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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 165
SECRETARY OF STATE
ELECTIONS DIVISION

FILED

03/24/2022 5:25 PM
ARCHIVES DIVISION
SECRETARY OF STATE

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

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 05/19/2022 3:00 PM

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

CONTACT: Bob Roberts
503-986-1518
elections.sos@sos.oregon.gov

Public Service Building
255 Capitol St NE Suite 501
Salem, OR 97310

Filed By:
Bob Roberts
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 05/18/2022

TIME: 2:00 PM - 3:00 PM

OFFICER: Bob Roberts

ADDRESS: Public Service Building

255 Capitol Street NE

Suite 501

Salem, OR 97310

SPECIAL INSTRUCTIONS:

The hearing will be held virtually via Teams. A link to the hearing will be available on the Division's website at www.oregonvotes.gov.

NEED FOR THE RULE(S)

ORS 260.537 requires the Elections Division to investigate certain complaints of false statements. This rule explains the criteria that the Elections Division will use when investigating complaints that arise under ORS 260.537.

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.

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

This rule promotes racial equity. ORS 260.537 includes several terms that the Elections Division must interpret in order to investigate complaints. This rule explains how the Elections Division defines those terms. Defined terms promote racial equity by protecting against implicit bias and ensuring that the same definitions apply consistently to everyone.

FISCAL AND ECONOMIC IMPACT:

These proposed rules may cause minimal fiscal or economic impact to state agencies, or the public.

COST OF COMPLIANCE:

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

(1) There may be a minimal fiscal impact for the state Elections Division to answer questions regarding compliance with this rule, or for other unanticipated reasons. There may be a minimal fiscal impact for members of the public who must comply with this rule. (2)(a)-(c) It is not expected that these rules will impact small businesses.

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

They were not, as this rule does not directly affect small businesses.

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

The fiscal impact of the proposed amendments is expected to be minimal at most.

ADOPT: 165-013-0045

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.

CHANGES TO RULE:

165-013-0045

Application of ORS 260.537 - False Statement Intended to Mislead Electors

(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)