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ARCHIVES DIVISION

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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 441
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
FINANCE AND SECURITIES REGULATION

FILED

09/21/2023 3:41 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Use of Certifications or Professional Designations by Person Engaged in Securities Business

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 10/31/2023 5:00 PM

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

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Salem, OR 97301

Filed By:
Karen Winkel
Rules Coordinator

HEARING(S)

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

DATE: 10/24/2023

TIME: 11:00 AM - 11:30 AM

OFFICER: Lauren Winters/Nicole Ferroux

HEARING LOCATION

ADDRESS: Labor and Industries Building, 350 Winter St. NE, Basement, Conf Rm E, Salem, OR 97301

REMOTE MEETING DETAILS

MEETING URL: [Click here to join the meeting](#)

PHONE NUMBER: 1-503-446-4951

CONFERENCE ID: 103935017

SPECIAL INSTRUCTIONS:

This is a hybrid meeting in-person and virtually via Microsoft Teams.

NEED FOR THE RULE(S)

There is ambiguity as to how OAR 441-135-0020 is to be interpreted and applied, and that ambiguity has caused uncertainty in the securities marketplace. The current construction of the rule is inconsistent with the permissible use of professional designations and certifications under federal securities law and in other jurisdictions with laws similar to OAR 441-135-0020. OAR 441-135-0020 could be construed as prohibiting the use of all professional designations and certifications that have not been one of the agencies listed in OAR 441-135-0020(1)(e)(E) (the "(E) Agencies" or "(E) Agency"), rather than the use of professional designations and certifications that are misleading or false.

In 2009, the Department of Consumer and Business Services (DCBS) enacted OAR 441-135-0020 based in part on a rule proposed in 2007 by the North American Securities Administrators Association (NASAA) and adopted by the NASAA membership in 2008, specifically the "NASAA Model Rule On The Use of Senior-Specific Certification and

Professional Designations.” The Model Rule incorporated certain aspects of the various regulations that were already in place or under consideration in other jurisdictions and was intended to prevent salespersons from misleading senior citizens or retirees that the salesperson has special qualifications or specialized education in particular areas of finance, financial planning, estate planning, or investing. Like the Model Rule, OAR 441-135-0020 prohibits a person from using a certification or designation “that falsely indicates or implies that the person has special certification or training, in connection with the offer, sale or purchase of securities, or the provision of advice as to the value of or the advisability of investing in, purchasing, or selling securities, directly or indirectly, or through a publication or writing, or by issuing or disseminating analyses or reports relating to securities.”

The Model Rule and OAR 441-135-0020 lists and describes certain prohibited uses of a certification or designation, such as using a certification or designation that a person has not actually earned. The Model Rule incorporated aspects of the various regulations that were already in place or under consideration in other jurisdictions and was intended to prevent salespersons from conferring an impression with senior citizens or retirees that the salesperson has special qualifications or specialized education in particular areas of finance, financial planning, estate planning, or investing.

The inclusion of OAR 441-135-0020(1)(e)(E) has resulted in two conflicting interpretations of OAR 441-135-0020. In both cases, which interpretation is correct dictates whether a person can use a designation or certification that has not been approved by one of the (E) Agencies. Under the first interpretation, designations and certifications that have not been approved by one of the (E) Agencies are prohibited. Under the second interpretation, designations and certifications may be used if they comply with the conditions in OAR 441-135-0020(1)(e)(A-D), even though they may not have been approved by an (E) Agency.

In 2020, DCBS attempted to more closely align OAR 441-135-0020 with the Model Rule by adding OAR 441-135-0020(4)(c). However, the amendment did not eliminate the ambiguity because it refers to OAR 441-135-0020(1)(e)(E) that is the basis of the two conflicting interpretations. If DCBS relies on the first interpretation of OAR 441-135-0020, the rule will be the most restrictive in the nation. The current version of the rule could be construed as prohibiting a person from using professional designations and certifications that are allowed in jurisdictions that have adopted the Model Rule or rely on federal Rule 206(4)-1 (the Advertising Rule) under the Investment Advisers Act of 1940, as amended, which governs the use of professional designations by investment advisers that are licensed under federal law. Of the 35 states, including California, Washington, Idaho, and Utah, that have adopted some version of the Model Rule, Oregon would be the only state to prohibit the per se use of all professional designations and certifications unless the designations or certifications have been approved by an accrediting agency.

The proposed rulemaking resolves the uncertainty regarding the application of the current rule and ensure that Oregon law is consistent with federal and state securities laws governing the use of professional designations and certifications by deleting OAR 441-135-0020(1)(e)(E) and 441-135-0020(4)(c) because it references OAR 441-135-0020(1)(e)(E).

NASAA developed the Model Rule, upon which OAR 441-135-0020 is based, to establish a single set of nationwide standards and requirements. Amending OAR 441-135-0020 to delete OAR 441-135-0020(1)(e)(E) and 441-135-0020(4)(c) brings DCBS' rule into alignment with the states that have adopted the Model Rule and those states that have not adopted the Model Rule but look to the Advertising Rule for guidance.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Draft rules are available from Karen Winkel, Rules Coordinator, Division of Financial Regulation located at 350 Winter St. NE, Salem, OR 97301 and are available on the division's website:
<https://dfr.oregon.gov/laws-rules/Pages/proposed-rules.aspx>.

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

The division sought input from the rulemaking advisory committee about potential racial equity impacts that are implicated directly by the proposed changes to the rules. None were identified.

In drafting the proposed changes to OAR 441-135-0020, the division carefully considered whether there would be any unintended racial impact consequences from adopting the proposed changes and concluded there were none. Financial professionals often use awards, rankings, and designations to distinguish themselves from their competitors, including to imply a higher degree of sophistication, expertise or success than others in the same profession. This type of information may help an investor make an informed decision in choosing a financial professional. Additionally, under federal law, investment advisors are required to provide to their customers a brochure that provides an explanation about the minimum qualifications required for professional title or certification.

FISCAL AND ECONOMIC IMPACT:

Based on information currently available to the department, the proposed rule would not have a fiscal or economic impact on state agencies, local government units, nor the public. The proposed changes to the rules do not add any new requirements on public entities. The Oregon Department of Justice, the other state agency with enforcement authority under ORS chapter 59, and local governments are not expected to incur any fiscal impact from the adoption of the proposed rules. The proposed changes are unlikely to have a fiscal impact on the department because it does not increase administrative costs for the division.

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) Based on information currently available to the department, the proposed rule would not have a fiscal or economic impact on state agencies, local government units, nor the public. The proposed changes to the rules do not add any new requirements on public entities. The Oregon Department of Justice, the other state agency with enforcement authority under ORS chapter 59, and local governments are not expected to incur any fiscal impact from the adoption of the proposed rules. The proposed changes are unlikely to have a fiscal impact on the department because it does not increase administrative costs for the division.

(2)(a) As of October 24, 2022, there are approximately 6,300 individual investment advisers that would be subject to the proposed changes to rule; however, it is unknown how many individuals will publicize their professional awards, rankings, or designations.

(2)(b) The division does expect an increase in cost for compliance with the proposed changes to the rule because under federal law requires individuals to provide information explaining the designation or certification to their clients.

(2)(c) Based on available information and feedback from the RAC, the proposed rule will not require the acquisition of additional equipment or supplies, or an increase labor costs or administration to comply with the proposed changes to the rule.

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

Persons serving on the RAC included representatives of professional organizations, individual advisors, and members of the securities bar who have clients that may be affected by the proposed changes to the rule or who have an interest in

representing individual investors who may be affected by the proposed changes to the rule. Some members of the RAC meet the definition of a small business under ORS 183.310.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

AMEND: 441-135-0020

RULE SUMMARY: Amended to permit the use of professional designations or certifications unless they falsely indicate or imply that the person has special certification or training, in connection with the offer, sale or purchase of securities, or the provision of advice as to the value of or the advisability of investing in, purchasing, or selling securities, directly or indirectly, or through a publication or writing, or by issuing or disseminating analyses or reports relating to securities.

CHANGES TO RULE:

441-135-0020

Use of Certification or Professional Designation ¶¶

(1) A person may not use a certification or designation that falsely indicates or implies that the person has special certification or training, in connection with the offer, sale or purchase of securities, or the provision of advice as to the value of or the advisability of investing in, purchasing, or selling securities, directly or indirectly, or through a publication or writing, or by issuing or disseminating analyses or reports relating to securities. Prohibited use of a certification or designation includes, but is not limited to, the following activities:¶¶

(a) Use of a certification or professional designation by a person who has not actually earned or is otherwise ineligible to use the certification or designation.¶¶

(b) Use of a nonexistent or self-conferred certification or professional designation.¶¶

(c) Use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training or experience that the person using the certification or professional designation does not have.¶¶

(d) Use of a certification that falsely states or implies specialized knowledge of the financial needs of a particular segment of the population, or class of investors, that the person using the certification or professional designation does not have. Examples of a particular segment of the population, or class of investors, include but are not limited to senior citizens, elderly or retired persons.¶¶

(e) Use of a certification or professional designation that was obtained from a designating or certifying organization that:¶¶

(A) Is primarily engaged in the business of instruction in sales or marketing, or both;¶¶

(B) Does not have reasonable standards or procedures for assuring the competency of its designees or certificants;¶¶

(C) Does not have reasonable standards or procedures for monitoring and disciplining its designees or certificants for improper or unethical conduct; ~~or~~¶¶

(D) Does not have reasonable continuing education requirements for its designees to maintain the designation or certificate; ~~or~~¶¶

~~(E) Has not been certified or accredited by one of the following organizations, or has been certified or accredited by one of the following organizations but the designation or credential issued from the organization primarily applies to sales or marketing, or both:~~¶¶

~~(i) The American National Standards Institute;~~¶¶

~~(ii) The National Commission for Certifying Agencies; or~~¶¶

~~(iii) An organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes".~~¶¶

(2) The director recognizes a rebuttable presumption that a designating or certifying organization is not disqualified solely for purposes of section (1)(e) of this rule when the designation or credential does not primarily apply to sales or marketing or both, and when the organization is accredited by:¶¶

(a) The American National Standards Institute;¶¶

(b) The National Commission for Certifying Agencies; or¶¶

(c) An organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes".¶¶

(3) The director will consider at least the following factors in determining whether a combination of words, or an acronym standing for a combination of words, constitutes a certification or professional designation that could falsely indicate or imply that a person has special certification or training in advising or servicing a particular

segment of the population or class of investor:¶¶

(a) The use of one or more words indicating specialized knowledge of the needs of a particular segment of the population or class of investors, including but not limited to "senior," "elder," "retired," or "retirement," combined with one or more words such as "certified," "registered," "chartered," "adviser," "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation; and¶¶

(b) The manner in which the words in subsection (a) of this section are combined.¶¶

(4) This rule does not apply to use of any of the following designations, titles, degrees, or certifications used by a person unless the facts and circumstances associated with the use of the designation, title, degree or certification indicate that the use suggests or implies a greater degree of certification or training than the person possesses or that the designation, title, degree or certification otherwise misleads consumers:¶¶

(a) A job title within an organization that is licensed, registered or authorized by a state or federal financial services regulatory agency, when that job title:¶¶

(A) Indicates seniority or standing within the organization; or¶¶

(B) Specifies an individual's area of specialization within the organization.¶¶

(b) A degree, certificate, or designation evidencing completion of an academic program at an institution of higher education that has been accredited by an organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes."¶¶

~~(c) For purpose of subdivision (1)(e)(E) of this rule, a certification or designation recognized as a basis for licensing examination waiver under OAR 441-175-0120(6)(b), when used by a person currently holding such certification or designation.¶¶~~

(5) Violation of section (1) of this rule is an act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, for the purposes of ORS 59.135(3) and OAR 441-205-0020(1).¶¶

(6) The prohibitions in this rule and the remedies available to the director do not limit the director's authority to enforce existing provisions of law and apply existing remedies.

Statutory/Other Authority: ~~ORS 59.2835, ORS 59.2385~~

Statutes/Other Implemented: ORS 59.235, 59.135, 59.205