

July 27, 2012

Hon. Scott Gessler
Colorado Secretary of State
1700 Broadway, Suite 270
Denver, CO 80290

Sent via email to:
andrea.gyger@sos.state.co.us

Re: Proposed Election Rules dated July 18, 2012

Dear Secretary Gessler:

Please accept this letter as the written comments of the Pitkin County Election Department regarding the above-referenced proposed Election Rules, considered at the July 23, 2012 rulemaking hearing. We participated in the rulemaking hearing via audio webcast.

Proposed Rule 2.7.5:

We have no objection to the substance of the proposed rule but simply request a clarification. If proposed Rule 2.7.5 is formally adopted, will SCORE be configured in a future quarterly release to alert users that an incomplete applicant must reapply because his or her application was incomplete for more than 24 months, or will individual counties be required to develop their own business processes to track the status and duration of incomplete applications?

Proposed Rule 8.6:

We respectfully suggest that proposed Rule 8.6.4 is not necessary and should not be adopted. As a practical matter, the precise manner in which the statutory rights of poll watchers are accommodated in each county is always committed to the discretion of the county clerk, because each county has different voting systems and facilities.

Proposed Rule 9.1:

While we have no objection to its content, we would like to know if the Secretary of State's office will issue a template of the polling place sign contemplated by the proposed rule as an approved form.

Proposed Rule 10.6:

Proposed Rule 10.6 requires county clerks to conduct a primary election for all major political parties if one major party nominates more than one candidate for any office. The net result is that all offices for which candidates may be nominated must appear on the primary election ballots for all major parties, even if particular major parties nominate no or only one candidate for any given office. Similar but slightly different rules apply to minor party primary election ballots.

We believe the proposed rule is consistent with applicable provisions of the Election Code with one exception: under current law, neither the General Assembly nor the Secretary of State has the legislative or rulemaking authority to dictate the manner in which home rule counties nominate or elect candidates for county offices. Colo. Const. art. 14, § 16(1).

Pitkin County adopted its Home Rule Charter in 1978, and the provisions of its charter relating to the nomination and election of county officers are substantially different from those applicable to statutory counties under the Election Code. One of these provisions requires the county clerk to include candidates for county office on a primary election ballot only if more than two candidates for that office submit timely and sufficient nomination petitions. We do not believe your office intends this proposed rule to require Pitkin County to alter its singular manner of electing county officials. Therefore, proposed Rule 10.6 should be prefaced with the language exempting home rule counties from its mandates, such as:

“Except as otherwise provided by charter or ordinance of a home rule county with respect to the conduct of primary elections for candidates for county office...”

Proposed Rule 10.7.4:

As a threshold matter, we believe this provision is incorrectly codified. Its subject matter relates to the counting of mail and mail-in ballots, not “ballots and election supplies.” If formally adopted, it is more properly included in Rule 13 rather than Rule 10.

We understand the motivation for this proposal. The Election Code's existing directives regarding the processing of mail and mail-in ballots from electors who are issued more than one ballot do not completely address all scenarios in which multiple ballots can be issued to a single voter. For example, § 1-8-111(3), C.R.S., provides that, where an elector requests issuance of a replacement ballot because she either did not receive or spoiled the original, the “first ballot returned by the elector shall be considered the elector's official ballot.” In these situations, without more, the replacement ballot should be of the same ballot style as the original ballot, so a “first-ballot-returned” rule makes sense. The existing statutory mandate

does not specifically address situations in which a replacement ballot is issued because the elector changes address or party affiliation after issuance of the original ballot. In these cases, a replacement primary election ballot will be, and a replacement coordinated or general election may be, a different ballot style than the original ballot.

Notwithstanding these gaps in existing law, we respectfully request the Department of State to forego formal adoption of proposed Rule 10.7.4 at this time. The problem to be remedied was legislatively created, and the solution should be legislatively crafted. Colorado is a "battleground state" for the 2012 Election Cycle, and all county clerks and election officials will be under intense scrutiny. The countless ramifications of this rule deserve very thorough and thoughtful consideration, and the proposed rule is silent with respect to many of them. Among other things:

- SCORE does not have the functionality to enable counties to automate compliance with this rule. Each county will be required to devise and implement their own manual processes to track and resolve multiple ballot situations. This is a recipe for chaos on a statewide basis, especially since the deadline for sending UOCAVA ballots is only about 74 days away.
- The rule completely prohibits the counting of the original ballot after a change of address or party affiliation is processed. This creates a very real potential for disenfranchising voters – particularly transient electors and those residing in rural communities where residential mail delivery is the exception rather than the rule – because most voters may not understand or care about the subtleties of voter eligibility. Does the Department of State have resources at its disposal to launch a massive public relations campaign to educate voters about the far-reaching implications of the rule? Pitkin County does not.
- The rule is silent with respect to the following situations, all of which are commonplace experiences to most county clerks in Colorado:
 - What if the elector returns the replacement ballot in the reply envelope that accompanied the original ballot? The label on the original reply envelope will indicate it contains the ballot that cannot be counted.
 - What if the elector returns the original ballot in the reply envelope that accompanied the replacement ballot? The label on the replacement reply envelope will indicate that it contains the ballot that must be counted. Must election judges confirm ballot styles and ballot numbers when processing mail-in ballots?
 - What if the elector returns the original ballot in the original reply envelope and, believing he or she has already voted, does not return the replacement ballot? As drafted, proposed Rule 10.7 completely prohibits the counting of the original ballot, and does not require election staff to even notify the elector of that fact. The elector in this scenario will be completely disenfranchised.

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- How does the proposed rule interact with the existing “household swap” signature verification protocol set forth in Election Rule 29.3.1? For example, assume two or more electors actually are members of the same household and they change their residence address. One of them obtains a replacement ballot due to a change of address, and the other does not change his or her address and receives and returns the original ballot. Assume further that they return their respective ballots in the reply envelope intended for use by the other household member. Do we refuse to count either ballot because they no longer appear to be members of the same household? Do we refuse to count only the original ballot issued to the household member who should have but did not change his or her address?
- How does the rule interact with other provisions of the Election Code, which require that reply envelopes containing uncounted ballots are to remain unopened and sealed for the statutory retention period? See §§ 1-8-111(3), -113(1)(a), -114.5(2)(b), C.R.S. Are county clerks and election judges now required to obtain approval from the district court or the district attorney in order to locate the ballot that the rule requires to be counted?
- How does the proposed rule interact with the recently mandated ability of electors to deliver their mail-in ballots to polling place drop-off sites on Election Day? These ballots are not received into SCORE until after 7 pm on Election Day, at least in Pitkin County. That may be the first time election staff learns of a multiple ballot situation requiring curative action by the elector, but unlike missing signatures and signature discrepancies, the affected elector has no ability to cure even if he or she was notified of the problem.
- The proposed rule ironically disenfranchises mail-in voters who update their voter registration record and mistakenly return the original ballot rather than the replacement. No similar penalty exists for mail-in voters who should but do not update their residence addresses and as result were issued an original ballot only. This disparate treatment will occur more frequently in communities such as Pitkin County, where people who change residence addresses frequently nevertheless retain a the same post office box for purposes of mail delivery for many years.

We believe there are too many ramifications and possible unintended consequences to implement this rule so soon before a presidential election. This rule may well generate litigation against the Secretary and one or more county clerks by the parties or candidates who do not otherwise prevail in November. We respectfully request that this proposed rule be withdrawn.

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Proposed Rules 12 & 13:

We believe the proposed amendments to Election Rules 12 and 13 are generally consistent with existing law relating to mail ballot and mail-in ballot requests by electors having the status of "active" and "inactive-failed to vote." You may recall that you granted county clerks the discretion to include "inactive-failed to vote" electors in the 2011 Coordinated Election following the Denver District Court's ruling in *Johnson v. Gessler*. Pitkin County took the opportunity to do so at substantial expense, and experienced an I-FTV return rate of slightly more than one-half of one percent. We fully understand the policy objections raised by opponents of the rule, and respectfully submit these concerns are better addressed to the General Assembly for resolution.

Proposed Rule 26.13:

The reference to "provisional ballot stock" in the proposed text should be changed to "provisional ballot envelope." There is no statutory requirement for printing sequential ballot numbers on provisional ballots, and creating such a requirement now only gives polling place election judges one more inventory to reconcile at the end of their 14-16 hour work day.

Proposed Rule 41:

While we wholeheartedly agree that existing Colorado law on the composition, rights and responsibilities of canvass boards deserve and require substantial legislative clarification and refinement, we respectfully request that this proposed rule be withdrawn. Among other things, its adoption will almost certainly trigger litigation against the Secretary and one or more county clerks by one or all of the parties or candidates who do not prevail in the 2012 General Election. This is because the proposed rule alters the composition of the canvass board, which is currently mandated by statute. In addition, the rule arguably eliminates or limits those statutory rights and powers of canvass board members that are codified in sections of the Election Code other than § 1-10-101.5, C.R.S. Pitkin County seeks to avoid unnecessary litigation because it consumes increasingly scarce fiscal resources.

Thank you for the opportunity to provide our input, and we hope you will contact us if you have any questions or require further information.

Respectfully submitted,

Janice K. Vos Caudill
Pitkin County Clerk & Recorder

Dwight K. Shellman III
Pitkin County Election Manager