



## Notice of Proposed Rulemaking

### Office of the Secretary of State Election Rules 8 CCR 1505-1

Date of notice: May 15, 2020

Date and time of public hearing: June 15, 2020 at 9:00 a.m.

#### I. Hearing Notice

As required by the State Administrative Procedure Act,<sup>1</sup> the Secretary of State gives notice of proposed rulemaking. The hearing is scheduled for June 15, 2020 at 9:00 a.m. **This meeting will be conducted via webinar; no in-person option is available.** Details regarding how to join the webinar and testify during the hearing are outlined in section VI of this notice.

#### II. Subject

The Secretary is considering amendments to the election rules<sup>2</sup> to improve the administration and enforcement of Colorado election law.<sup>3</sup>

Specifically, the Secretary proposes permanent adoption of temporary rules, adopted on May 8, 2020. The Secretary is also considering rule revisions necessary to ensure the proper administration of elections and risk-limiting audits statewide; certify elections equipment; ensure proper administration of HB 19-1278 and mail ballot elections statewide; ensure proper administration of logic and accuracy testing; ensure proper issuance of provisional ballots; eliminate obsolete provisions; organize existing rules for clarity; simplify the language of existing rules; and ensure consistency with Department rulemaking standards. The Secretary may consider additional rule amendments.

A detailed Statement of Basis, Purpose, and Specific Statutory Authority follows this notice and is incorporated by reference.

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<sup>1</sup> Section 24-4-103(3)(a), C.R.S. (2019).

<sup>2</sup> 8 CCR 1505-CCR 1.

<sup>3</sup> Article VII of the Colorado Constitution, Title 1 of the Colorado Revised Statutes, and the Help America Vote Act of 2002 ("HAVA"), P.L. No. 107-252.

### **III. Statutory authority**

The Secretary proposes the rule revisions and amendments in accordance with the following statutory provisions:

- Section 1-1-107(2)(a), C.R.S., (2019), which authorizes the Secretary of State “[t]o promulgate, publish and distribute...such rules as the secretary finds necessary for the proper administration and enforcement of the election laws.”
- Section 1-1.5-104(1)(e), C.R.S., (2019), which gives the Secretary of State the power to “[p]romulgate rules...as the secretary finds necessary for the proper administration, implementation, and enforcement of HAVA.”
- Section 1-5-601.5, C.R.S., (2019), which allows the Secretary of State to “require by rule that voting systems and voting equipment satisfy voting systems standards promulgated after January 1, 2008, by the federal election assistance commission as long as such standards meet or exceed those promulgated in 2002.”
- Section 1-5-613(1), C.R.S., (2019), which requires the Secretary of State to “adopt uniform rules...for the purchase and sale of voting equipment in the state.”
- Section 1-5-616, C.R.S., (2019), which requires the Secretary of State to adopt rules “that establish minimum standards for electronic and electromechanical voting systems.”
- Section 1-7-510(6), C.R.S., (2019), which requires the Secretary of State to promulgate rules to implement the section regarding election setup records.
- Section 1-7-515(4), C.R.S., (2019), which requires the Secretary of State to promulgate rules “necessary to implement and administer,” risk-limiting audits.
- Section 1-7.5-106(2), C.R.S., (2019), which allows the Secretary of State to adopt rules governing procedures and forms necessary to implement” mail ballot elections.
- Section 1-8.5-112, C.R.S., (2019), which requires the Secretary of State to adopt rules governing the issuance of provisional ballots statewide.

### **IV. Copies of draft rules**

A preliminary draft of the proposed rules is posted on the Secretary of State’s rules and notices of rulemaking website at:

[www.sos.state.co.us/pubs/rule\\_making/hearings/2020/ElectionsRulesHearing20200615.html](http://www.sos.state.co.us/pubs/rule_making/hearings/2020/ElectionsRulesHearing20200615.html).

You may also contact our office to request an editable electronic copy of the draft rules.

As required by the State Administrative Procedures Act,<sup>4</sup> if changes are made before the hearing, revised proposed draft rules will be available to the public and posted on the website by June 10, 2020.

## **V. Opportunity to testify and submit written comments**

The Secretary values your feedback in our rulemaking process and we would very much like to hear your thoughts on the proposed amendments. Please review and consider the attached proposed draft rules.

Everyone will have the opportunity to testify and provide written comment concerning the rule amendments. You may submit written comments to [SoS.Rulemaking@sos.state.co.us](mailto:SoS.Rulemaking@sos.state.co.us) any time before and during the hearing. Additional opportunity to comment in writing will be announced at the conclusion of the hearing. Information regarding how to testify during the webinar hearing is providing in section VI of this notice.

As soon as possible after receipt, written comments will be posted online at the Secretary of State website:

[www.sos.state.co.us/pubs/rule\\_making/hearings/2020/ElectionsRulesHearing20200615.html](http://www.sos.state.co.us/pubs/rule_making/hearings/2020/ElectionsRulesHearing20200615.html).

We will redact apparent personal contact information, including home address, email address, and telephone number(s), from submissions before posting the information online, unless otherwise directed by the contributor. All written comments will be added to the official rulemaking record.

## **VI. Webinar and audio recording of hearing**

### *Register for the webinar hearing*

To join and listen to the hearing, you must register for the webinar online: <https://attendee.gotowebinar.com/register/2301283741070772493>.

When you register, you must provide your full name and email address. Please provide additional contact information including your address and telephone number. You may also provide your job title and organization. Lastly, indicate whether you plan to testify during the hearing. When you submit your registration, you should receive a confirmation email including details about how to join the webinar.

### *Webinar hearing procedures*

At the beginning of the webinar, we will mute all public participants. After the introduction and a brief summary of the rulemaking, we will open the hearing to testimony as follows:

- Referencing registration records, we will identify and individually unmute participants who indicated that they plan to testify during the hearing.

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<sup>4</sup> Section 24-4-103(3)(a), C.R.S. (2019). “Any proposed rule or revised proposed rule by an agency which is to be considered at the public hearing...shall be made available to any person at least five days prior to said hearing.”

- When we exhaust the list, we will ask whether any additional attendees wish to testify. Attendees may raise/lower their hand by clicking the icon in their control panel.
- To ensure that the hearing is prompt and efficient, oral testimony may be time-limited.

Before the hearing concludes, we will announce an additional opportunity to submit written comments and the associated deadline.

*Webinar audio requirements*

**Please be advised:** we strongly encourage attendees to join the webinar through their computer even if they use their telephone to dial in for audio. To testify during the hearing, it is best to use your computer microphone and speakers or a headset. As outlined above, we will first receive testimony from attendees whose registration indicates that they plan to provide testimony and then we will offer attendees the option to raise their hand. If you access the webinar only by telephone, you may not appear in our webinar attendee list meaning we may not be able to unmute you. Moreover, the raise your hand feature is only available to attendees who access the webinar by computer.

*Audio recording*

After the hearing concludes, a recording will be available on our audio broadcasts page here: [https://www.sos.state.co.us/pubs/info\\_center/audioBroadcasts.html](https://www.sos.state.co.us/pubs/info_center/audioBroadcasts.html).

**VII. Office contact**

If you have any questions or would like to submit written comments, please contact the Department Rulemaking Program Manager at [SoS.Rulemaking@sos.state.co.us](mailto:SoS.Rulemaking@sos.state.co.us) or (303) 894-2200 ext. 6329.

Dated this 15<sup>th</sup> Day of May, 2020.

Ian Rayder  
Deputy Secretary of State

For

Jena Griswold  
Colorado Secretary of State



## **Draft Statement of Basis, Purpose, and Specific Statutory Authority**

**Office of the Secretary of State**  
**Election Rules**  
**8 CCR 1505-1**

**May 15, 2020**

### **I. Basis and Purpose**

This statement explains proposed amendments to the Colorado Secretary of State Election Rules. The Secretary is considering amendments to ensure uniform and proper administration, implementation, and enforcement of Federal and Colorado election laws,<sup>1</sup> improve elections administration in Colorado, and increase the transparency and security of the election process.

Specific proposed changes include:

- Permanent adoption of temporary New Rule 1.1.17 that defines “de minimis change” to establish minimum standards for the certification of electronic voting systems in the state.
- Amendments to Rule 6.4.1 to clarify existing rules regarding signature verification.
- Permanent adoption of temporary amendments to Rule 7.2.3 to ensure proper administration of mail ballot elections statewide.
- Permanent adoption of temporary New Rule 7.2.17 to ensure proper administration of mail ballot elections statewide.
- Permanent adoption of temporary New Rule 7.9.11 to implement and ensure proper administration of HB 19-1278 and mail ballot elections statewide.
- Permanent adoption of temporary New Rule 7.17 to ensure proper administration of mail ballot elections statewide, specifically in regards to the operation of voter service and polling centers.
- Permanent adoption of temporary amendments to Rule 11.3.2 further prescribing the manner of performing logic and accuracy testing.

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<sup>1</sup> Article VII of the Colorado Constitution, Title 1 of the Colorado Revised Statutes, and the Help America Vote Act of 2002 (“HAVA”), P.L. No. 107-252.

- Amendments to Rule 17.1.2 to further implement HB 19-1278 and to ensure that the HAVA requirement that provisional ballots be issued to voter’s whose eligibility cannot be immediately determined is followed.
- New Rule 17.1.4 to ensure that the HAVA requirement that provisional ballots be issued to voter’s whose eligibility cannot be immediately determined is followed.
- Permanent adoption of temporary New Rule 21.1.1(c) that clarifies standards for certification of changes to voting systems that are de minimis in nature.
- Permanent adoption of temporary amendments to Rule 25.2.2 further prescribing the manner of performing risk-limiting audits statewide.

Other changes to rules not specifically listed are non-substantive and necessary for consistency with Department rulemaking format and style. Cross-references in rules are also corrected or updated.

Statements above concerning proposed permanent adoption of temporary rules relate to the Secretary of State’s May 8, 2020 temporary adoption of election rules (e-filed under CCR tracking #2020-00330).

## **II. Rulemaking Authority**

The statutory and constitutional authority is as follows:

- Section 1-1-107(2)(a), C.R.S., (2019), which authorizes the Secretary of State “[t]o promulgate, publish and distribute...such rules as the secretary finds necessary for the proper administration and enforcement of the election laws.”
- Section 1-1.5-104(1)(e), C.R.S., (2019), which gives the Secretary of State the power to “[p]romulgate rules...as the secretary finds necessary for the proper administration, implementation, and enforcement of HAVA.”
- Section 1-5-601.5, C.R.S., (2019), which allows the Secretary of State to “require by rule that voting systems and voting equipment satisfy voting systems standards promulgated after January 1, 2008, by the federal election assistance commission as long as such standards meet or exceed those promulgated in 2002.”
- Section 1-5-613(1), C.R.S., (2019), which requires the Secretary of State to “adopt uniform rules...for the purchase and sale of voting equipment in the state.”
- Section 1-5-616, C.R.S., (2019), which requires the Secretary of State to adopt rules “that establish minimum standards for electronic and electromechanical voting systems.”
- Section 1-7-510(6), C.R.S., (2019), which requires the Secretary of State to promulgate rules to implement the section regarding election setup records.

- Section 1-7-515 (4), C.R.S., (2019), which requires the Secretary of State to promulgate rules “necessary to implement and administer,” risk-limiting audits.
- Section 1-7.5-106(2), C.R.S., (2019), which allows the Secretary of State to adopt rules governing procedures and forms necessary to implement” mail ballot elections.
- Section 1-8.5-112, C.R.S., (2019), which requires the Secretary of State to adopt rules governing the issuance of provisional ballots statewide.

# Preliminary Draft of Proposed Rules

## Office of the Colorado Secretary of State Election Rules 8 CCR 1505-1

May 15, 2020

### Disclaimer:

In accordance with the State Administrative Procedure Act, this draft is filed with the Secretary of State and submitted to the Department of Regulatory Agencies.<sup>1</sup>

This is a preliminary draft of the proposed rules that may be revised before the June 15, 2020 rulemaking hearing. If changes are made, a revised copy of the proposed rules will be available to the public and a copy will be posted on the Department of State's website no later than **June 10, 2020**.<sup>2</sup>

Please note the following formatting key:

| Font effect                  | Meaning                                 |
|------------------------------|---|
| Sentence case                | Retained/modified current rule language |
| SMALL CAPS                   | New language                            |
| <del>Strikethrough</del>     | Deletions                               |
| <i>Italic blue font text</i> | Annotations                             |

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*Amendments to 8 CCR 1505-1 follow:*

*Proposed permanent adoption of temporarily adopted New Rule 1.1.17, concerning definitions. Current temporary rule adopted May 8, 2020:*

1.1.17 "De minimis change" means a change to voting system hardware that is so minor in nature and effect that it requires no additional testing by a VSTL.

*[Not shown: proposed permanent adoption of renumbering Rules 1.1.17-1.1.50 to Rules 1.1.18-1.1.51]*

*Amendments to Rule 6.4.1 concerning election judges:*

6.4 Except for UOCAVA ballots and ballots received for counting after election day:

6.4.1 Absent written consent by each major party county chair, a county with 5,000 OR more ~~than 5,000~~ active electors on the 90<sup>th</sup> day before election day may not use regular staff as signature verification judges.

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<sup>1</sup> Sections 24-4-103(2.5) and (3)(a), C.R.S. (2019). A draft must be submitted to the Department at the time that a notice of proposed rulemaking is filed with the Secretary of State.

<sup>2</sup> Section 24-4-103(4)(a), C.R.S. (2019). "[A]ny proposed rule or revised proposed rule by an agency which is to be considered at the public hearing...shall be made available to any person at least five days prior to said hearing."



- 6.4.2 A county with fewer than 5,000 active electors on the 90<sup>th</sup> day before election day may use regular county staff that are sworn in as election judges to conduct signature verification.

*Proposed permanent adoption of temporarily adopted amendments to Rule 7.2.3, including new Rule 7.2.3(c), concerning ballots and ballot packets for elections conducted by the County Clerk and Recorder. Current temporary Rule adopted May 8, 2020:*

7.2.3 Processing deadlines.

- (a) The county clerk must process all new registration applications and updates received by the 22-day deadline to mail applicants a ballot in accordance with section 1-7.5-107(3), C.R.S.
- (b) Beginning the 15<sup>th</sup> day before election day, the county clerk must process all registration applications and updates within two business days of receipt; subject to Rule 7.2.3(d).
- (c) Beginning the 14<sup>th</sup> day before election day, the county clerk must deliver any original or replacement ballot to the United States Postal Service within two business days after processing a registration application or update; subject to Rule 7.2.3(d).
- (d) No county may take more than three days to process and deliver the ballot to the united states postal service.

*Proposed permanent adoption of temporary New Rule 7.2.17. Current temporary rule adopted May 8, 2020:*

- 7.2.17 The county clerk must send all mail ballots by first-class mail beginning the 11<sup>th</sup> day before election day.

*Proposed permanent adoption of temporarily adopted amendments to Rule 7.5.1 to update a cross-reference. Current temporary rule adopted May 8, 2020:*

- 7.5.1 The county clerk must adequately light all drop box locations and use a video security surveillance recording system as defined in Rule 1.1.45 to monitor each location.

*Proposed permanent adoption of temporary New Rule 7.9.11, concerning voter service and polling centers. Current temporary rule adopted May 8, 2020:*

7.9 Voter service and polling centers

- 7.9.11 The county clerk of any county that has a tribal council headquarters located within the county borders must notify the tribal council by letter that the tribal nation has the right to request that a voter service and polling center be located within the boundaries of the tribal nation in the upcoming general election. The county clerk must send this notification by mail no later than 225 days before the date of any general election.

*Proposed permanent adoption of temporary New Rule 7.17. Current temporary rule adopted May 8, 2020 with additional new proposed amendments to Rule 7.17.3:*

- 7.17 Closure of VSPCs due to emergency condition

- 7.17.1 If as a result of an extreme weather event, natural disaster, act of God, human made incident, or disruption to, or threat of disruption to critical infrastructure, a county government or other entity closes all day, closes early, or delays the opening of a building where a voter service and polling center is located, then the county clerk may close for the day, close early, or delay the opening of any voter service and polling center located in those buildings affected.
- 7.17.2 The county clerk must immediately notify the Secretary of State and the public of any closure or delayed opening of a voter service and polling center under this rule.
- 7.17.3 A county clerk must ~~request approval from the Secretary of State before closing or delaying the opening of a voter service and polling center under this rule beginning seven days before election day through election day.~~ RELOCATE VSPC OPERATIONS TO A BACKUP LOCATION IN THE EVENT A CLOSURE WOULD RESULT IN THE COUNTY NOT MEETING THEIR STATUTORY MINIMUM VSPCs. A COUNTY CLERK MUST IMMEDIATELY NOTIFY THE SECRETARY OF STATE OF THE BACKUP LOCATION THAT THEY WILL RELOCATE TO.
- 7.17.4 The Secretary of State may petition a court under section 1-7-101 (1)(b), C.R.S. to extend the polling hours in a county or statewide if voter service and polling centers are closed or delayed opening under this rule.
- 7.17.5 If a county clerk closes or delays the opening of a voter service and polling center under this rule, then the Secretary of State and county clerk must issue an emergency ballot available under section 1-7.5-115, C.R.S. to any voter who requests it due to the delay or closure.

*Proposed permanent adoption of temporarily adopted amendments to Rule 8.7.4 to update a cross-reference. Current temporary rule adopted May 8, 2020:*

- 8.7.4 Watchers must remain outside the immediate voting area while an elector is voting. The six-foot limit in Rule 1.1.31 applies only to voting.

*Proposed permanent adoption of temporarily adopted amendments to Rule 11.3.2(e), including new Rule 11.3.2(e)(2), concerning logic and accuracy test. Current temporary rule adopted May 8, 2020:*

- (e) Completing the test
  - (1) The county must keep all test materials, when not in use, in a durable, secure box. Each member of the Testing Board must verify the seals and initial the chain-of-custody log maintained by the county clerk. If the records are opened for inspection, at least two election officials must verify the seals and initial the chain-of-custody log.
  - (2) The county must backup and preserve the election database or project containing test results, and export and preserve the test results and CVR files. The county must prepare and preserve a ballot manifest corresponding to the test CVR file.
  - (3) The county must upload the test results file during the ENR test required under Rule 11.9.3. The county must hash and upload the CVR and ballot manifest to the RLA software during the RLA practice period, as required under Rule 25.2.2(b).
  - (4) After testing, the Testing Board must watch the county reset and seal each voting device, if applicable.

- (5) The Testing Board and the county clerk must sign a written statement attesting to the qualification of each device successfully tested, the number of the seal attached to the voting device at the end of the test, if applicable, any problems discovered, and any other documentation necessary to provide a full and accurate account of the condition of a given device.
- (6) The county may not change the programming of any voting device after completing the logic and accuracy test for an election, except as required to conduct a recount or as authorized by the Secretary of State.

*Amendments to Rule 17.1.2, including New Rule 17.1.2(b), concerning provisional voting in a voter service and polling center:*

17.1.2 ISSUANCE OF MAIL BALLOTS INSTEAD OF PROVISIONAL BALLOTS

- (A) If a voter service and polling center loses connectivity to SCORE an election judge must attempt to verify the elector's eligibility.
  - (1) Eligibility may be determined by reviewing or receiving information produced from the statewide voter registration system either in real-time or within the preceding 24 hours; except if the time for voting is extended beyond 7 p.m. on election day by a court order, in which case eligibility may be determined by reviewing or receiving information produced from the statewide voter registration system either in real-time or no earlier than the day prior.
  - (2) If the elector's eligibility can be determined, the judge must issue the elector a mail ballot or replacement mail ballot. If an elector's eligibility cannot be determined, the election judge must issue the voter a provisional ballot.
- (B) BEGINNING THE FRIDAY BEFORE ELECTION DAY, A COUNTY CLERK MUST KEEP A PAPER OR ELECTRONIC BACKUP OF THE COUNTY'S VOTER REGISTRATION LIST PRODUCED FROM THE PRECEDING DAY FOR THE PURPOSE OF DETERMINING ELIGIBILITY UNDER THIS RULE.

*New Rule 17.1.4, concerning provisional ballots:*

17.1.4 A COUNTY CLERK MUST HAVE THE ABILITY TO ISSUE PROVISIONAL BALLOTS AND ENVELOPES TOTALING 10% OF VOTERS WHO APPEARED IN PERSON IN THE LAST ELECTION OF THE SAME TYPE.

*Proposed permanent adoption of temporary New Rule 21.1.1(c), concerning voting system standards for certification. Current temporary rule adopted May 8, 2020:*

- (c) A voting system provider may apply for modification to a currently certified voting system to address de minimis commercial off-the-shelf hardware changes using the process laid out in this Rule.
  - (1) The provider must submit an application package that includes an application for modification provided by the Secretary of State, internal testing documentation, VSTL determination of de minimis changes, specification documents for existing and new equipment, updated TDP documents as applicable, other engineering change order documents, an

integration testing plan, and any other documentation requested by the Secretary of State. If the submitted application package is incomplete the Secretary of State will identify the deficiencies and the voting system provider must remedy the deficiencies within ten days.

- (2) If the Secretary of State reviews the application package and determines that the modification requires any additional testing from the VSTL, the provider will work with the Secretary of State to create a test plan for the modification. The Secretary of State makes the final determination as to whether the change is de minimis or not.
- (3) If the Secretary of State reviews the application package and determines that the modification does not require testing by the VSTL, the provider will coordinate with the Secretary of State to perform integration testing overseen by the Secretary of State using the plan provided in the application package.
- (4) Upon completion of testing the Secretary of State will review the outcomes of the integration testing and determine if the modification complies with section 1-5-618(1.5), C.R.S. and approve or deny the modification request.

*Proposed permanent adoption of temporarily adopted amendments to Rule 25.2.2, including new Rules 25.2.2(b) and 25.2.2(c)(2), concerning risk limiting audit. Current temporary rule adopted May 8, 2020:*

#### 25.2.2 Preparing for the audit

- (a) Risk limit. No later than 32 days before election day, the Secretary of State will establish and publish on the Audit Center the risk limits that will apply in RLAs for that election. The Secretary of State may establish different risk limits for comparison audits and ballot polling audits, and for audits of statewide and countywide contests. In comparison audits the risk limit will not exceed five percent for statewide contests, and ten percent for countywide contests.
- (b) Practice Period. Beginning 20 days before the election counties may practice conducting the audit. The county must, at a minimum, hash and upload the ballot manifest and CVR file from the logic and accuracy test to the RLA software.
- (c) Audit board. No later than 15 days before election day, the designated election official must appoint an audit board to conduct the risk-limiting audit. The audit board must consist of electors nominated by the major political party county chairpersons. The designated election official must give written notice to the county chairpersons of their obligation to nominate audit board members and may designate appropriately affiliated electors as audit board members if one or both county chairpersons fail to do so in a timely manner.
  - (1) At least two canvass board members must observe at least the first round of the RLA, and members of the canvass board may serve as members of the audit board. The designated election official, members of his or her staff, and other duly appointed election judges may assist the audit board in conducting the audit. To the extent practicable, the audit board should not consist of individuals who participated in ballot resolution or adjudication during the election being audited. Each member of the audit board must take the election judge oath.

- (2) If the Secretary of State randomly selects five or fewer ballots for any audit round after the first, the designated election official may appoint as the audit board members of staff of different party affiliations to conduct and sign off on the audit round in question. The designated election official must get approval from the Secretary of State before appointing staff as the audit board. The designated election official may not appoint themselves to conduct any audit round.

*[Not shown: proposed permanent adoption of renumbering Rules 25.2.2(c)-(k) as 25.2.2(d)-(l)]*