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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

ELECT 15-2022

CHAPTER 165
SECRETARY OF STATE
ELECTIONS DIVISION

FILED

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ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Clarifies Criteria for Investigations Under ORS 260.537 - False Statement Intended to Mislead Electors.

EFFECTIVE DATE: 03/25/2022 THROUGH 09/19/2022

AGENCY APPROVED DATE: 03/17/2022

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Filed By:
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NEED FOR THE RULE(S):

ORS 260.537 requires the Elections Division to investigate certain complaints of false statements. This temporary rule is needed to explain the criteria that the Elections Division will use when investigating complaints concerning statements that may occur before the May 2022 primary election or other special elections that may occur even earlier.

JUSTIFICATION OF TEMPORARY FILING:

The Elections Division finds that the failure to act promptly will result in serious prejudice to the public interest because without this rule complainants and respondents would not have clear expectations about how the Elections Division intends to respond to complaints that occur before the adoption of a permanent rule. The Elections Division is accepting public comments on the Notice of Proposed Rulemaking filing for this rule which will supersede this temporary filing when formally adopted.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

ORS 260.345, ORS 260.537, and HB 2323 (2021), available online at oregonlegislature.gov or from the Elections Division.

ADOPT: 165-013-0045

RULE TITLE: Application of ORS 260.537 - False Statement Intended to Mislead Electors

RULE SUMMARY: HB 2323 (2021), now codified in ORS 260.537 and ORS 260.345, vested the Secretary of State with authority to investigate complaints of certain false statements intended to mislead voters. This rule explains how the Secretary of State's Elections Division intends to evaluate such complaints.

RULE TEXT:

(1) ORS 260.345 provides that, in certain circumstances, the Elections Division may take action against people who disseminate false statements concerning election law in violation of ORS 260.537. The Elections Division recognizes the importance of avoiding mis- and dis-information in elections while encouraging the public to participate in the electoral

process. The purpose of this rule is to explain how the Elections Division honors those dual goals when evaluating complaints alleging a violation of ORS 260.537.

(2) The Elections Division evaluates complaints alleging violations of ORS 260.537 to determine whether they state facts sufficient to meet the criteria described in Section (4). The Elections Division may decline further investigation as to any complaint that:

(a) Alleges a violation of ORS 260.537 but does not state facts sufficient to meet the criteria in Section (4), or

(b) Is filed more than 90 days after the election defined in Section (4)(c), or more than 90 days after the date the violation occurs, whichever is later.

(3) After examining the complaint and conducting any investigation it considers necessary, the Elections Division examines the evidence in light of the criteria in Section (4) to determine whether it is more likely than not that the alleged violation occurred.

(4) The following criteria sets forth the elements that must be met to constitute a violation of ORS 260.537:

(a) A person must do one or more of the following:

(A) Cause a letter, circular, bill, placard, poster, photograph or other publication to be written, printed, published, posted, communicated or circulated, or

(B) Cause any advertisement to be placed in a publication, or

(C) Pay for any advertisement, either singly or with others, or

(D) Circulate any advertisement, either singly or with others.

(b) The publication or advertisement described in Section (4)(a) must contain a statement concerning one or more of the following:

(A) The date of the election, or

(B) The deadline for depositing a ballot in order for the ballot to be tallied (including but not limited to vote-by-mail procedures or the effect of postmarks or postal indicators), or

(C) The voter registration deadline, or

(D) The methods by which an elector may register to vote, or

(E) The locations at which an elector may deposit a ballot in order for the ballot to be tallied, or

(F) The qualifications an individual must meet to be eligible to vote in an election, or

(G) An elector's voter registration status.

(c) The person must do the act in Section (4)(a) within one or more of the following time periods:

(A) within 30 calendar days before a primary or special election, including all special district elections, or

(B) within 60 calendar days before a general election.

(d) The statement defined in Section (4)(b) must be false. For purposes of this rule, a statement is not false if any reasonable inference can be drawn that:

(A) the statement is factually correct, or

(B) the statement is merely an expression of opinion.

(e) The statement must be material. For purposes of this rule, "material" means that the statement could reasonably cause a person not to register to vote or not to exercise the right to vote.

(f) When doing the act in Section (4)(a), the person must either

(A) Know that the statement is false, or

(B) Act with reckless disregard as to whether the statement is false. For purposes of this rule, "reckless disregard" means that the person knows there is a substantial likelihood that the statement is false.

(g) When doing the act defined in Section (4)(a), the person must intend for the statement defined in Section (4)(b) to mislead voters.

(A) A person does not intend to mislead voters when the person disseminates a false statement in circumstances that indicate the statement is false. For example, news media may report about a false statement without presenting it as true, or the public may discuss a false statement without presenting it as true.

(B) A clear and obvious disclaimer that the false statement is false is sufficient to demonstrate that the person does not

intend to mislead voters. However, the Elections Division may also determine that a person did not intend to mislead voters based on the circumstances, even when a clear and obvious disclaimer is not present.

(C) To determine whether the person intended the statement to mislead voters, the Elections Division considers all of the circumstances relevant to the act in Section (4)(a).

(D) If an act meets the criteria in Section(4)(a)-(f), and the evidence obtained suggests that the person did not intend to mislead voters, then the Elections Division may conclude that the person did not in fact intend to mislead voters.

STATUTORY/OTHER AUTHORITY: ORS 260.345, ORS 260.537, HB 2323 (2021)

STATUTES/OTHER IMPLEMENTED: ORS 260.537, HB 2323 (2021)