IV. Tax Credit Transferability

Oregon statute currently provides limited general guidance on the transferability of tax credits. The two statutes that exist are ORS 315.052 and ORS 315.053. Both of these were originally enacted in 2009 and are included below for reference purposes. The former statute simply states that each income tax credit may be transferred only once, unless explicitly stated otherwise. The latter statute limits the transferability of six tax credits to a C-corporation, S-corporation, or personal income taxpayer. Three of the affected tax credits are included in this report: biomass, conservation, and transportation. The other three listed tax credits have already sunset: the business energy tax credit, the manufacturing business energy tax credit, and the diesel engines tax credit.

315.052 Limitation on transfer or sale of credit. An income tax credit that is allowed under this chapter or ORS chapter 316, 317 or 318 and that is transferable may be transferred or sold only once, unless expressly provided otherwise by statute.

315.053 Restriction on types of transferees. An income tax credit allowed under ORS 315.141, 315.331, 315.336, 315.341 or 315.354 or section 12, chapter 855, Oregon Laws 2007, may be transferred or sold only to one or more of the following:
(1) A C corporation.
(2) An S corporation.
(3) A personal income taxpayer.

This section of the report describes the issue of tax credit transferability and the related tax implications. Oregon currently has six active tax credits that may be sold or transferred in some way.[15] All six of these credits are included in this report. The statutory language varies across the credits along with the underlying policy reasons. This section lists the six tax credits, along with the relevant part of statute and a brief description. The section then moves to a summary history of relevant IRS rulings and an example.

1. **Agriculture Workforce Housing Construction**
   315.169 (2) An owner or operator of agriculture workforce housing may transfer all or a portion of the credit allowed to the owner or operator under ORS 315.164 to one or more contributors but the amount transferred may not total more than the total credit the owner or operator may claim.

   Statute does not contain direct administrative oversight for these transfers. Statute does require the seller and buyer to jointly file notice with the DOR. Generally, the tax credit is

[15] An "active" tax credit is one that has not yet sunset.

sold as a way for developers to raise additional capital to fund construction projects. These transactions appear to be similar to those for the federal Low-Income Housing Tax Credit.

2. Biomass Production or Collection

315.144 (1) A person that has obtained a tax credit under ORS 315.141 may transfer the credit to a taxpayer subject to tax under ORS chapter 316, 317 or 318.

Statute requires any transfer to occur on or before the due date of the tax return. Statute also requires the seller and buyer to jointly file notice with the DOR. Statute grants rule making authority for the ODOE to set the minimum discount value of the tax credit; it is currently set at 90 percent. For example, a $1,000 tax credit can be sold for no less than $900. Statute also grants rule-making authority to both departments to jointly establish procedures for transferring these tax credits.

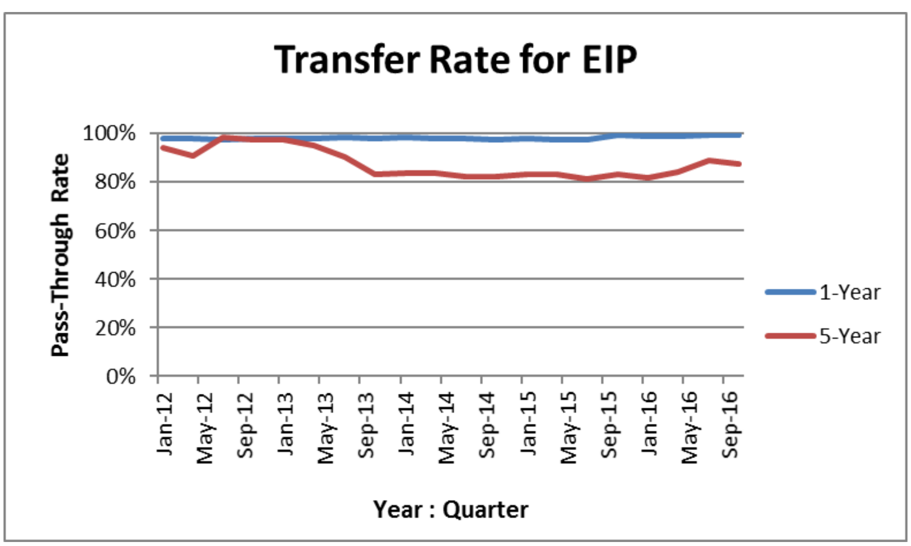
3. Energy Conservation Projects

469B.276 (1) The owner of a project may transfer a tax credit for the project in exchange for a cash payment equal to the present value of the potential tax credit, as determined at the time of the application for preliminary certification.

(2) The State Department of Energy shall establish by rule a formula to be employed in the determination of prices of credits transferred under this section. In establishing the formula, the department shall incorporate inflation projections and market real rate of return.

(3) The department shall recalculate credit transfer prices quarterly, employing the formula established under subsection (2) of this section.

Statute directs ODOE to establish and administer a credit transfer program, including using a formula to set transfer prices. Prices are updated quarterly; their history is shown in the graph below. These rates also apply to the Transportation tax credits.



4. **Transportation Projects**
469B.323 (1) The owner of a transportation project may transfer a tax credit for the project in exchange for a cash payment equal to the present value of the tax credit.
(2) The State Department of Energy shall establish by rule a formula to be employed in the determination of prices of credits transferred under this section. In establishing the formula, the department shall incorporate inflation projections and market real rate of return.
(3) The department shall recalculate credit transfer prices quarterly, employing the formula established under subsection (2) of this section.

   Statute directs the ODOE to establish and administer a transfer program for this credit. The history of the transfer prices is shown in the graph above.

5. **Residential Energy**
469B.106
(8) The verification form and contractor's certificate described under this section may be transferred to the first purchaser of a dwelling who intends to use the dwelling as a principal or secondary residence.
(9) Any person that pays the present value of the tax credit for an alternative energy device provided under ORS 316.116 and 469B.100 to 469B.118 to the person who constructs or installs the alternative energy device shall be entitled to claim the credit in the manner and subject to rules adopted by the Department of Revenue to carry out the purposes of this subsection. The State Department of Energy may establish by rule uniform discount rates to be used in calculating the present value of a tax credit under this subsection.

   In 2014, Roughly 300 of the 17,000 tax credits were transferred.

6. **Affordable Housing Lenders**
317.097 (12) Notwithstanding any other provision of law, a lending institution that is a community development corporation organized under the Oregon Nonprofit Corporation Law may transfer all or part of a tax credit allowed under this section to one or more other lending institutions that are stockholders or members of the community development corporation or that otherwise participate through the community development corporation in the making of one or more qualified loans for which the tax credit under this section is allowed.

> The transferability of this tax credit is unique. A functional aspect of the loans that are associated with this credit is that they may be sold. When the loans are sold, the tax credit is transferred to the new owner of the loan. The tax credit, in and of itself, is not transferred. By design, the credit "follows" the below-market interest rate loan.

Tax Implications

Under current federal and state law, when a tax credit is transferred or sold, there are potential tax consequences for the buyer and seller. As per the IRS, the tax credit is considered a capital asset. The taxable events occur in two steps, when it is sold and when it is used. The seller receives taxable income at the time of sale. Assuming the buyer purchased the tax credit at less than its face value, they receive taxable income at the time of use.

When a taxpayer sells a tax credit they realize a capital gain. If the sale is within one year of earning (or being awarded) the tax credit, the income is taxed as short-term capital gain. If the sale occurs after one year from the date it was earned/awarded it is considered a long-term capital gain. This distinction is only relevant at the federal level, which contains preferential tax rates for capital gains. The distinction is irrelevant for Oregon because the state does not have different tax rates for capital gains income.

For the buyer of the tax credit, they realize taxable income at the time they use the tax credit to satisfy their state tax liability. This income is always considered ordinary income because it does not involve the sale or exchange of a capital asset.

The table below contains an example. The Seller's basis is zero because they earned or were awarded the tax credit. Upon the sale, the seller has a taxable capital gain of $500 ($500-$0). The buyer of the tax credit then has a basis of $500, the amount paid for the tax credit. When the buyer uses the tax credit (i.e. claims it on their Oregon tax return), they are required to also report income of $200 in the year the liability was discharged. The full value of the tax credit ($700) is taxable between the seller and buyer. Relevant Oregon tax credits are: Agriculture Worker Housing Construction, Biomass, Residential Energy, Energy Conservation Projects, and Transportation Projects.

Transfer of a $700 Tax Credit			
	Basis	Sales Price	Taxable Income
Tax Credit Seller	$0	$500	$500
	Basis	Use Value	Taxable Income
Tax Credit Buyer	$500	$700	$200