

State Board of Elections Policy 2023-002

A meeting of the Virginia State Board of Elections (SBE) was held on December 20, 2023, during which the following policy was proposed by the Department of Elections (ELECT) and approved by the Board:

STAND BY YOUR AD HEARINGS

WHEREAS, Virginia Code § 24.2-955.3(D) provides that the SBE shall conduct a public hearing to determine whether to find a violation of Chapter 9.5 of Title 24.2 (commonly known as “Stand By Your Ad” or “SBYA”) and, if the SBE finds a violation of that chapter, shall assess civil penalties in accordance with that section.

NOW, THEREFORE, BE IT RESOLVED, by the SBE under its authority to issue rules and regulations to promote the proper administration of election laws and obtain uniformity in the administration of elections pursuant to Va. Code § 24.2-103(A), that:

The policy entitled “State Board of Elections Policy 2021-001” is rescinded; and

The below policy applies to the conduct of SBYA hearings held pursuant to Va. Code § 24.2-955.3(D).

Definitions

- “Clearly identified” means the candidate’s name, nickname, photograph, or drawing or the identity of the candidate is otherwise apparent—
 - through an unambiguous reference, such as the candidate’s initials (e.g., FDR), nickname (e.g., Ike), office (e.g., “the Governor”); or
 - through an unambiguous reference to their status as a candidate such as “the Democratic Senate nominee for District 5”.
- “Complainant” means the filer of a complaint.
- “Express advocacy” has the meaning given the term in 1 Va. Admin. Code 20-90-30.
- “Occurrence” means—
 - one broadcast of a radio or television political campaign advertisement;¹
 - or
 - with respect to print media,² one print media political campaign advertisement.
- “Respondent” means a person that is the subject of a complaint.

Complaints³

- Complaints may be submitted on the ELECT website at www.elections.virginia.gov/candidatepac-info/regulation-and-policies/. Complainants who submit complaints via other methods will be directed to submit a complaint online.

¹ Section 24.2-955.1.

² *Id.*

³ SBYA is silent as to the submission process for complaints.

- A complainant shall be notified upon submitting a complaint that the complainant may be required to appear or to produce evidence at a hearing arising from the complaint, as required under Va. Code § 2.2-4020(C).
- To allege a violation of SBYA, a complaint must contain all of the following—
 - The name of the complainant and the respondent;
 - A statement of the alleged violation; and
 - Evidence of the alleged violation, including—
 - In the case of print media, typically photographic evidence; or
 - In the case of radio or television, the complaint should identify the station and time at which the advertisement was aired.
- If the disputed conduct does not allege a violation of SBYA, ELECT will provide notice of receipt of the complaint to the complainant but will recommend that the SBE takes no action.
- Upon receipt of a complaint containing sufficient evidence to allege a violation of SBYA, ELECT shall investigate the complaint.

Notice

Method

- If a person is alleged to have violated SBYA, ELECT shall provide notice to the respondent via certified mail not later than 21 days before the date on which a hearing on the matter will be held.⁴
- If the respondent is a registered voter, ELECT shall send such notice via certified mail to the most recent physical address provided in the respondent’s voter registration statement.
- If the respondent is a registered committee, ELECT shall send such notice via certified mail to the most recent physical address provided in the respondent’s statement of organization.
- If ELECT is aware of an electronic mail address for the respondent, ELECT shall also send such notification via electronic mail.

Contents

- Each notice shall include—
 - The time,⁵ date,⁶ location,⁷ and nature of the hearing;⁸
 - The basic law under which the SBE contemplates its possible exercise of authority;⁹
 - The matters of fact and law asserted or questioned by the SBE,¹⁰ including an explanation of the alleged violation;¹¹
 - A statement of the maximum civil penalty that may be assessed with respect to

⁴ Section 24.2-955.3(D) (requiring the State Board to "send notice by certified mail to persons whose actions will be reviewed at such meeting and may be subject to civil penalty" "[a]t least 10 days prior to such hearing" (emphasis added)).

⁵ Sections 24.2-955.3(D) and 2.2-4020(B).

⁶ *Id.*

⁷ Section 2.2-4020(B).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Section 24.2-955.3(D).

the alleged violation;¹²

- Contact information consisting of the name, phone number, and government email address of the person designated by the SBE to respond to questions or otherwise assist a named party;¹³ and
- Notice that a default order may be issued pursuant to Va. Code § 2.2-4020.2(A) against the respondent if the respondent fails without good cause to attend or appear at the hearing and, if such a default order is issued, the SBE may conduct all further proceedings necessary to complete the hearing without the defaulting respondent's presence at the hearing.¹⁴

Hearings

Timing of Hearings

- The SBE will meet two times per year, once after each period listed below, to consider SBYA complaints received in that period:
 - July 1 through November 30.
 - December 1 through June 30.

Rights of respondents

- A respondent shall be entitled to—
 - Be accompanied by and represented by counsel;¹⁵
 - Submit oral and documentary evidence and rebuttal proofs;¹⁶
 - Conduct such cross-examination as may elicit a full and fair disclosure of the facts;¹⁷ and
 - Have the proceedings completed and a decision made with dispatch.¹⁸
- A respondent shall be given the opportunity to, on request and before the recommendations of ELECT are presented, submit in writing for the record—
 - Proposed findings and conclusions;¹⁹ and
 - Statements of reasons for the proposed findings and conclusions.²⁰
- If a respondent intends to conduct cross-examination of any person at the hearing, the respondent shall provide reasonable notice of such proposed cross-examination to the SBE prior to the hearing.

Rights of the Board

- The SBE may—
 - Administer oaths and affirmations;
 - Receive probative evidence;
 - Exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination;

¹² *Id.*

¹³ Section 2.2-4020(B).

¹⁴ Sections 2.2-4020.2(B) and 2.2-4020.2(C).

¹⁵ Section 2.2-4020(C).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Section 2.2-4020(D).

²⁰ *Id.*

- Rule upon offers of proof;
- Oversee a verbatim recording of the evidence;
- Hold conferences for the settlement or simplification of issues by consent;
- Dispose of procedural requests; and
- Regulate and expedite the course of the hearing.²¹

Default orders

- If a respondent without good cause fails to attend or appear at a hearing, the SBE may issue a default order against the respondent.²²
- If the SBE issues a default order, the SBE may conduct all further proceedings necessary to complete the hearing without the defaulting respondent's presence at the hearing.²³
- Not later than 15 days after the SBE gives notice to a respondent subject to a default order that an initial or final order has been rendered against the respondent, the respondent may petition the SBE to vacate the order.²⁴
 - If good cause is shown for the respondent's failure to appear, the SBE shall vacate the order and, after proper service of notice, conduct another hearing.²⁵
 - If good cause is not shown for the respondent's failure to appear, the SBE shall deny the motion to vacate.²⁶

Continuance

- A scheduled hearing shall not be delayed by the inability of the respondent to attend the hearing unless a request for a continuance is made in writing to the SBE not less than 7 days before the scheduled hearing date.
- A continuance shall not be granted unless the request is received in the required time and, in the opinion of the Chair, sets forth good and sufficient cause for the continuance.
- If a continuance is granted, ELECT staff shall notify all members of the SBE and document the grant in the official record of the meeting for continuity.

Subpoenas

- The SBE may, and on the request of a respondent shall, issue a subpoena requiring testimony or the production of other evidence.²⁷
- Upon request for a subpoena, the proceedings shall be continued, if necessary, in the opinion of the Chair, to allow reasonable time for the issuance of the subpoena and the production of the required testimony or other evidence.
- Any person who receives a subpoena issued by the SBE to appear or produce evidence with respect to a hearing and who objects to the subpoena may procure by petition a decision on the validity of the subpoena in the Circuit Court for the City of Richmond.²⁸

²¹ Section 2.2-4020(C).

²² Section 2.2-4020.2(A).

²³ Section 2.2-4020.2(C).

²⁴ Section 2.2-4020.2(E).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Section 2.2-4022.

²⁸ *Id.*

- If any person refuses or neglects to comply with a subpoena issued by the SBE with respect to a hearing, the SBE may procure an order of enforcement from the Circuit Court for the City of Richmond.²⁹

Interpreter services

- If an interpreter is required, ELECT will make appropriate arrangements to ensure an interpreter is present during the hearing. The complainant or respondent shall provide ELECT reasonable notice before the hearing that an interpreter is required.

Presentation of complaints

- With respect to each complaint, ELECT shall present information to assist the SBE in making a determination as to whether a violation has occurred and, if so, the civil penalty that should be assessed, and the respondent shall be entitled to appear and present information in response.
- In presenting each complaint, ELECT shall include—
 - The evidence submitted regarding the complaint and such other evidence as ELECT discovered during its investigation of the complaint;
 - The names of the complainant and the respondent;
 - The provision of SBYA that the respondent is alleged to have violated;
 - The manner in which SBYA is alleged to have been violated;
 - The date of the alleged violation;
 - Whether the respondent has previously violated SBYA during any election cycle;
 - The manner in which the complaint was received (i.e., online, via USPS, via FedEx, etc.);
 - A statement of whether any written explanation or proposed findings and conclusions, and statements of reasons for the proposed findings and conclusions, have been received from the respondent; and
 - The action that ELECT recommends the SBE take with respect to the complaint, including the amount of civil penalty to be assessed if ELECT recommends finding that a provision of SBYA has been violated.

Initial decision

- At a hearing at which a complaint is presented, after the complaint is presented, the SBE shall—
 - Carry out further deliberation as necessary; and
 - Conduct a vote relating to an initial decision as to whether a violation has occurred and, if so, the civil penalty that should be assessed.
- To assess a civil penalty for a violation of SBYA, the SBE must find that SBYA requirements apply to the communication in question, and that the communication fails to comply with SBYA requirements.
 - The SBE should consider whether the communication—
 - constitutes an advertisement subject to SBYA, consistent with the scope³⁰ and definitions³¹ provided by SBYA (*see* Appendix A for Virginia Code provisions); and

²⁹ *Id.*; *see also id.* 2.2-4003.

³⁰ Section 24.2-955.

³¹ Section 24.2-955.1.

- expressly advocates for the election or defeat of a clearly identified candidate.
- Upon such finding, the SBE may then determine whether the advertisement complies with SBYA disclosure requirements, and if not, what civil penalty to assess. An initial decision of the SBE may be modified or vacated subject to the requirement that a final decision shall be rendered not later than 90 days after the date on which the hearing occurs.

Final decisions

- The SBE shall render any final decision not later than 90 days after the date on which a hearing occurs.³²
- The SBE shall provide notice to the respondent not later than 5 days after the date of its final decision,³³ and such notice shall be signed by the SBE and served upon the respondent by mail.³⁴
- The original signed copy of a final decision of the SBE shall remain in the custody of the agency as a public record.³⁵
- A decision shall briefly state—
 - The findings, conclusions, reasons, or basis therefor upon the evidence presented by the record and relevant to the basic law under which the agency is operating;
 - The appropriate order for a penalty under Va. Code § 24.2-955.3 or denial thereof;³⁶ and
 - The time for filing a notice of appeal under Va. S. Ct. Rule 2A:2.

Reconsideration

- A respondent may file a petition for reconsideration with the SBE of a final decision of the SBE made pursuant to Va. Code § 2.2-4020.³⁷
- A petition for reconsideration shall be filed with the SBE not later than 15 days after service of the final decision.³⁸
- A petition for reconsideration shall include—
 - A full and clear statement of the facts pertaining to the reasons for reconsideration;
 - The grounds in support thereof; and
 - A statement of the relief desired.³⁹
- Not later than 30 days after the date on which the SBE receives a respondent’s timely petition for reconsideration, the SBE shall render a written decision on the petition, which shall—
 - Deny the petition;
 - Modify the case decision; or
 - Vacate the case decision and set a new hearing for further proceedings.⁴⁰

³² Section 2.2-4021(B).

³³ *Id.*

³⁴ Section 2.2-4023.

³⁵ *Id.*

³⁶ Section 2.2-4020(E).

³⁷ Section 2.2-4023.1(A).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Section 2.2-4023.1(B).

- The SBE may reconsider a final decision on its own initiative for good cause within 30 days of the date of the final decision.⁴¹

⁴¹ Section 2.2-4023.1(E).

APPENDIX A: Virginia Code Provisions

Code of Virginia
Title 24.2. Elections
Chapter 9.5. Political Campaign Advertisements
Article 1. General Provisions

§ 24.2-955. Scope of disclosure requirements

The disclosure requirements of this chapter apply to any sponsor of an advertisement in the print media, on radio or television, or placed or promoted for a fee on an online platform, the cost or value of which constitutes an expenditure or contribution required to be disclosed under Chapter 9.3 (§ 24.2-945 et seq.) except that the disclosure requirements of this chapter do not apply to (i) an individual who makes independent expenditures aggregating less than \$1,000 in an election cycle for or against a candidate for statewide office or less than \$200 in an election cycle for or against a candidate for any other office or (ii) an individual who incurs expenses only with respect to a referendum.

2002, c. 487, § 24.2-941; 2006, cc. 787, 892; 2008, c. 825; 2020, c. 551.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 24.2-955.1. Definitions

As used in this chapter, unless the context requires a different meaning:

"Advertisement" means any message appearing in the print media, on television, on radio, or on an online platform, that constitutes a contribution or expenditure under Chapter 9.3 (§ 24.2-945 et seq.). "Advertisement" shall not include novelty items authorized by a candidate including, but not limited to, pens, pencils, magnets, and buttons to be attached to wearing apparel.

"Authorized by _____" means the same as "authorization" as defined in § 24.2-945.1.

"Campaign telephone calls" means a series of telephone calls or text messages, electronic or otherwise, made (i) to 25 or more telephone numbers in the Commonwealth, (ii) during the 180 days before a general or special election or during the 90 days before a primary or other political party nominating event, (iii) conveying or soliciting information relating to any candidate or political party participating in the election, primary or other nominating event, and (iv) under an agreement to compensate the telephone callers.

"Candidate" means "candidate" as defined in § 24.2-101.

"Candidate campaign committee" or "campaign committee" means "campaign committee" as defined in § 24.2-945.1.

"Coordinated" or "coordination" means an expenditure that is made (i) at the express request or suggestion of a candidate, a candidate's campaign committee, or an agent of the candidate or his campaign committee or (ii) with material involvement of the candidate, a candidate's campaign committee, or an agent of the candidate or his campaign committee in devising the strategy, content, means of dissemination, or timing of the expenditure.

"Conspicuous" means so written, displayed, or communicated that a reasonable person ought to have noticed it.

"Full-screen" means the only picture appearing on the television screen during the oral disclosure statement that (i) contains the disclosing person, (ii) occupies all visible space on the television screen, and (iii) contains the image of the disclosing person that occupies at least 50% of the vertical height of the television screen.

"Independent expenditure" means "independent expenditure" as defined in § 24.2-945.1.

"Name of candidate" means (i) the full name of the candidate as it appears on the statement of qualification filed pursuant to § 24.2-501 or as it will appear on the ballot or (ii) the first name, middle name, or "nickname" of the candidate as it appears on his statement of qualification and a last name of the candidate as it appears on his statement of qualification.

"Occurrence" means one broadcast of a radio or television political campaign advertisement.

"Online platform" means any public-facing website, web application, or digital application,

including a social network, ad network, or search engine, that sells advertisements.

"Online political advertisement" means an advertisement that is placed or promoted for a fee on an online platform.

"Online political advertiser" means any person who purchases an advertisement from an online platform or promotes an advertisement on an online platform for a fee.

"Political action committee" means "political action committee" as defined in § 24.2-945.1.

"Political committee" means "political committee" as defined in § 24.2-945.1.

"Political party" has the same meaning as "party" or "political party" as defined in § 24.2-101.

"Political party committee" means any state political party committee, congressional district political party committee, county or city political party committee, or organized political party group of elected officials. The term shall not include any other organization or auxiliary associated with or using the name of a political party.

"Print media" means billboards, cards, newspapers, newspaper inserts, magazines, printed material disseminated through the mail, pamphlets, fliers, bumper stickers, periodicals, websites, electronic mail, non-video or non-audio messages placed or promoted for a fee on an online platform, yard signs, and outdoor advertising facilities. If a single print media advertisement consists of multiple pages, folds, or faces, the disclosure requirement of this section applies only to one page, fold, or face.

"Radio" means any radio broadcast station that is subject to the provisions of 47 U.S.C. §§ 315 and 317.

"Scan line" means a standard term of measurement used in the electronic media industry calculating a certain area in a television advertisement.

"Sponsor" means a candidate, candidate campaign committee, political committee, or person that purchases an advertisement.

"Telephone call" means any single telephone call or text message, electronic or otherwise, that when combined with other telephone calls or text messages constitutes campaign telephone calls.

"Television" means any television broadcast station, cable television system, wireless-cable multipoint distribution system, satellite company, or telephone company transmitting video programming that is subject to the provisions of 47 U.S.C. §§ 315 and 317.

"Unobscured" means that the only printed material that may appear on the television screen is a visual disclosure statement required by law, and that nothing is blocking the view of the disclosing person's face.

"Yard sign" means a sign paid for or distributed by a candidate, campaign committee, or political committee to be placed on public or private property. Yard signs paid for or distributed prior to July 1, 2015, shall not be subject to the provisions of §§ 24.2-956 and 24.2-956.1.

2002, c. 487, § 24.2-942; 2003, c. 237; 2006, cc. 787, 892; 2015, c. 573; 2020, cc. 551, 554, 615.

The chapters of the acts of assembly referenced in the historical citation at the end of this

section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.