NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 333
OREGON HEALTH AUTHORITY
PUBLIC HEALTH DIVISION

FILING CAPTION: Enforcement of Governor's Executive Orders for food establishments, public pools, and tourist facilities

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 05/21/2021 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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FILED
04/30/2021 11:27 AM
ARCHIVES DIVISION
SECRETARY OF STATE

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

DATE: 05/20/2021
TIME: 11:00 AM
OFFICER: Staff
ADDRESS: VIA CONFERENCE CALL ONLY
Portland, OR 97232
SPECIAL INSTRUCTIONS:
Due to COVID-19, public meetings are being held remotely. To provide oral testimony during this hearing, please dial 1-877-848-7030, Access Code: 2030826#

NEED FOR THE RULE(S):
The Governor has declared an emergency due to the public health threat posed by coronavirus disease 2019 (COVID-19) and issued several Executive Orders that have been designated as public health laws. They include prohibitions on onsite consumption of food or drink unless the establishment operates in a county in a designated risk level that allows it and complies with Oregon Health Authority (Authority) guidance. In addition, establishments offering or providing food or drink must comply with certain conditions and Authority guidance. The Governor has also issued Executive Orders that establish other community mitigation strategies including but not limited to, prohibitions and limitations on social and recreational gatherings, required physical distancing when outside the home, and closure of certain businesses. These Executive Orders are public health laws and these rules are necessary to allow the Authority and
local public health authorities to enforce the Orders if necessary, as long as the Executive Orders are in effect.

These rules allow the Authority or a local public health authority to issue civil penalties and enforce the provisions of the Executive Orders, but only as long as the underlying Executive Orders are in effect. The rules also allow the Authority or local public health authority to act under their licensing authorities for food establishments, public pools and tourist facilities to enforce applicable Executive Order and Authority guidance requirements, including through closures, suspension, revocation, and civil penalty.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:
Governor’s Executive Orders relating to COVID-19 including but not limited to EO 20-59, 20-66 and 21-05 available online at https://www.oregon.gov/gov/admin/Pages/executive-orders.aspx

FISCAL AND ECONOMIC IMPACT:
There will be no fiscal or economic impact on the Public Health Division as a result of the proposed changes. The rules will be implemented by existing program staff and are part of current staff responsibilities relating to statewide rulemaking, consultation and technical assistance.

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) The Oregon Health Authority and local public health authorities are responsible for implementing public health law and these rules are necessary to implement and enforce the Governor’s Executive Orders related to the COVID-19 emergency. Local health departments license and inspect these facilities under an existing intergovernmental agreement with the Authority. The responsibility for assuring compliance with the provisions of these rules will be added to current licensing and inspection workload, however, the Authority has advised LPHA’s that inspection work may be postponed depending upon local priorities and capacity. The Oregon Department of Agriculture regulates grocery stores and the Authority may also need to use these rules to conduct enforcement on their behalf. There will be no cost of compliance impact on other state agencies or the public.

(2) (a) There are approximately 30,000 licensed food, pool and lodging facilities in Oregon, many of these considered small businesses. In addition, the Governor’s Orders are considered public health law and may apply to many other small businesses that are not subject to the licensing statutes in ORS chapters 624, 448 and 446. The number of these unlicensed businesses is unknown.

(b) Facilities that fail to comply with these rules, the Governor’s Executive Orders and Authority guidance may be subject to civil penalties, closure or license suspension, revocation or denial.

(c) Depending upon how a facility decides to operate during the Covid-19 emergency, there could be several costs for compliance. Facilities are required to designate a physical distancing officer and provide face coverings for employees. Facilities will also need to assure that physical distancing of 6 feet is maintained between consumers and staff when
possible. Depending upon the county risk level, some food service establishments may not provide on-premises consumption and will be limited to takeout and delivery. Self-service operations will be prohibited unless permitted and in compliance with Authority guidance. Public pools must meet occupancy limits and follow any other Authority reopening guidance.

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

These rules were developed by the Authority and the Oregon Department of Justice to provide the legal framework to implement and enforce the Governor's Executive Orders relating to the Covid-19 emergency and small businesses were not consulted. However, the Oregon Restaurant and Lodging Association attended the Rule Advisory Committee meeting and represents many small food service, public pool and tourist facility operations.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:
333-003-1001, 333-003-1011, 333-003-1021, 333-003-1031, 333-003-3010, 333-003-3020, 333-003-3030

AMEND: 333-003-1001

RULE SUMMARY: Amend OAR 333-003-1001: Provides definitions necessary to implement the proposed rules and add references to the Governor's Executive Orders.

CHANGES TO RULE:

333-003-1001
COVID-19 Related Requirements: Definitions
The following definitions apply to OAR 333-003-1001 to 333-003-3040: ¶
(1) “Authority” means the Oregon Health Authority. ¶
(2) “Authority guidance” means guidance issued by the Authority implementing any Governor's Executive Order that the Governor has designated as a public health law as defined in ORS 431A.005. ¶
(3) “Physical distancing officer” or “physical distancing monitor” means an individual designated to establish, implement, and enforce physical distancing requirements.

Statutory/Other Authority: ORS 413.042, ORS 433.441, ORS 624.020, ORS 624.355, ORS 624.415, ORS 624.041, Governor's EOs relating to COVID-19 including but not limited to EO 20-59, 20-66, 21-05

Statutes/Other Implemented: ORS 431A.005, ORS 431A.010, Governor's EOs relating to COVID-19 including but not limited to EO 20-59, 20-66, 21-05
AMEND: 333-003-1011

RULE SUMMARY: Amend OAR 333-003-1011: Adds references to the Governor’s Executive Orders.

CHANGES TO RULE:

333-003-1011
COVID-19 Related Requirements: Enforcement of Governors Executive Orders and State Guidance
(1) The Authority or a local public health authority may impose civil penalties up to $500 per day per violation on any person for violating any provision of:¶
(a) Any Governor’s Executive Order that the Governor has designated as a public health law as defined in ORS 431A.005;¶
(b) Authority guidance implementing such an Executive Order; or¶
(c) OAR 333-003-1001 to OAR 333-003-3041.¶
(2) Any civil penalties imposed by the Authority shall be imposed in accordance with ORS chapter 183.745. Civil penalties imposed by the local public health authority shall be imposed in a manner substantially equivalent to ORS chapter 183.745.¶
(3) Civil penalties may not be imposed under this rule if the Executive Order alleged to have been violated is not in effect at the time the Notice of Imposition of Civil Penalties is issued.¶
Note: Copies of the Executive Orders are available at: https://www.oregon.gov/gov/admin/Pages/executive-orders.aspx¶
Note: Authority guidance is available at: https://govstatus.egov.com/OR-OHA-COVID-19
Statutory/Other Authority: ORS 413.042, ORS 433.441, ORS 431A.010, ORS 624.415, ORS 624.020, ORS 624.041, ORS 624.355, ORS 624.415, Governors EOs relating to COVID-19 including but not limited to EO 20-59, 20-66, 21-05
Statutes/Other Implemented: ORS 431A.005, ORS 431A.010, Governors EOs relating to COVID-19 including but not limited to EO 20-59, 20-66, 21-05
AMEND: 333-003-1021

RULE SUMMARY: Amend OAR 333-003-1021: Establishes requirements that include, but are not limited to, compliance with Authority guidance relating to physical distancing, face coverings, capacity and party size limits, customer self-service and the prohibition of indoor dining unless allowed as part of a county’s designated risk level and adds references to the Governor’s Executive Orders.

CHANGES TO RULE:

333-003-1021

COVID-19 Related Requirements: Food and Drink Establishments

(1) **For the purposes of this rule,** “eating and drinking establishments” means food and drink establishments, including but not limited to, restaurants, bars, taverns, brewpubs, taverns, wine bars, cafes, food courts, coffee shops, clubs, mobile food units, food cart pods, or other similar establishments that offer food or drink may not offer or allow on-premises consumption of food or drink unless permitted as described in section (2) of this rule.

(a) This prohibition includes, but is not limited to:

(A) Both indoor and outdoor areas of an establishment.
(B) Continental breakfast operations, buffets, or other self-service operations.
(b) Off-premises consumption is permitted for clubs, wineries, tasting rooms and distilleries or other similar establishments that offer or allow food or drink.

(2) Eating and drinking establishments must comply with the requirements in Authority guidance as applicable to the county where the establishment is located. Such requirements include but are not limited to:

(A) Implementing physical distancing protocols of at least six feet between customers not in the same party while ordering, waiting, in line, and at any time on the premises.
(B) Implementing physical distancing protocols of at least six feet between staff whenever possible.
(C) Complying with ORS chapter 471 and any rules adopted thereunder when offering or selling alcoholic beverages for off-premises consumption.
(D) Designating a physical distancing officer.
(E) Complying with all applicable Authority guidance, including but not limited to Statewide Mask, Face Shield, Face Covering Guidance.

(3) Continental breakfast operations, buffets, and other self-service operations may offer or allow off-premises consumption if they comply with subsection (1)(b) of this rule and only staff are permitted to prepare and package food or drinks for off-premises consumption.

(4) Health care facilities, child care facilities, workplaces, government buildings, emergency response facilities, school-based food programs, and shelter and meal programs serving vulnerable populations are exempt from
section (1) of this rule for Self-Service Operations based on the designated risk level of the county where the operation is located.¶

(4) This rule does not apply to persons or entities exempt under the Governor's Executive Order 20-66, paragraph 8.¶

(5) The prohibition and requirements of this rule do not apply if at the time of the alleged conduct the Governor has terminated the Executive Order underlying the prohibition or requirement.¶

Note: Authority guidance is available at: https://govstatus.egov.com/OR-OHA-COVID-19

Statutory/Other Authority: ORS 401.168, ORS 413.042, ORS 433.441, Governors EOs relating to COVID-19 including but not limited to EO 20-59, 20-66, 21-05

Statutes/Other Implemented: ORS 401.990, ORS 431A.005, ORS 431A.010, ORS 431A.015, Governors EOs relating to COVID-19 including but not limited to EO 20-59, 20-66, 21-05
AMEND: 333-003-1031

RULE SUMMARY: Amend OAR 333-003-1031: Specifies that non-compliance with OAR 333-003-1021 may serve as the basis for the Oregon Health Authority to assess civil penalties of up to $1000 per day per violation, can be considered a priority item as defined in OAR 333-150 and 157, or may serve as the basis for any enforcement or licensing action permitted under ORS chapter 624. Enforcement or licensing action may not be taken under this rule if the Governor has terminated the Executive Order underlying the prohibition or requirement that serves as the basis for the violation and adds reference to the Governor’s Executive Orders.

CHANGES TO RULE:

333-003-1031

COVID-19 Related Requirements: Disciplinary Action for Violation of an Executive Order or Authority Guidance

(1) Violation of OAR 333-003-1021 constitutes a violation of the Oregon Food Sanitation Rules OAR 333-150-0000.¶

(2)(a) The requirements and prohibitions of OAR 333-003-1021 and Authority guidance applicable to food establishments are "priority items" as that term is used in OAR chapter 333, divisions 150 and 157. ¶
(b) As used in ORS chapter 624 and OAR chapter 333, divisions 150 and 157, violations of OAR 333-003-1021 and applicable Authority guidance, including but not limited to, failure to implement mask, face covering, face shield requirements, failure to comply with maximum capacity or party size limitations, failure to implement physical distancing requirements, or failing to comply with a prohibition on on-site consumption as applicable, may constitute:¶
(A) Critical violations that are a potential danger to the public health; and¶
(B) Critical violations that create an imminent or present danger to public health.¶
(C) The Authority or the local public health authority shall determine whether a violation of OAR 333-003-1021 or of Authority guidance constitutes a critical violation creating a potential danger to public health or creating an imminent or present danger to public health by reviewing the information available to the Authority or the local public health authority at the time and the scope of the violation, including any known mitigating or aggravating factors.¶

(3) Violation of OAR 333-003-1021 may serve as the basis for the Authority, or its designee, to take any enforcement or licensing action permitted under ORS chapter 624 against any food establishment as defined in OAR 333-150-0000(4)(q) regulated by the Authority, including but not limited to:¶
(a) Restaurants;¶
(b) Bed and breakfast facilities;¶
(c) Mobile food units;¶
(d) Commissaries;¶
(e) Warehouses;¶
(f) Vending machines;¶
(g) Traveler’s accommodations; or¶
(h) Organizational camps.¶

(34)(a) In addition to the bases for imposing civil penalties under OAR 333-157-0045, a local public health authority may impose civil penalties against any food establishment as defined in OAR 333-150-0000(4)(q) regulated by the Authority for any violation of OAR 333-003-1021 or applicable Authority guidance that poses an imminent and present danger to public health.¶
(b) Civil penalties imposed under this section may be up to $1000 per day per violation.¶

(5) Any enforcement or licensing action taken under this rule shall be taken in accordance with ORS chapter 183.¶

(46) Enforcement or licensing action may not be taken under this rule if the Governor has terminated the Executive Order underlying the prohibition or requirement that serves as the basis for the violation, is not in
effect at the time the notice of enforcement or licensing action is issued. ¶

Note: Authority guidance is available at: https://govstatus.egov.com/OR-OHA-COVID-19
Statutory/Other Authority: ORS 433.441, ORS 413.042, Governors EOs relating to COVID-19 including but not limited to EO 20-59, 20-66, 21-05, ORS 624.992
Statutes/Other Implemented: ORS 431A.005, ORS 431A.010, ORS 624.020, ORS 624.041, ORS 624.355, ORS 624.415, Governors EOs relating to COVID-19 including but not limited to EO 20-59, 20-66, 21-05
AMEND: 333-003-3010

RULE SUMMARY: Amend OAR 333-003-3010: Makes minor housekeeping changes and adds references to the Governor’s Executive Orders.

CHANGES TO RULE:

333-003-3010
Requirements for Tourist Facilities During Declared Emergency

(1) Subject tourist facilities must comply with all applicable requirements and prohibitions imposed by a Governor’s Executive Order that is designated as a public health law as defined in ORS 431A.005 and any provision of Authority guidance implementing such an Executive Order.

(2) Compliance with a Governor’s Executive Order designated as a public health law as described in subsection (1) includes, but is not limited to:

(a) Operating a facility or portion of a facility required by an Executive Order or Authority guidance to be closed;

(b) Failing to comply with the requirements of Authority guidance implementing an Executive Order, including but not limited to:

(A) Failing to implement protocols or take other action necessary to maintain physical distancing of six (6) feet between individuals not in the same party when and as required by Authority guidance;

(B) Failing to comply with restrictions on party size when and as required by Authority guidance;

(C) Failing to implement the Authority Statewide Mask, Face Shield, Face Covering Guidance or Oregon General Guidance for Employers on COVID-19 when and as required by Authority guidance;

(D) Failing to clean and disinfect in accordance with Authority guidance;

(E) Failing to prohibit activities or close facilities when and in accordance with Authority guidance; and

(F) Failing to post signs required by Authority guidance.

(3) The requirements of this rule do not apply if at the time of the alleged conduct the Governor has terminated the Executive Order that imposes the requirement or prohibition or terminated the Executive Order underlying the Authority guidance.

Note: Copies of Executive Orders are available at: https://www.oregon.gov/gov/admin/Pages/executive-orders.aspx
Copies of Authority guidance are available at: https://govstatus.egov.com/OR-OHA-COVID-19
Statutory/Other Authority: ORS 413.042, ORS 433.441, Governors EOs relating to COVID-19 including but not limited to EO 20-59, 20-66, 21-05
Statutes/Other Implemented: ORS 431A.005, ORS 431A.010, ORS 431A.015, ORS 446.310, ORS 446.330, ORS 446.340, ORS 446.349, Governors EOs relating to COVID-19 including but not limited to EO 20-59, 20-66, 21-05
AMEND: 333-003-3020

RULE SUMMARY: Amend OAR 333-003-3020: Authorizes the Oregon Health Authority or designee to deny, suspend, or revoke the license or impose civil penalties against a tourist facility for failing to comply with any applicable requirement imposed by a Governor’s Executive Order and any Authority guidance implementing such an Executive Order and adds references to the Governor’s Executive Orders.

CHANGES TO RULE:

333-003-3020 Disciplinary Action or Civil Penalties for Tourist Facilities During Declared Emergency
(1) The Authority, or its designee, may deny, suspend, or revoke the license of a subject tourist facility, or impose civil penalties against a subject tourist facility for failing to comply with any applicable requirement imposed by a Governor’s Executive Order that is designated as a public health law as defined in ORS 431A.005 and any provision of Authority guidance implementing such an Executive Order.
(2) Any action taken under this rule shall be taken in accordance with ORS chapter 183.
(3) No action under this rule shall be taken if the Governor has terminated the Executive Order underlying the prohibition or requirement that serves at the basis for the violation, is not in effect at the time the notice of enforcement or licensing action is issued.
(4) Violation of a Governor's Executive Order, any provision of Authority guidance implementing such an Executive Order, or OAR 333-003-3010 is a Class I violation as described in OAR 333-029-0130.

Note: Authority guidance is available at: https://govstatus.egov.com/OR-OHA-COVID-19
Copies of the Executive Orders are available at: https://www.oregon.gov/gov/admin/Pages/executive-orders.aspx

Statutory/Other Authority: ORS 413.042, ORS 433.441, ORS 446.310 - 446.350, Governors EOs relating to COVID-19 including but not limited to EO 20-59, 20-66, 21-05

Statutes/Other Implemented: ORS 431A.005, ORS 431A.010, ORS 446.310, ORS 446.324, ORS 446.340, ORS 446.347 - 446.349, Governors EOs relating to COVID-19 including but not limited to EO 20-59, 20-66, 21-05
AMEND: 333-003-3030

RULE SUMMARY: Amend OAR 333-003-3030: Makes minor housekeeping changes and adds references to the Governor’s Executive Orders.

CHANGES TO RULE:

333-003-3030
Requirements for Subject Public Pools and Spas During Declared Emergency
(1) Subject public pools and spas must comply with all applicable requirements and prohibitions imposed by a Governor’s Executive Order that is designated as a public health law as defined in ORS 431A.005 and any provision of Authority guidance implementing such an Executive Order.
(2) Compliance with a Governor’s Executive Order designated as a public health law as described in subsection (1) includes, but is not limited to:
   (a) Operating a facility or portion of a facility required by an Executive Order or Authority guidance to be closed;
   (b) Failing to comply with the requirements of Authority guidance implementing an Executive Order, including but not limited to:
      (A) Failing to limit the number of individuals inside the premises or implement other protocols necessary to maintain physical distancing of six (6) feet between individuals not in the same party when and as required by Authority guidance;
      (B) Failing to implement the Authority Statewide Mask, Face Shield, Face Covering Guidance or Oregon General Guidance for Employers on COVID-19 when and as required by Authority guidance;
      (C) Failing to designate a physical distancing monitor in accordance with Authority guidance;
      (D) Failing to clean and disinfect in accordance with Authority guidance; and
      (E) Failing to prohibit employees or visitors with symptoms associated with COVID-19 from entering premises in accordance with Authority guidance.
(3) The requirements of this rule do not apply if at the time of the alleged conduct the Governor has terminated the Executive Order that imposes the requirement or prohibition or terminated the Executive Order underlying the Authority guidance.

Note: Copies of Executive Orders are available at: https://www.oregon.gov/gov/admin/Pages/executive-orders.aspx
Copies of Authority guidance are available at: https://govstatus.egov.com/OR-OHA-COVID-19
Statutory/Other Authority: ORS 413.042, ORS 433.441, Governors EOs relating to COVID-19 including but not limited to EO 20-59, 20-66, 21-05
Statutes/Other Implemented: ORS 431A.005, ORS 431A.010, ORS 431A.015, ORS 448.011, Governors EOs relating to COVID-19 including but not limited to EO 20-59, 20-66, 21-05