensive service categories provided shall be as follows:

(1) Service Category: Case Status/Progress Information: **“Inform Victims and witnesses of their case status and progress”:**

(a) Service Definition: To provide a procedure for systematic notification to victims and witnesses of crime which are the subject of prosecution, and family members of all deceased victims the subject of criminal prosecutions, of any significant developments in the proceeding in which they are involved, including informing such victims and witnesses and family members of deceased victims of the final disposition of the case;

(b) Specific Service:

(A) Notify victims of felony* crimes and families of deceased victims, the subject of such crimes, of:

NOTE: * May not be applicable to city attorneys.

(i) The date of the arraignment of the defendant;

(ii) The charges upon which the defendant was arraigned;

(iii) A tentative trial date when it becomes known; and

(iv) Hearing dates and cancellations.

(B) Notify victims of felony* crimes and witnesses thereto and families of deceased victims, the subject of such crimes, of the final disposition of the case in which they are involved;

NOTE: * May not be applicable to city attorneys.

(C) Notify victims of misdemeanor crimes of the final disposition of the case in which they are involved.

(2) Service Category: Advocate Duties: **“Perform advocate duties for victims within the criminal justice system”:** Service Definition: (The services identified in sections (3), (4), (5), (7), (8) and (11) of this rule, are the services to be performed under this category.)

(3) Service Category: Assistance in Recovering Property and Obtaining Restitution or Compensation for Expenses: **“Assist victims in recovering property damaged or stolen and obtaining restitution or compensation for medical and other expenses incurred as a result of the criminal act”:**

(a) Service Definition: To provide a procedure for systematic assistance to victims of crimes which are the subject of prosecution and family members of all deceased victims the subject of

criminal prosecution in recovering damaged or stolen property and in obtaining restitution or compensation for medical or other expenses incurred as a result of the criminal act;

(b) Specific Service:

(A) Identify/contact victims of crime who have sustained monetary losses and obtain from them verification of those losses (estimates of damage, salary verification, etc.);

(B) Make available to the courts itemized and verified lists of losses incurred by the victims of crime;

(C) Assist victims when it is necessary for them to attend a restitution hearing;

(D) Assist victims who inform the program of nonreceipt of restitution payments;

(E) Refer victims to those criminal justice system authorities responsible for the return of property damaged or stolen;

(F) Intercede on behalf of victims with those criminal justice authorities responsible for the return of property in order to obtain the early release of victims' property.

(4) Service Category: Preparation of Victims for Court Hearings: **"Prepare victims for impending court hearings by informing them of procedures involved"**:

(a) Service Definition: To provide a procedure for systematic notification to victims of crime of the procedures involved in pending court hearings;

(b) Specific Service: Prepare crime victims, either by written or verbal communication, by explaining to them the various court stages through which a case progresses (preliminary hearing, grand jury, trial, etc.).

(5) Service Category: Accompanying Victims to Hearings: **"Accompany victims to court hearings"**:

(a) Service Definition: To provide, when deemed necessary or when requested, accompaniment of victims to court hearings;

(b) Specific Service:

(A) Upon request or when deemed necessary by the program staff, arrange for program person to accompany victims and witnesses to the courtroom;

(B) When deemed necessary by program staff, the program person to remain with victims or witnesses throughout their court appearances.

(6) Service Category: Involving Victims in Decision-Making Process: **"Involve victims when possible in the decision-making process in the criminal justice system"**:

(a) Service Definition: To provide a procedure for systematic inclusion of victims' input into the decision-making process, both at the prosecutorial and the judicial level;

(b) Specific Service:

(A) In whatever ways appropriate, involve the crime victims in the sentencing process, including appearances at sentencing hearings, making the court aware of the victim's presence, and facilitating the victim's involvement in the preparation of presentence reports and the "Victim Impact Statement";

(B) Involve the victims in the plea negotiation process when appropriate.

(7) Service Category: Assistance in Obtaining Return of Property Held as Evidence: **"Assist victims in obtaining the return of property held as evidence"**:

(a) Service Definition: To provide a procedure for systematic assistance to victims and witnesses of crimes which are the subject of prosecution and all family members of all deceased victims the subject of criminal prosecution to obtain the return of property held as evidence;

(b) Specific Service:

(A) Refer victims and witnesses to those criminal justice system authorities responsible for the return of property held as evidence;

(B) Intercede on behalf of victims and witnesses with those criminal justice authorities responsible for the return of property in order to obtain the early release of victims' or witnesses' property;

(C) Direct participation in and administration of a system to facilitate the early release of victims' or witnesses' property (i.e., by use of photographs).

(8) Service Category: Victims' and Witnesses' Logistical Problems: **"Assisting victims with personal logistical problems related to court appearances"**:

(a) Service Definition: To provide a procedure for systematic assistance to victims and witnesses having personal problems militating against appearances in court in order to meet such court appearances;

(b) Specific Service:

(A) Arrange for the provision of temporary child care when appropriate;

(B) Upon request, arrange for transportation of victims/witnesses when deemed necessary for their participation in the criminal justice proceedings;

(C) When requested, intercede with an employer on the victims'/witnesses' behalf where the need for court appearance has caused, or will cause, an employed person to lost time from work and possibly jeopardize his/her employment.

(9) Service Category: Community Resource Development: **"Developing community resources to assist victims of crime"**:

(a) Service Definition: To develop a procedure for systematically providing victims and witnesses of crime with information as to, and referrals to, existing community resources responsive to their needs;

(b) Specific Service:

(A) Maintain a comprehensive, up-to-date directory of existing agencies with individuals within the community which provide relevant services to citizens, such as financial counseling, shelter and food. This directory shall include the general eligibility requirements, services offered, hours of operation, location, telephone number, and a contact name;

(B) When deemed necessary, refer victims and witnesses, and particularly families of deceased victims, directly to appropriate community service resources in order to meet immediate and long-term needs of these individuals. Follow-up on referrals to ensure that the victim's/witness' needs have been met.

(10) Service Category: Orientation to Crime Victim Compensation Benefits: **"Assist victims of crimes in the preparation and presentation of claims against the Criminal Injuries Compensation Account"**:

(a) Service Definition: To provide a procedure for systematic notification of victims and relatives of deceased victims of compensable crimes under ORS 147.005 to 147.365 of the existence of the Crime Victim Compensation Program in the Oregon Department of Justice, including explaining to such victims and relatives of the benefits available through Crime Victim Compensation, how to apply for benefits and assisting, when requested, those demonstrating inability to do so independently, in gathering information and completing applications in order to perfect a claim;

(b) Specific Service:

(A) Notification of the existence of the Crime Victim Compensation Program and explanation of available benefits and how to apply shall be accomplished by providing such victims and relatives with an informational brochure and an application form;

(B) When requested, the program shall have program persons available to assist such victims and relatives, not able to do so independently, in gathering information and completing their applications in order to perfect a claim for compensation under ORS 147.005 to 147.365.

(11) Service Category: Encouragement and Facilitation of Testimony: **"Generally encourage and facilitate testimony by victims of and witnesses to criminal conduct"**:

(a) Service Definitions: To develop procedures that systematically ensure that the interests, needs, and welfare of victims and witnesses are attended to, toward the end that they are encouraged to testify in all proceedings to which they are called;

(b) Specific Service:

(A) Orient personnel of the criminal justice system, who will or may have contact with victims or witnesses, to the needs of victims or witnesses in general and in special circumstances, the needs of particular victims and/or witnesses;

(B) Provide a safe waiting area separated from the defendant, defendant's family, friends and witnesses;

(C) Notify the appropriate law enforcement agency if protection of the victim or witness is requested or deemed necessary by staff;

(D) When deemed necessary, advise the proper authorities of the need for a "no contact" condition of release and/or sentence;

(E) In those cases where tampering with and/or harassment of a victim or witness appears provable, to act to ensure that proper charges are filed and given priority;

(F) When hearings are cancelled, act to ensure that victims and/or witnesses who have been requested or subpoenaed to attend are notified not to appear.

Stat. Auth.: ORS 147

Stats. Implemented: ORS 147.227

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0035

Maintenance and Retention of Records

The program shall maintain accurate, complete, orderly, and separate records. All records and documents must be adequately stored and protected from fire and other damage. All record books, documents, and records related to the program must be accessible to the Administrator of the Special Compensation Programs or his designee for inspection and audit. All records must be retained for at least three years after submitting the annual report or the date ending the program period, whichever is later.

Stat. Auth.: ORS 147

Stats. Implemented: ORS 147.227

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0040

Fiscal and Contracting Requirements

(1) Subsidiary record documentations, source documents, e.g., invoices, time and payroll records, and indirect cost computations are the instruments which bring about the actual expenditure of funds. All ledger account entries must be supported by secondary or intermediate records in the original source documentation. Unless commonly accepted accounting standards and practices have been followed, audits may result in non-renewal of program approval.

(2) Penalty assessment funds returned to a district or city attorney under the provisions of the Act may not be used for expenditures that a district or city attorney's office would incur if it did not have a victim/witness assistance program. The monies returned are to be exclusively used for the operation of the victim/witness program.

(3) Programs are required to be prudent in the acquisition of equipment. Careful screening should take place before purchasing equipment to be sure that the property is needed and the need cannot be met with the equipment already in the possession of the program funds for the purchase of new equipment required for a program that is already available for use within the county or city will be considered unnecessary purchases.

(4)(a) Professional services may be performed under contract by individuals and organizations, when such services are not readily available within the program and are clearly consistent with the intent of the Act. Employees on the program's payroll are not included;

(b) Under the Act, city and district attorneys are required to administer the victims/witness assistance program. This is understood as serving the objective of incorporating these programs as an integral function of the prosecutor's office, to the end that there is an efficient and coordinated merger between the interests of serving the needs of the victim/witness and the prosecution of crime. Accordingly, no contract may be entered into which will allow the program to be administered independently of the control and policy direction of the city or district attorney whose program is the subject of the contracted service. Any contract must:

(A) Detail those specific services identified in the approved program that are to be carried out by the contractor;

(B) Provide for coordination of the contractor's functions with those of the prosecutor's office, including as appropriate to

the services to be performed, for the contractor's access to the prosecutor's records and personnel, and for the exchange of such communications between the prosecutor's office and the contractor as are necessary to the ongoing performance of the contractor's services and to the prosecutorial function;

(C) Provide that ultimate program control and policy direction not addressed in the agreement shall be retained as the responsibility of the prosecutor and that he or she shall provide timely consideration and written determination thereof; and

(D) Provide a procedure for routine review by the city or district attorney of the contractor's performance, facilitated by quarterly activity reports to be made by the contractor to the prosecutor outlining the activities and accomplishments during the report period, any problems in operation or implementation of the contracted services, and any critical observations relative to the program's operation.

Stat. Auth.: ORS 147

Stats. Implemented: ORS 147.227

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 5-1983(Temp), f. & ef. 9-9-83

137-078-0045

Annual Report

The Program Director shall each year of funding submit an annual report to the Administrator of the Special Compensation Programs. The report shall be made upon a form supplied by the Department of Justice. The report shall be submitted within 30 days of receiving the forms and instructions, but not later than August 31 of the funding year. The report shall include the following information. Face Sheet — The program title, program director, period of report, signature of person reporting, and signature of the district or city attorney certifying the truth and accuracy of the report. The sheet shall also contain the verification of continued operation specified in OAR 137-078-0010(1).

(2) Program Narrative - A description of the implementation and operation of each service provided by the victim/witness assistance program during the report period. The following subject areas shall be included:

(a) Activities and accomplishments completed during the report period in terms of meeting of objectives set forth in the approved program plan. Copies of any brochures or pamphlets, policies, procedures, guidelines or rules that have been developed for administration of the program, as well as controls for professional services, shall be attached;

(b) Personnel and staffing, which will include the number of positions (full-time and part-time) and volunteers;

(c) Problems in operation or implementation of service in the program and critical observations, if any.

(3) Data Statistical information on services provided as specified in the form supplied by the Department of Justice.

(4) Financial Report - A summary of revenues and expenditures of the program in line item detail, including but not limited to the following expenditure categories:

(a) Personnel services - Salaries;

(b) Personnel services - Benefits;

(c) Operating expenses, such as rent, telephone, supplies, postage, utilities, etc.;

(d) Equipment acquisitions;

(e) Contractual services (see OAR 137-078-0040(4));

(f) Additionally, a copy of the city's or county's annual financial report, accompanied by an independent auditor's report, shall be submitted to the Administrator of the Special Compensation Programs as soon as is practical upon completion of the entity's annual audit.

Stat. Auth.: ORS 147

Stats. Implemented: ORS 147.227

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0050

Disapproval of Program for Funding — Discontinuance of Funding

(1) The Administrator of the Special Compensation Program may disapprove any program for funding that does not comply with the Act or these rules. Similarly, he may discontinue

approval of funding for these reasons or for the program's failure to comply with the approved program. Prior to any disapproval or discontinuance of funding, the Administrator of the Special Compensation Programs will contact the district or city attorney in an effort to assist in development of an approvable program or in correcting any deviation from requirements. In the case of discontinuance of funding, 30-days advance notice will be provided by the Administrator of the Special Compensation Programs to the district or city attorney.

(2) A district or city attorney may request reconsideration of any decision resulting in the disapproval of a victim/witness assistance program for funding or in the discontinuance of funding. The process is as follows:

(a) The district or city attorney shall first request reconsideration in writing to the Administrator of the Special Compensation Programs, detailing his reasons for disagreement with the Department's decision. The Administrator will reconsider any decision for which request for reconsideration is received, and will notify the district or city attorney within a reasonable period of time in writing of the reconsideration decision;

(b) Any district or city attorney who requests review by the Administrator and who disagrees with the reconsideration decision may appeal to the Deputy Attorney General. Requests for the Deputy Attorney General's review shall be in writing. The Deputy Attorney General's decision will be in writing and will be final.

Stat. Auth.: ORS 147

Stats. Implemented: ORS 147.227

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

DIVISION 80

CRIME VICTIMS' COMPENSATION

137-080-0005

Definitions

As used in these rules:

(1) "Administrator" means the administrator of the office of Special Compensation Programs of the Oregon State Department of Justice.

(2) "Contract" means a contract by a person or legal entity with any individual charged with or convicted of committing a compensable crime in the State of Oregon or found guilty except for insanity with regard to such a crime, or with a representative or assignee of that individual, for the payment of money in return for the right to reenact such crime, or to describe the individual's thoughts, opinions or emotions regarding the crime, in a motion picture, book, magazine, article, tape recording, phonograph record, radio or television presentation or live entertainment of any kind.

(3) "Compensable Crime" has the meaning under ORS 147.005.

(4) "Department" means the Department of Justice of the State of Oregon.

(5) "Dependent" has the meaning under ORS 147.005.

(6) "Escrow Account" means an account established by the Department with the State Treasurer dedicated for the purpose of Oregon Laws 1985 Chapter 552, Section 3.

(7) "Judgment" means a money judgment received in a civil action for damages suffered as a result of a compensable crime.

(8) "Victim" has the meaning under ORS 147.005.

Stat. Auth.: ORS 147

Stats. Implemented: ORS 147.275

Hist.: JD 3-1985(Temp), f. & ef. 9-20-85; JD 1-1986, f. & ef. 1-15-86

137-080-0010

Determining Contracts

(1) Upon receipt of information concerning a contract, or a judgment or restitution order which may be subject to the provisions of Section 3, Chapter 552, Oregon Laws 1985 the administrator shall promptly investigate as necessary and determine whether the subject contract, judgment or restitution order falls within the provisions of said statute. Upon completion of such

investigation, the administrator shall issue in writing a proposed determination and/or order with regard to the contract or matter in question.

(2) Written notice of the proposed determination and/or order shall be served in the same manner as service of a summons under the Oregon Rules of Civil Procedure (ORCP) on the contracting party or parties, the person charged with, convicted, or found guilty, except for insanity of the crime, and any known victims or dependents of deceased victims of the crime, and by certified mail, return receipt requested on such other persons or legal entities as the administrator may determine have an interest in the contract or subject matter of the proposed determination and/or order. Such notice shall contain the following statement:

"This proposed determination and/or order will become final within 30 days of the date of service of this notice unless a hearing is requested in writing by an interested party. If you disagree with the proposed determination and/or order, you have the right to a hearing before the Department of Justice prior to a final determination in this matter. A request for a hearing must be made in writing addressed to: Administrator, Special Compensation Programs, Oregon State Department of Justice, 100 Justice Building, Salem, Oregon 97310. The request must state the reason for your disagreement with the proposed determination and/or order, and your interest in this matter."

(3) If a hearing is not requested within the time allowed, the proposed determination and/or order shall become the final decision of the Department.

(4) Upon receipt of a request for a hearing, the administrator shall conduct or shall appoint a hearing officer to conduct a hearing on the matter.

(5) The party requesting the hearing and all persons or entities mentioned in section (2) of this rule shall be notified in writing of the time, place and purpose of the hearing and informed of the rights of a party under ORS 183.413. A copy of the request for hearing shall also be provided. The notice shall be mailed certified mail, return receipt requested, not less than ten days before the date of the hearing.

(6) Hearings shall be conducted as a contested case in accordance with ORS Chapter 183 and the Attorney General's Model Rules of Procedure.

(7) Whenever the administrator determines that a substantial danger exists that moneys paid or owing to a person charged with or convicted of a crime pursuant to a contract which may be subject to the provisions of Section 3, Chapter 552, Oregon Laws 1985 Chapter 552, may be concealed, wasted, converted, assigned, encumbered, disposed of, or removed from the state, prior to a final decision of the Department on the applicability of the statute to the contract; or where a necessary party to the determination cannot be served with notice of the Department's proposed determination and order despite diligent efforts to do so; the administrator may issue an emergency determination on behalf of the Department providing for the turning over of such moneys to the Department, pending the outcome of a hearing where requested and a final decision by the Department.

Stat. Auth.: ORS 147

Stats. Implemented: ORS 147.275

Hist.: JD 3-1985(Temp), f. & ef. 9-20-85; JD 1-1986, f. & ef. 1-15-86

137-080-0015

Notice of Establishment of an Escrow Account

In the case where a victim of crime is deceased, the notice to be published by the Department for five years from the establishment of an escrow account, under Section 3, Chapter 552, Oregon Laws 1985, shall advise dependents of such victims of the escrow moneys' availability to satisfy judgments for damages suffered as a result of the crime.

Stat. Auth.: ORS 147

Stats. Implemented: ORS 147.275

Hist.: JD 3-1985(Temp), f. & ef. 9-20-85; JD 1-1986, f. & ef. 1-15-86

137-080-0020

Disbursement of Moneys in the Escrow Account

(1) Moneys in the escrow account established under Section 3, Chapter 552, Oregon Laws 1985 will be disbursed by the Department to pay:

- (a) Restitution orders under ORS 137.103 to 137.109; and
- (b) Judgments as defined in section (1) of this rule.

(2) Payments will not be made from the escrow account on the basis of a judgment until either the amounts of all unsatisfied judgments are determined, or it is determined that the payment for an unsatisfied judgment will not diminish the escrow account so that other potential victim claims could not be satisfied. Escrow accounts having insufficient funds to meet all judgments presented by victims or dependents of deceased victims shall be prorated on the basis of the amounts of the unsatisfied judgments or partially satisfied judgments.

Stat. Auth.: ORS 147
 Stats. Implemented: ORS 147.275
 Hist.: JD 3-1985(Temp), f. & ef. 9-20-85; JD 1-1986, f. & ef. 1-15-86

137-080-0025

Notice of Action for Damages by Beneficiary of an Escrow Account

If any person or the representative of any person who has received an award from the Department under ORS Chapter 147 or any victim or dependent of a deceased victim or their representative who may because of a resulting judgment become the beneficiary of an escrow account established under Section 3, Chapter 552, Oregon Laws 1985 brings an action for damages against the person or persons criminally liable for injury or death giving rise to an award or to the establishment of an escrow account, he or she shall give written notice to the Department of the commencement of such action at the time such action is commenced. Such notice shall be served personally or by certified mail, return receipt requested, upon the administrator of the Department's Office of Special Compensation Programs. Such persons shall keep the administrator timely apprised in writing of any subsequent settlements, judgments, or other disposition of such actions.

Stat. Auth.: ORS 147
 Stats. Implemented: ORS 147.275
 Hist.: JD 3-1985(Temp), f. & ef. 9-20-85; JD 1-1986, f. & ef. 1-15-86

137-080-0030

Contracts with Convicted Persons to Tell Story of Crime

(1) Contracts described in Section 3(1), Chapter 552, Oregon Laws 1985 include any such contract under which payment is due, on or after September 20, 1985, to an individual charged with or convicted of committing a compensable crime (as defined in ORS 147.005) in this state, or who is found guilty, except for insanity, with regard to such a crime, or who is the representative or assignee of any such individual. A copy of such contracts shall promptly be submitted to the Department by any person or entity contracting with an individual, representative or assignee described above.

(2) Monies payable to the Department pursuant to Section 3(1), Chapter 552, Oregon Laws 1985, for deposit into escrow include any monies which would otherwise, under the terms of a contract described in section (1) of this rule, be paid to the accused or convicted individual, the individual found guilty except for insanity, or the representative or assignee of such individuals, on or after September 20, 1985.

(3) Earnings, payments to and profits of the author and publisher under the contract are not subject to payment to the Department for deposit into escrow unless the author or publisher is also the accused or convicted individual, the individual found guilty but for insanity, or that individual's representative or assignee.

Stat. Auth.: ORS 147
 Stats. Implemented: ORS 147.275
 Hist.: JD 4-1985, f. & ef. 11-22-85

DIVISION 90

CRIMINAL INTELLIGENCE UNIT

137-090-0000

Purpose

The purpose of these rules is to provide standards, policies and procedures for the operation of the Criminal Intelligence Unit (CIU) of the Organized Crime Section.

Stat. Auth.: ORS 180
 Stats. Implemented: ORS 180.610(2), ORS 180.610(3) & ORS 180.610(4)
 Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0010

Authority

The Criminal Intelligence unit operates under the authority of ORS 180.610(2), (3) and (4).

Stat. Auth.: ORS 180
 Stats. Implemented: ORS 180.610 (2), ORS 180.610(3) & ORS 180.610(4)
 Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0020

Abbreviations

- (1) CIU: Criminal Intelligence Unit.
 - (2) CIUS: Criminal Intelligence unit Supervisor.
 - (3) CJD: Criminal Justice Division.
- Stat. Auth.: ORS 180
 Stats. Implemented: ORS 180.610(2), ORS 180.610(3) & ORS 180.610(4)
 Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0030

Criminal Intelligence Unit Mission

The mission of the Criminal Intelligence Unit is to provide the Department of Justice and Oregon law enforcement agencies with a statewide criminal information base and analyses which meets their needs to protect the public and suppress criminal activity.

Stat. Auth.: ORS 180
 Stats. Implemented: ORS 180.610(2), ORS 180.610(3) & ORS 180.610(4)
 Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0040

Public Access

(1) The Criminal Intelligence Unit will comply with the the Oregon Public Records law in responding to requests by members of the public for file information to the extent that the law allows and to the degree the materials requested are not classified according to defined restrictions on dissemination.

(2) The Criminal Intelligence Unit will comply with the "Third Agency Rule" which is explained as follows: Reports and other investigative material and information received by the Criminal Intelligence Unit shall remain the property of the originating agency, but may, subject to consideration of official need, be retained by the Criminal Intelligence Unit. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies on a right-to-know, need-to-know basis. This policy also applies to individuals, groups or organizations requesting specific records or material under the Freedom of Information Act or Oregon Public Records Law.

(3) The originating agency shall determine whether the investigative report, material or other information may be released to the requestor, or whether the requestor should be referred to that agency for disposition of the case. In any case, the decision by the originating agency shall not be contested by the Criminal Intelligence Unit.

Stat. Auth.: ORS 180
 Stats. Implemented: ORS 180.610(2), ORS 180.610(3) & ORS 192.410 et seq.
 Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0050

Definition of Reasonable Grounds

As used in these rules, reasonable grounds means reasonable suspicion. Reasonable suspicion is suspicion that is reasonable under the totality of the circumstances. It is less than probable cause and more than mere suspicion.

Stat. Auth.: ORS 180
 Stats. Implemented: ORS 180.610(2), (3) & (4)
 Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0060

Definition of Criminal Intelligence File

A criminal intelligence file consists of stored information on the activities and associations of:

(1) Individuals who:

(a) Based upon reasonable suspicion are suspected of being or having been involved in the actual or attempted planning, organizing, threatening, financing, or commission of criminal acts; or

(b) Based upon reasonable suspicion are suspected of being or having been involved in criminal activities with known or suspected crime figures.

(2) Organizations, businesses, and groups which:

(a) Based upon reasonable suspicion are suspected of being or having been involved in the actual or attempted planning, organizing, threatening, financing, or commission of criminal acts; or

(b) Based upon reasonable suspicion are suspected of being or having been illegally operated, controlled, financed, or infiltrated by known or suspected crime figures.

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), ORS 180.610(3), ORS 180.610(4), ORS 181.575 & 28 CFR §23.20

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0070

File Content

Only information meeting the CIU's criteria for file input will be stored in the criminal intelligence files. No information will be collected or maintained about the political, religious, racial, or social views, sexual orientation, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is, or may be, involved in criminal conduct.

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), ORS 180.610(3) ORS 180.610(4), ORS 181.575 & 28 CFR §23.20

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0080

File Categories

All information to be retained in the criminal intelligence files must meet the stated guidelines for file definition and content. Information will only be retained in one of three file categories as set forth below:

(1) Working File:

(a) The working file is the receiving phase of newly acquired raw data. The CIU staff review the new materials for its acceptability to the CIU's criminal intelligence system.

(b) Retention Period: The retention period is thirty working days during which effort is made to determine the value of the raw data and its acceptability to the CIU's criminal intelligence system.

(2) Temporary File:

(a) The temporary file includes individuals, groups, businesses, and organizations which have *not* been positively identified by one or more distinguishing characteristics, or whose criminal involvement is questionable;

(b) Individuals, groups, and organizations are given temporary file status *only* in the following situations:

(A) The subject is unidentifiable because there are no physical descriptors, identification numbers, or distinguishing characteristics available; and

(B) The subject's involvement in criminal or gang activities is questionable; and

(C) The subject has a history of criminal or gang conduct, and the circumstances afford him an opportunity to again become active; and/or

(D) The reliability of the information source and/or the validity of the information content cannot be determined at the time of receipt; and

(E) The information appears to be significant and merits temporary storage.

(c) Retention Period: The retention period is one year during which time effort is made to secure additional data verification. If the information still remains in the temporary file at the end of one year with no update information added, and no information is available, the information is purged and destroyed.

(3) Permanent File:

(a) This file includes individuals, groups, businesses, and organizations which have been positively identified by one or more distinguishing characteristics and criminal involvement;

(b) Retention Period: The retention period is five years after which the information is evaluated for its file acceptability.

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), ORS 180.610(3), ORS 180.610(4), ORS 181.575 & 28 CFR §23.20

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0090

Information Input

Information to be stored in the CIU's criminal intelligence file must first undergo a review for relevancy and an evaluation for source reliability and information validity prior to filing:

(1) Relevancy Review: Incoming information is reviewed by the CIUS to determine its relevancy to the CIU's mission.

(2) Source Reliability: The term, source, relates to the individual, group, or organization providing the information to the CIU. Source reliability will be determined according to the criteria set forth in Table 1.

(3) Information Validity: The term, information, relates to written, oral, and/or pictorial materials provided to the CIU by the individual, group, or organization. Information validity will be determined according to the criteria set forth in Table 2.

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), ORS 180.610(3), ORS 180.610(4) & 28 CFR §23.20

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

TABLE 1

SOURCE RELIABILITY

Class - Level - Description

A - Reliable - Source's reliability is unquestioned or has been well tested in the past.

B - Usually Reliable - Source's reliability can usually be relied upon as factual. The majority of past information provided has proven to be reliable.

C - Unreliable - Source's reliability cannot be relied upon as factual or is sporadic at best.

D - Unknown - Source's reliability cannot be judged. His authenticity or trustworthiness has not been determined by either experience or investigation.

TABLE 2

INFORMATION VALIDITY

Class - Level - Description

1 - **Confirmed** - The information has been corroborated.

2 - **Probable** - The information is consistent with past accounts.

3 - **Doubtful** - The information is inconsistent with past accounts.

4 - **Cannot Be Judged** - The information cannot be evaluated

137-090-0100

Information Classification

(1) General: In order to protect sources, investigations and individual rights to privacy, information retained in the CIU's criminal intelligence file is classified to indicate the degree to which it must be kept secure. Many documents received by the

CIU have classifications assigned to them by the senders. In such cases, CIU personnel must take care to review and to assign levels of security classification not below that given by senders. The classification of criminal intelligence information is subject to continual change. The passage of time, the conclusion of investigations, and other factors may affect the security classification assigned to particular documents. Documents within the intelligence files should be reviewed on an ongoing basis to ascertain whether a higher or lesser degree of document security is required and to insure that information is released only when and if appropriate.

(2) Classification: Criminal intelligence information is classified according to the following system:

(a) Sensitive:

(A) The classification, sensitive, is assigned by the CIUS in consultation with the Chief Counsel, Attorney-in-Charge of the Organized Crime Section or the Chief Investigator and is given only to documents which relate to:

(i) Information pertaining to significant law enforcement cases currently under investigation;

(ii) Public Corruption;

(iii) Informant identification information;

(iv) Criminal intelligence reports which require strict dissemination and release criteria;

(v) Documents which have been designated sensitive by another law enforcement agency;

(vi) A document bearing this classification cannot be disseminated without the approval of the Chief Counsel, Attorney-in-Charge of the Organized Crime Section or the Chief Investigator.

(b) Confidential:

(A) The classification, confidential, is assigned by the CIUS and is given to the following documents:

(i) Criminal intelligence reports which are not designated sensitive;

(ii) Information obtained through intelligence unit channels which is not classified sensitive and is for law enforcement intelligence use only;

(iii) Documents which describe ongoing investigatory projects and open investigations;

(iv) Documents which describe law enforcement strategies and techniques;

(v) Documents which have been designated confidential by another law enforcement agency.

(B) A document bearing this classification can be released with the approval of the CIUS.

(c) Restricted:

(A) The classification, restricted, is assigned by the CIUS and is given to documents of general use in the CIU such as reports that at an earlier date were classified sensitive or confidential and the need for high level security no longer exists or non-confidential information prepared for/by law enforcement agencies;

(B) A document bearing this classification can be released for general law enforcement use with the approval of the CIUS.

(d) Unclassified: The classification, unclassified, is assigned by the CIUS and is used to identify documents of a public nature. Examples of unclassified materials include non-news related information to which, in its original form, the general public had direct access (i.e., birth and death certificates, corporation papers, etc.) and news media information such as newspapers, magazine and periodical clippings dealing with specified criminal categories;

(e) Classification Hand Stamp: The hand stamp shown in **Table 3** is the approved classification marking device. Any document intended for storage in the CIU's file must bear this hand stamp or have the appropriate level of classification stated on the document in some other manner -- hand written or typed.

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), ORS 180.610(3), ORS 180.610(4), ORS 181.575 & 28 CFR §23.20

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

TABLE 3

CLASSIFICATION HAND STAMP

Sensitive Confidential Restricted Unclassified

137-090-0110**Information Contributions**

To the extent possible, all criminal intelligence maintained in CIU files must display the names and phone numbers of persons and agencies providing the information. When anonymity is requested by a contributor, a contributor code number may be used. All contributor code numbers will be provided and retained by the CIUS. When a contributor's name identification is difficult to obtain, it will suffice to describe the contributor in general terms. All information obtained from the public domain will be identified by document name, date and page number. In addition to identifying the source, the manner in which the source obtained the information is described.

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), ORS 180.610(3), ORS 180.610(4) & 28 CFR §23.20

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0120**Quality Control**

Information stored in the CIU's criminal intelligence file will undergo a review by the CIUS for compliance with the law and with the standards, policies, and procedures of this chapter before its entry into the file.

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), ORS 180.610(3), ORS 180.610(4), ORS 181.575 & 28 CFR §23.20

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0130**Dissemination**

Criminal intelligence information is provided to CIU personnel and to personnel of criminal justice agencies only on a right-to-know authority and need-to-know responsibility.

(1) Definitions:

(a) Right-to-know: Requester agency has official capacity and statutory authority to the information being requested;

(b) Need-to-know: Requested information is pertinent and necessary to the requester agency in initiating, furthering, or completing an investigation.

(2) Control:

(a) It is the policy of the Organized Crime Section to account for date, nature and purpose of all disclosures of criminal intelligence by the CIU. The accounting includes names, title, and agency of the person or agency to whom the disclosure is made, what was disclosed and the name of the person making the disclosure;

(b) The audit form (CJD Form 29) will be completed every time a document is removed from the file section. This accounting includes the sharing of information with intelligence personnel outside the CIU to include the Criminal Justice Division's staff members;

(c) It is the responsibility of the receiving Investigator, Criminal Intelligence Investigator, or other staff member, to complete the audit form prior to the document's return to file;

(d) Audit forms are attached to all stored documents. All disclosures, oral and written, are logged and the records of the disclosures are retained for the life of disclosed documents.

(3) Unauthorized Access: The person requesting and receiving file documents is solely responsible for their security and for their return to the file section. Any person possessing the disseminated file documents other than the original requester, except as provided in section (4) of this rule, is deemed to have unauthorized access.

(4) Unauthorized Dissemination: No CJD employee requesting and receiving CIU file documents will allow access to these documents by other individuals except at meetings or during shared project assignments in which the subject of the documents

is being used and all the participants in these meetings and/or projects meet the dissemination criteria of this chapter.

(5) Dissemination Table: Table 4 sets forth the classification level, dissemination criteria and release authority for information stored in CIU files:

[Publication: The Publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), ORS 180.610(3) & ORS 180.610(4) & 28 CFR §23.20

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

TABLE 4

FILE DISSEMINATION

Classification Level - Dissemination Criteria - Release Authority

Sensitive - Restricted to law enforcement having a specific need-to-know, right-to-know - Chief Counsel, AIC of OC Section or Chief Investigator.

Confidential - Same as for Sensitive - Same as Sensitive plus CIUS.

Restricted - Same as for Sensitive - Same as Sensitive plus CIUS.

Unclassified - Not restricted - Same as Sensitive plus CIUS.

137-090-0140

Security

Because security and protection of the materials in the criminal intelligence file is of utmost importance, the following procedures shall be observed:

(1) Policy: All CIU employees shall be thoroughly familiar with access and dissemination policies of this chapter.

(2) Access: Direct access to the CIU's criminal intelligence files is limited to CIU file section employees and the CIUS.

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), ORS 180.610(3), ORS 180.610(4) & 28 CFR §23.20

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0150

File Review and Inspection

(1) Review Authority: All information in the criminal intelligence file is subject to review at any time by the Chief Counsel, Attorney-in-Charge of the Organized Crime Section, Chief Investigator, Deputy Attorney General and Attorney General.

(2) CIUS Document Review: By July 1 of each year, the CIUS shall review a representative random sample of the materials in the file to determine the need for document classification change in accordance with this chapter.

(3) CIUS Operational Inspection: By July 1 of each year, the CIUS will inspect all aspects of the intelligence file operation. This inspection shall include, but not be limited to, the following:

(a) Parameters of Review: Review the CIU rules to insure they are in accordance with current law and accurately reflect the standards, policies and procedures of CJD. Check recently submitted documents to insure they meet CIU criteria. Review indexing for compliance with established CIU procedures. Check completed source document for accuracy — AKAs, monikers, categories, sequence numbers, and other requirements. Review the audit forms to ensure they are properly maintained and completed appropriately;

(b) Review Procedures: The CIU staff shall select at random five source documents from each major crime category. Staff will review these documents to ensure that all materials meet file criteria. The out cards will be examined to ascertain that no file document is out of file for longer than the time prescribed by this chapter. Staff will ensure that purge forms are in place and complete. Staff will study all materials not meeting the criteria and will take immediate corrective action;

(c) Criminal Intelligence Unit Supervisor's Report: The CIUS shall compose a written report of the findings of this review and shall submit the report to the Chief Counsel through the Chief Investigator and Attorney-in-Charge of the Organized Crime Section. The report will describe the general condition of the files and any corrective measures taken.

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), ORS 180.610(3), ORS 180.610(4), ORS 181.575 & 28 CFR §23.20

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0160

Purging

All information in the Criminal Intelligence file is eventually removed and destroyed. Its removal and destruction is in accordance with the following purge and destruction criteria:

(1) Purging Constraints: All file material selected for purging and destruction will only be removed and destroyed when it meets the requirements of these rules.

(2) Purge Criteria: Information is only purged when it is:

(a) No longer useful;

(b) No longer relevant;

(c) Invalid;

(d) Inaccurate;

(e) Outdated;

(f) Unverifiable; or

(g) Inconsistent with mission.

(3) Purging Process: The first step for determining which documents in file require purging begins with their selection according to purge criteria as described in section (2) of this rule.

(4) Process for Retention: When the CIUS wishes to retain information which has been recommended for purge, he/she must substantiate his/her reasons for retention to the Chief Investigator. Final decision on retention is made by the Attorney-in-Charge of the Organized Crime Section. In matters of great exception, the final decision will be made by the Chief Counsel of the Criminal Justice Division.

(5) Retention Period: Any information ordered retained will be placed in the permanent section of the central file for a new retention period of five years from date of re-entry.

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), ORS 180.610(3), ORS 180.610(4), ORS 181.575 & 28 CFR §23.20

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0170

Destruction

Material purged from the criminal intelligence file shall be destroyed under the supervision of the CIUS. Destruction will be accomplished by shredding consistent with statutes and rules relating to destruction of public records.

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), (3) & (4) & 387.805 et seq.

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0180

File Integrity Officer

The CIUS will be CIU's File Integrity Officer. In this capacity, the CIUS is responsible for the contents of *all* intelligence files in the CIU and for their compliance to these rules.

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), (3) & (4), 181.575 & 28 CFR §23.20

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0190

File Room Requirements

(1) Supervision: The CIU file room shall be occupied by one or more CIU staff members during normal work hours, when practical. The files and door are to be locked when a CIU staff member is not present.

(2) Entry "Key": Keys for file room entry are issued by the CIUS. Keys are issued to named individuals only and are not to be loaned to persons not authorized to possess them unless prior

approval is received from the CIUS. Only assigned CIU personnel are authorized to possess keys

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), ORS 180.610(3) & ORS 180.610(4)

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0200

File Index Number System

(1) General Information:

(a) The CIU's criminal intelligence files are indexed according to a modified Dewey Decimal System. In the CIU's system, file categories and sub-categories are separated by decimal points;

(b) File categories are created or deleted at the request of CIU personnel as needs arise for more crime topic areas. The list of authorized crime topics is always in a state of change. A request for a change in the index system is first brought to the attention of the CIUS through the use of the memorandum. If approved by the CIUS, the index system is altered to reflect the change and an updated file index list is distributed to all CIU personnel possessing copies of file guidelines.

(2) Crime Topic:

(a) Crime topics are those authorized for collection, storage, and dissemination according to the mission of the CIU. The crime topics list is classified *confidential* and is not to be duplicated or released outside the CIU. The list is for official staff use only;

(b) The crime topics list is not to be removed from the CIU file room without the approval of the CIUS.

(3) Use of Index Numbers: The file category, *general*, is only used when there is insufficient data available to indicate a more specific index selection. Spread of Index Numbers. The index system is displayed as several independent groupings of numbers separated by decimal points. The following defines the various groupings.

(a) Group 1 (Mission): Index numbers in the first position represent the subject of the file. As examples are the following: 10. Political Corruption; 20. Major Financial Crimes; 30. Traditional Organized Crime; 40. Emerging Criminal Gangs and Street Gangs; 50. General;

(b) Group 2 (Crime): Index numbers in the second position represent crime the subject is involved in;

(c) Group 3 (Geographic Assignment): Index numbers in the third position represent geographic areas;

(d) Group 4 (File Position): Index numbers in this last group represent the document's position in the file. The numbers are assigned chronologically.

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), ORS 180.610(3) & ORS 180.610(4)

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

TABLE 5

INDEX NUMBER EXAMPLE

Index - Subject - Description

10. - Traditional Organized Crime -Mission

10.10. - Assault - Crime

10.10.10. - Marion - Geographic Area

10.10.10.129. - Document number - Position in File

137-090-0210

Forms

The CIU will only use forms developed, tested, and approved for use by the Criminal Justice Division. Only the forms described below are authorized for use in the CIU file system.

(1) Criminal Intelligence Report (IR) (CJD Form 35).

(a) The Criminal Intelligence Report form is the CIU's standard collection document pertaining to criminal intelligence. It is designed to provide both collection and a more efficient way to analyze and disseminate what the CIU handles in the way of information;

(b) The IR is used by investigators and CJD staff alike as they collect criminal information in person, by mail, phone, and through access to public and controlled information;

(c) The IR is designed to collect information on *one event only*. It should never be used to report on several events at the same time such as a stakeout observation combined with information about a later meeting in which the stakeout findings were discussed;

(d) IR Preparation Guide: As a guide for the use of the IR, the following applies:

(A) Record one event per IR;

(B) Write in the first person;

(C) State and evaluate your sources;

(D) Forward the IR promptly.

(2) Out Card (CJD Form 27):

(a) The out card is a document designed to replace source materials which have been removed from the file. Its primary purpose is to note the location of the removed file material and to identify who acquired the information and on what date;

(b) Out card use is the responsibility of personnel of the CIU file section. They not only complete the card when file material has been removed but they also use the card during daily quality control inspections when searching the file for missing documents and overdue "returns." Control: A criminal intelligence file document may be removed from the file by CIU personnel for up to ten working days. The starting date of the ten-day period is noted on the OUT card. When the ten days is passed and the source document has not been returned to the file, a memo from the CIUS is generated to the possessor of the document. (CJD Form 28). Should there be a strong need to retain the document for more than *ten days*, the possessor must request the extension in writing to the CIUS.

(3) Cover Sheet (CJD Form 29).

(a) The cover sheet is the CIU's file jacket for all individual file documents. Attached beneath this jacket are newspaper clippings, intelligence reports, investigative documents, and all other materials maintained by the file section. The cover sheet is the initial responsibility of personnel who desire a particular item of information to be filed. The cover sheet is attached to an item by a single staple located in the upper left-hand corner of its face. Each individual document stored in the central file has its own cover sheet;

(b) The *face* of the cover sheet displays key information for the later processing of the attached item of information. The information on its face includes: index numbers; identification of its maker; source and content ratings; level of classification; sources; synopsis; and quality control signatures. The *back* of the cover sheet contains the audit form.

(4) Audit Form (CJD Form 29). The back side of the cover sheet contains the audit form. The audit form records all activity regarding the perusal and/or use of the attached item of information. *Every time* a filed item of information is removed from the file for review purposes, the audit form is filled out to record the following:

(a) Date, The date of removal from the file;

(b) Agency/Individual, To whom the item of information was released;

(c) Purpose, A brief statement as to how the item of information is to be use;

(d) Information, The page number and the paragraph(s) that were utilized;

(e) Staff, The CIU staff member who made the release.

(5) Document Retrieval Form (CJD Form 31) .

(a) Routine Request. This is the normal request form personnel use when they wish items of information from the CIU File Section. It is completed first by the requesting Investigator or staff and then routed directly to the CIUS. The CIUS retrieves the documents and routes them to the requestor;

(b) Expedite Request. Should the requestor require expeditious handling, the requestor must secure the initials and time notation from the requestor's supervisor. Upon a supervisor's special request, the document retrieval will receive priority handling;

(c) Control. The Document Retrieval Form is also used to monitor items of information that have been released to unit personnel. It serves as additional proof of the location of items and how long they have been out of file. The used forms are studied later by the CIUS to evaluate the use of the supervisor's usage of priority service requests.

(6) Purged and Destroyed (CJD Form 32).

(a) It is the policy of the CJD that all items of information contained in the CIU files will one day be purged and destroyed. Purging is an ongoing effort, thus creating daily voids of items of information in the file. The "Purged and Destroyed" form is designed to replace documents so that all voids are accounted for;

(b) When an item of information has been identified as possibly meeting purge and destroy criteria, it is removed from the file and attached to the "Purged and Destroyed" form. The item is then routed to the Chief Investigator for initial review and decision. The Chief Investigator reviews the item of information and makes the initial decision regarding its retention or destruction. The item is then routed to the Attorney-in-Charge of the Organized Crime Section for final review and approval;

(c) Once approved for destruction, CIU staff will separate the item of information from the "Purged and Destroyed" form and delete all evidence of the persons, organizations, and groups that might have been named in the item. When the files are clear of the purged document, the "Purged and Destroyed" form is inserted in the place of the removed item of information;

(d) Control: This form insures that document voids in the files due to purging and destruction are properly identified. As a control, the form collects two or more initials and dates which further proves that the decision to remove and destroy was made based on need, relevancy, and/or for some other bona fide reason.

(7) Document Sequence Log (CJD Form 33). This form is used to record the entry of each document into the CIU files. It is always the top document in the file and is completed by the CIUS or CIU file room employees when the document is put in the file.

[Publication: The Publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), ORS 180.610(3), ORS 180.610(4), ORS 181.575, ORS 387.805 et seq. & 28 CFR §23.20

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0220

Statement of Understanding (CJD Form 34)

All Criminal Justice Division employees who are assigned to the Criminal Intelligence Unit shall read these rules and sign an understanding of such.

[Publication: The Publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 180

Stats. Implemented: ORS 180.610(2), ORS 180.610(3), ORS 180.610(4), ORS 181.575, ORS 387.805 et seq. & 28 CFR §23.20

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

DIVISION 95

MODEL GUIDELINES FOR PROSECUTION OF ENVIRONMENTAL CRIMES

137-095-0010

Background and Purpose of Guidelines for Prosecution of Environmental Crimes

The 1993 legislature adopted Senate Bill 912 (codified as ORS 468.920 - 468.963), which establishes criminal penalties for certain violations of environmental laws. Section 19 of Senate Bill 912, ORS 468.961, provides that the district attorney of each county shall adopt written guidelines for filing felony criminal charges under Senate Bill 912. It also requires the Attorney General to adopt model guidelines that district attorneys may adopt as their written guidelines. These model guidelines address each of the factors listed in ORS 468.961(2).

Stat. Auth.: ORS 468.961

Stats. Implemented: ORS 468.961

Hist.: JD 3-1994, f. & cert. ef. 6-16-94

137-095-0020

General Principles for Prosecutors to Consider

(1)(a) Each of the acts that Senate Bill 912 makes a felony also violates a civil regulatory statute or administrative rule. For most violations, administrative remedies and civil penalties are an appropriate and adequate response. For some violations, however, criminal sanctions are necessary adequately to punish offenders and to deter similar conduct in the future by the violator or others. For still other violations, both civil/administrative and criminal remedies may be appropriate;

(b) These guidelines are intended to assist prosecutors in deciding when to file criminal charges. Prosecutors are to coordinate with local, state and federal regulatory agencies in making those decisions. Frequently, those agencies may be able to provide the prosecutor with the most accurate information about the degree of harm caused by a violation, the violator's past record of compliance or noncompliance with the law, the appropriate regulatory agency's past handling of similar violations, and other information pertinent to the decision to file or not to file criminal charges.

(2) For purposes of these guidelines the term "person" includes corporations. The term "prosecutor" includes district attorneys and the Attorney General.

(3)(a) The decision to prosecute or not to prosecute a particular violation of environmental laws is a matter of prosecutorial discretion to be exercised in light of the specific circumstances of each case. The guidelines are intended to promote consistency by making sure that all prosecutors consider the same factors before initiating a prosecution under Senate Bill 912. The intent of the guidelines is to guide the prosecutor's exercise of discretion, however, not to replace it with a formula;

(b) The statute requires prosecutors to consider and apply the guidelines before initiating a prosecution, but the weight to be given each factor is a matter of prosecutorial discretion to be determined on a case-by-case basis. The prosecutor's certification in accordance with ORS 468.961(4) establishes conclusively that the prosecutor has applied the guidelines as required by statute and that the criminal charges are being filed in accordance with the guidelines.

(4) The factors listed in ORS 468.961(2) are nonexclusive. In appropriate cases, prosecutors should also consider additional factors, such as:

(a) The probable efficacy and enforceability of civil penalties and remedial orders;

(b) The impact of criminal prosecution on civil regulatory objectives, including prompt remediation of pollution and its effects;

(c) The likelihood that a prosecution will result in a conviction;

(d) The probable sentence if a conviction is obtained; and

(e) The cost of a prosecution, the resources available to the prosecutor, and the severity of the offense compared to other offenses that would not be prosecuted if the prosecutor uses available resources to prosecute an offense under Senate Bill 912.

Stat. Auth.: ORS 468.961

Stats. Implemented: ORS 468.961

Hist.: JD 3-1994, f. & cert. ef. 6-16-94

137-095-0030

Specific Factors for Prosecutors to Consider and Apply

The following guidelines address each of the factors listed in ORS 468.961(2). Each subsection lists the statutory factor, followed by a suggestion of how the prosecutor might weigh that factor in deciding whether or not to file criminal charges in a particular case.

(1) The complexity and clarity of the statute or regulation violated. The more complex the regulation or regulatory scheme, the greater is the likelihood that a person could violate a statute or regulation despite making a good faith effort to comply with the law. The prosecutor may also consider whether the violation is so egregious that, despite the complexity of the statute or regulation, the person should have known that the person's action was unlaw-

ful or the person's conduct was nonetheless reckless as to the consequences for human health or the environment.

(2) The extent to which the person was or should have been aware of the requirement violated. This factor is a corollary to section (1) of this rule. The following questions are examples of the type of questions that may aid the prosecutor in applying this factor. To answer these questions, prosecutors are encouraged to confer with the appropriate regulatory agency (e.g., Department of Environmental Quality):

(a) Is it clear on the face of the regulation that the regulation applies to the person and the activity in question? If not, is applicability determined by agency guidance or policy that is distributed to the persons or entities subject to the regulation? Has the agency clearly defined the conduct that would violate the regulation?

(b) Is the applicable statute or regulation readily available to the person? Is its applicability based on a new interpretation of existing statutes or rules?

(c) Does the person engage in a heavily regulated occupation or industry, subject to substantial environmental regulation of the media at issue, so that knowledge of environmental requirements at issue should be an elementary part of doing business?

(d) Is the occupation or industry one in which hiring environmental consultants is commonplace or regulatory agencies offer technical assistance or published guidance?

(e) Do specific circumstances show that the person knew or clearly should have known that the conduct violated the law?

(3) The existence and effectiveness of the person's program to promote compliance with environmental regulations. The existence of a bona fide effective compliance program suggests that the violation more likely is isolated and that the person has means in place to prevent future violations or detect future violations before they result in substantial harm to human beings or the environment. The existence of an effective compliance program, however, does not negate the possibility that a person has knowingly violated the law or caused substantial harm.

(4) The magnitude and probability of the actual or potential harm to humans or to the environment. The greater the magnitude, probability and foreseeability of harm, the greater is the need for criminal sanctions. In considering the magnitude of harm, the prosecutor should consider the toxicity of the pollutant or regulated substance, and whether the harm is long-lasting or can be remedied promptly. If the person's conduct created a great risk of substantial harm, the fact that little or no harm actually occurred may carry little weight in deciding whether or not to prosecute. The appropriate regulatory agency can provide technical assistance to the prosecutor in evaluating the magnitude, probability and foreseeability of harm.

(5) The need for public sanctions to protect human health and the environment or to deter others from committing similar violations:

(a) A person's persistent and willful violation of environmental laws may mean that incarceration is necessary to protect human health and the environment from the person's criminal activity;

(b) If the requirement that has been violated applies to many citizens or businesses, its enforcement may also deter others from violating that requirement or similar requirements. In addition, the prosecution may create general deterrence against violations of other environmental laws in addition to the specific statute or regulation that was violated in the particular case. Prosecutors should also consider whether more consistent or stringent civil/administrative remedies would be sufficient to deter violations.

(6) The person's history of repeated violations of environmental laws after having been given notice of those violations:

(a) Repeated violations after notice imply intentional criminal conduct, which makes criminal sanctions more appropriate. Repeated violations also support an inference that prior civil/administrative remedies, if invoked, were insufficient to deter misconduct, making criminal sanctions appropriate under the same rationale as described under section (5) of this rule;

(b) By contrast, past determinations by the appropriate regulatory agency that a similar violation did not warrant substantial civil/administrative sanctions may suggest that criminal sanctions are inappropriate, under the rationale described in section (9) of this rule. Regulatory agencies can provide the prosecutor with information about the person's previous violations, the person's subsequent compliance efforts, past agency contacts with the person, and past agency enforcement actions.

(7) The person's false statements, concealment of misconduct or tampering with monitoring or pollution control equipment. Knowingly false statements, concealment and tampering imply intentional misconduct, making criminal sanctions more appropriate. In addition, because the regulatory scheme for many environmental laws relies heavily on self-reporting, false statements, concealment and tampering undermine the integrity of the regulatory system. Where the deviation from reporting requirements is unintentional, however, civil and administrative remedies usually should provide an adequate sanction.

(8) The person's cooperation with regulatory authorities, including voluntary disclosure and prompt subsequent efforts to comply with applicable regulations and to remedy harm caused by the violations:

(a) Voluntary disclosure and prompt efforts to remove violations and remedy harm suggest that criminal prosecution probably is not necessary for public retribution or deterrence of future violations by the same person;

(b) Voluntary disclosure and remediation may also reduce the likelihood that a prosecution would succeed. ORS 468.959(4) provides an affirmative defense for a defendant who:

(A) Did not cause or create the condition or occurrence constituting the offense;

(B) Reported the violation promptly to the appropriate regulatory agency; and

(C) Took reasonable steps to correct the violation. Similar conditions apply to the affirmative defenses of "upset" and "bypass," defined in ORS 468.959(2). If admissible evidence establishes an affirmative defense, criminal prosecution is neither appropriate nor fruitful.

(9) The appropriate regulatory agency's current and past policy and practice regarding the enforcement of the applicable environmental law. If the regulatory agency having jurisdiction has determined that a violation is not serious enough to merit civil or administrative enforcement under current agency policy, criminal sanctions usually would be disproportionate to the severity of the violation. In addition, fairness suggests that regulated persons should have notice that their misconduct will be subject to sanctions; a regulatory practice of nonenforcement of the law in question usually would be at odds with fair notice of criminal liability.

(10) The person's good faith effort to comply with the law to the extent practicable. Although it is not conclusive, a person's good faith effort to comply with the law is a factor that weighs against criminal prosecution. In some instances, a given regulation may be so strict that full compliance or compliance 100 percent of the time is virtually impossible. An operator's view of what is practicable, however, does not substitute for legal requirements, and the decision as to what constitutes a good faith effort to comply with the law for purposes of this factor rests with the prosecutor. In appropriate cases, that decision may be influenced by section 17 of Senate Bill 912, which provides affirmative defenses called "upset" and "bypass" to recognize that certain temporary violations of environmental laws do not entail fault for which sanctions should be imposed.

Stat. Auth.: ORS 468.961

Stats. Implemented: ORS 468.961

Hist.: JD 3-1994, f. & cert. ef. 6-16-94

DIVISION 100

SATISFACTION OF JUDGMENTS

137-100-0005

Oregon Administrative Rules Compilation

Definitions

For purposes of these rules the following definitions apply:

(1) “Court Clerk” — The trial court administrator or trial court clerk of the district or circuit court in which the original judgment was entered and shall include any person to whom the duties of that office lawfully are delegated. ORS 8.185 et seq.

(2) “County Clerk” — The clerk or clerks of the county or counties in which a judgment is recorded in the County Clerk Lien Records. ORS 205.010 et seq.

(3) “Defendant” — The person named in the district or circuit court judgment as the “defendant” who is ordered by that judgment to pay a monetary obligation.

(4) “Interested Person” — A person or entity who has an interest affected by the money judgment entered in the criminal proceeding.

(5) “Issuer of Satisfaction” — The State of Oregon is the judgment creditor in a criminal matter in which a money judgment is ordered. “Issuer of Satisfaction” refers to the person, agency or entity or entities authorized by the Attorney General to issue a partial or full satisfaction of judgment after payment of the monetary amounts assessed in the money judgment portion of a criminal judgment. ORS 137.452.

(6) “Judgment Docket” — The record where the clerk of the circuit or district court docket the money judgment portions of a criminal judgment.

(7) “Money Judgment” — The portion of a judgment issued by a district or circuit court in a criminal proceeding requiring the defendant to pay a sum of money as a criminal fine, forfeiture, compensatory fine, restitution, unitary assessment, costs, forfeited bail, reward reimbursement, county assessment and any other monetary obligation. ORS 137.071.

(8) “Payment” — Payment shall mean receipt of cash or actual deposit of funds in the Trial Court Administrator/Trial Court Clerk’s account. When payment is by check, draft or other negotiable instrument, such payment is not considered final until the negotiable instrument is accepted and paid.

(9) “Prosecuting Agency” — The office or agency, such as the District Attorney, the City Attorney or the Attorney General, which prosecuted the original criminal action in the district or circuit court as identified in the judgment.

(10) “Satisfaction of Judgment” — A document appropriate for filing in the court clerk records or County Clerk Lien Records issued by the Issuer of Satisfaction as provided by these rules which legally releases the judgment lien from the property in which the named defendant had or has an interest. A partial satisfaction of judgment may be issued when less than the full amount of the monetary obligation has been paid. ORS 137.452.

Stat. Auth.: ORS 137.452

Stats. Implemented: ORS 137.452

Hist.: JD 7-1990(Temp), f. & cert. ef. 8-20-90; JD 10-1990, f. & cert. ef. 12-13-90; JD 12-1991, f. & cert. ef. 12-23-91

137-100-0010**Appointment of Issuer of Satisfaction**

The Attorney General hereby appoints the following as the Issuer of Satisfaction for purposes of issuing a satisfaction of judgment to a criminal defendant or an interested person as authorized by ORS 137.452(1)(a):

(1) The primary Issuer of Satisfaction shall be the District Attorney or Deputy District Attorney in the county in which the original judgment was entered;

(2) If the District Attorney declines to participate as an Issuer of Satisfaction to a defendant or defendants or an interested person, the Department of Justice may issue the satisfaction of judgment upon presentation by the defendant or interested person of the appropriate documentation, as set out in these rules, if the defendant or interested person is entitled thereto. A District Attorney who declines to participate in a particular instance should refer the defendant, the interested person or the request for issuance of a satisfaction of judgment to the Department of Justice in Salem.

Stat. Auth.: ORS 137.452

Stats. Implemented: ORS 137.452

Hist.: JD 7-1990(Temp), f. & cert. ef. 8-20-90; JD 10-1990, f. & cert. ef. 12-13-90; JD 12-1991, f. & cert. ef. 12-23-91

137-100-0020**Request for Satisfaction**

(1) A defendant or interested person who has fully or partially paid a money judgment imposed in a criminal proceeding may obtain a full or partial satisfaction of judgment from the Issuer of Satisfaction upon written request. The request for issuance of a satisfaction of judgment shall contain the following information:

- (a) The name of the defendant as stated on the judgment;
- (b) The address of the defendant or interested person applying for the satisfaction;
- (c) The telephone number of the defendant or interested person;
- (d) The designation of the court in which the original judgment was entered whether district or circuit court;
- (e) The county in which the court is located;
- (f) The case number;
- (g) The date of docketing in the judgment docket;
- (h) The total amount of the money judgment;
- (i) The date of any prior partial satisfactions of judgment issued and the amount satisfied with copies of all partial satisfactions; and
- (j) A copy of the criminal judgment in which the monetary obligation is set forth must be attached to the request form;
- (k) A certified copy of the court clerk’s record of payment must be attached to the request form.

(2) Request for Satisfaction of Judgment Form: An approved request form is required which provides all of the above information. **Exhibit 1.** The Issuer of Satisfaction shall determine if the information submitted substantially complies with the rules. If the information submitted is incomplete, additional information may be requested. The decision of the Issuer of Satisfaction as to substantial compliance with these rules shall be final.

(3) Full Satisfaction of Judgment: A satisfaction of judgment may be obtained by the defendant or an interested person from the Issuer of Satisfaction for payments made to the state after payment in full of the money judgment. The defendant or interested person shall provide the Issuer of Satisfaction with the following documents:

- (a) A completed Request for Satisfaction of Judgment form; and
- (b) A certified copy of the court clerk’s record of payment (generally contained within the accounts receivable ledger). The court clerk’s record of payment must contain the name of the defendant and identify the case number.

(4) Partial Satisfaction of Judgment: A partial satisfaction of judgment may be obtained by the defendant of an interested person when less than the full amount of the money judgment has been paid. The defendant or interested person shall provide the Issuer of Satisfaction with the following:

- (a) A completed Request for Satisfaction of Judgment form;
- (b) A certified copy of the court clerk’s record of payment (generally contained in the accounts receivable ledger) which verifies the dates and amounts of the payments received on the judgment from the date of the entry of judgment or from the date of the issuance of any prior satisfaction to the date of the request; and

(c) Copies of all prior satisfactions issued. The defendant or interested person shall attach a copy or copies of any partial satisfaction(s) previously entered to the Request for Satisfaction of Judgment form. Any document which verifies payment of a monetary obligation must contain the name of the defendant and identify the case number.

(5) Issuance of Satisfaction After Payment: Upon receipt of the Request for Satisfaction of Judgment accompanied by a certified copy of the court clerk’s payment record verifying payment and any other documents required by these rules, the Issuer of Satisfaction shall issue a satisfaction of judgment equal to the total verified amount of payment received and file the satisfaction with

the court clerk of the court in the county in which the original judgment was entered. Refer to the Satisfaction of Judgment sample form, **Exhibit 2** and Partial Satisfaction of Judgment sample form, **Exhibit 3**.

(6) Filing of Satisfaction of Judgment: The Issuer of Satisfaction shall mail or deliver the satisfaction of judgment to the defendant or interested person and the court clerk's office where the original money judgment was filed. If a certified copy of the judgment was filed in the County Clerk Lien Records, a certified copy of the satisfaction of judgment shall be mailed or delivered by the Issuer of Satisfaction to the county clerk's office of the county in which the original money judgment was issued. The Issuer of Satisfaction shall also deliver to the defendant or interested person an executed Satisfaction of Judgment for every county where a certified copy of the judgment or a lien record abstract has been recorded. Verification of the docketing of the satisfaction of judgment shall be forwarded by the Issuer of Satisfaction to the defendant or interested person at the address stated on the Request for Satisfaction of Judgment by first class mail, postage prepaid.

(7) No Independent Verification Required: The Issuer of Satisfaction shall not be required to obtain the certified payment record from the court clerk, obtain additional documentation or verify payment of the money judgment. The Issuer of Satisfaction shall refuse the defendant's or interested person's request if the documentation presented contains obvious or apparent irregularities or any procedural or substantive basis exists for which a satisfaction should be denied. The decision of the Issuer of Satisfaction to deny a satisfaction on procedural or substantive grounds is final.

(8) No Compromise by Issuer: The Issuer of Satisfaction issuing a satisfaction of judgment shall not be authorized to compromise or make any agreement or stipulation for satisfaction of the money judgment. A judgment may be satisfied by less than the full amount only if the defendant or interested person provides the Issuer of Satisfaction with a subsequent court order amending the original judgment or a certified copy of a commutation order of the Governor, and, if any amounts remain payable, a certified payment record from the court clerk evidencing payments received in satisfaction of the amended judgment. If any monetary obligations are deemed judgments for the payment of money under ORS 82.010 and not subject to the court's statutory authority to modify such payments, then interest may accrue on such obligations. Unless the payment of interest is specifically ordered by the court, the Issuer of Satisfaction has absolute discretion to waive any interest due on a monetary obligation in a criminal money judgment. The decision of the Issuer of Satisfaction on waiver of interest is final. Unless stated otherwise in the satisfaction, it shall be presumed that the judgment did not accrue interest or that interest has been waived by the Issuer.

(9) Matters for Which Satisfaction are not Authorized:

(a) The Issuer of Satisfaction is not authorized to issue any satisfaction where the monetary obligation runs to any party other than the state;

(b) The Issuer of Satisfaction is not authorized to issue satisfaction for any part of the judgment other than a money judgment.

(10) Court Proceedings to Determine Payment: If the defendant or interested person files a motion to obtain a satisfaction of judgment, the prosecuting agency shall appear and respond as the judgment creditor. ORS 18.410. Upon request of the defendant or interested person accompanied by the order of the court and the documents required herein, the Issuer of Satisfaction shall issue the satisfaction of judgment and file such satisfaction of judgment in the county in which the original judgment is entered and provide the defendant or interested person with an executed Satisfaction of Judgment for every county where a certified copy of the judgment or lien record abstract has been recorded.

(11) Notice to Defendant of Authorized Issuer: Upon request, the prosecuting agency shall inform a defendant against whom a money judgment has been entered or an interested person of the identity and address of the Issuer of Satisfaction authorized to

issue a satisfaction of judgment in the county in which the original judgment was entered.

NOTES:

-1- (1) and (2) Judgment Liens. When a judgment has been docketed in the judgment docket of the circuit court, it becomes a lien upon the real property of the defendant in the county where the judgment is originally docketed. ORS 18.320 and 46.276. After a money judgment has been docketed in the circuit court judgment docket by the clerk, a certified copy of the judgment or a lien record abstract may be filed by the judgment creditor in the County Clerk Lien Records in any other county in which the defendant owns real property. ORS 18.320. The lien is effective against real property owned or acquired by the defendant for ten years and may be renewed for an additional ten year period. ORS 18.360.

-2- (3) and (4) Payment of Judgment. Payments on monetary judgments due to the state are made generally to the clerk. ORS 137.017. A satisfaction of judgment may issue under these rules only for payments made to the court clerk or a state agency or public officer. Entry and docketing of a criminal money judgment has the same effect as a judgment in a civil action. ORS 137.180(4).

-3- (5) and (6) Issuance and Filing of Satisfaction of Judgment. The legislative history of ORS 137.452 evidences an intent that the Attorney General, or his designee, should serve a position analogous to that of the attorney for a civil judgment creditor in issuing satisfactions of judgments in criminal cases in which a money judgment has been entered. A civil judgment creditor has the duty to file the satisfaction of judgment with the court clerk. ORS 18.350. Therefore, the Issuer of Satisfaction is obligated to file the satisfaction.

-4- (7) No Independent Verification. The District Attorney has the duty to enforce criminal money judgments. ORS 8.680. The issuance of a satisfaction of judgment is a documentary task indicating performance has been completed. The Issuer of Satisfaction does not enforce the terms of criminal judgments.

-5- Once the District Attorney elects to participate in issuing a satisfaction in a particular case or cases, the District Attorney is the Issuer of Satisfaction and any decision is final. By contrast, if the District Attorney declines to participate at the outset, then the defendant is referred to the Attorney General or if the District Attorney forwards the request to the Attorney General then the Attorney General, in that instance, is the Issuer of Satisfaction, whose decision is final. The Attorney General does not provide another layer of review for satisfactions denied by District Attorneys.

-6- (8) No Compromise by Issuer. The Issuer of Satisfaction is acting as the attorney for the judgment creditor in the issuance of a satisfaction of judgment. The attorney for the judgment creditor cannot accept anything other than money to satisfy a judgment except by special authority. *Barr v. Rader*, 31 Or 225, 49 P 962 (1897). A civil judgment creditor is entitled to compromise and accept less than the full sum set forth in the judgment and may have good economic reasons for doing so. See, *Dickinson v. Fletcher*, 181 Or 316, 182 P2d 371 (1947). A criminal money judgment for restitution is not a final judgment and therefore interest on a judgment for the payment of money as provided in ORS 82.010 is not applicable. *State v. Dickenson*, 68 Or App 283, 680 P2d 1028 (1984). A court may modify a restitution order. ORS 137.540(6). A defendant may petition the court for remission of the payment of costs or any unpaid portion thereof. ORS 161.655(4). If the defendant defaults in the payment of a fine or restitution and is not in contempt, the court may reduce or revoke the fine or order of restitution in whole or part. ORS 161.685(5). There is no specific statutory authority for the court to modify other monetary obligations imposed by the court, unless such payments are encompassed within probation terms. ORS 137.540(6). The court has statutory authority to reduce or remit fines, restitution or costs. ORS 161.665(4) and 161.685(5). Otherwise, a criminal money judgment may be modified only by the Governor. ORS 144.640 et seq. The Issuer of Satisfaction is not authorized to release a lien against a specific parcel of real estate. ORS 137.452. Absent statutory authority the Issuer of Satisfaction may not grant a release. See, 31 Op Attorney General 108 (1962-64). The entry of a satisfaction of judgment is prima facie evidence of a discharge of the obligation. ORS 137.452(5); *Dose v. Bank of Woodburn*, 58 Or 529, 115 P2d 286 (1911).

-7- (9) Matters for Which Satisfaction are not Authorized. ORS 137.452(4)(a) and (b). A money judgment in a criminal action is a judgment in favor of the state and may be enforced only by the state. ORS 137.180(4).

-8- (10) Court Proceeding to Determine Payment. It is the duty of the state in criminal cases to release judgment liens after payment in full has been made. A judgment debtor or interested person may petition to have the court determine the sufficiency of the payments made or determine the outstanding balance due for a money judgment. ORS 18.410. If a hearing is necessary to determine the sufficiency of payment, the prosecuting agency has access to the records needed to verify the dates and amounts of payment. Therefore, the prosecuting agency should reply to the defendant's or interested person's motion. Thereafter, the Issuer of Satisfaction shall issue the satisfaction in accordance with the court's order.

Chapter 137 Department of Justice

[ED. NOTE: The Exhibits referenced in this rule are not printed in the OAR

Compilation. Copies are available from the agency.]

Stat. Auth.: ORS 137.452

Stats. Implemented: ORS 137.452

Hist.: JD 7-1990(Temp), f. & cert. ef. 8-20-90; JD 10-1990, f. & cert. ef. 12-

13-90; JD 12-1991, f. & cert. ef. 12-23-91