

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the adoption of NEW)	NOTICE OF PUBLIC HEARING ON
RULE I, the amendment of ARM)	PROPOSED ADOPTION,
44.3.1719, and the repeal of ARM)	AMENDMENT, AND REPEAL
44.3.1718 and 44.3.1720 pertaining)	
to postelection audit processes for)	
federal and nonfederal elections)	

TO: All Concerned Persons

1. On January 16, 2024, at 3:00 p.m., the Secretary of State will hold a public hearing in the Secretary of State's Office conference room, Room 260, State Capitol, Helena, Montana, to consider the proposed adoption, amendment, and repeal of the above-stated rules.

2. The Secretary of State will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Secretary of State no later than 5:00 p.m., January 9, 2024, to advise of the nature of the accommodation needed. Please contact Andy Ritter, Secretary of State's Office, P.O. Box 202801, Helena, MT 59620-2801; telephone (406) 444-7911; fax (406) 444-3976; TTY/Montana Relay Service 711; or email Andrew.Ritter@mt.gov.

3. The rule proposed to be adopted provides as follows:

NEW RULE I POSTELECTION AUDIT PROCESS FOR A NONFEDERAL ELECTION (1) Pursuant to the Postelection Audit Act, Title 13, chapter 17, part 5, MCA, if a board of county commissioners requests an audit of vote-counting machines for a nonfederal election, they shall randomly select the precincts or ballot styles, races and ballot issues, and vote counting machines (if applicable) to be audited.

(a) The selection of precincts or ballot styles, races and ballot issues, and vote counting machines (if applicable) shall be accomplished by using a statistically random technique chosen by the board.

(b) The board shall record the results on a form prescribed by the Secretary of State.

(2) If audit selection is based on precincts, the board of county commissioners shall utilize current official precinct information provided by the county conducting the audit. One precinct in the election shall be selected. If there is only one precinct, that precinct is automatically selected. After random selection, one additional precinct from the election will also be selected, if possible, in case a discrepancy in vote tallies occurs that necessitates further auditing.

(a) The board shall select up to two races and up to two ballot issues from the selected precinct to audit. If there is only one race and/or ballot issue, that one is automatically selected. The selections may not include:

- (i) a retention election for a judicial candidate; or
- (ii) a race in which a candidate was unopposed.

(3) If audit selection is based on ballot styles, the board of county commissioners shall utilize current official ballot style information provided by the county conducting the audit. One ballot style in the election shall be selected. If there is only one ballot style, that ballot style is automatically selected. After random selection of the ballot style to be audited, an additional ballot style from the election will also be selected, if possible, in case a discrepancy in vote tallies occurs that necessitates further auditing.

(a) The board shall select up to two races and up to two ballot issues from the selected ballot style to audit. If there is only one race and/or ballot issue, that one is automatically selected. The selections may not include:

- (i) a retention election for a judicial candidate; or
- (ii) a race in which a candidate was unopposed.

(b) If a selected ballot style has more than 2500 ballots cast and the ballots were counted by more than one vote-counting machine, the board of county commissioners may further narrow the audit by selecting one vote-counting machine used to count the selected ballot style.

(4) The board shall notify the county election administrator of the selections in a public meeting.

(5) The board shall appoint individuals to serve on an audit committee, complying in number and composition with 13-17-504, MCA.

(6) The county audit committee shall conduct the audit pursuant to 13-17-506 and 13-17-510, MCA.

(7) Once the county audit committee has conducted a random-sample audit, the county election administrator shall submit the results to the Secretary of State on an approved form.

AUTH: 13-17-510, MCA

IMP: 13-17-504, 13-17-506, 13-17-510, MCA

REASONABLE NECESSITY: On April 19, 2023, the Governor of Montana signed into law House Bill (HB) 172 which allows boards of county commissioners to request a random-sample audit of vote-counting machines after a nonfederal election and directs the Secretary of State to promulgate rules defining the process and procedure. The Secretary proposes NEW RULE I as the process for conducting a postelection audit for a nonfederal election. The process proposed incorporates postelection audit best practices in order to promote citizens' confidence in elections.

4. The rule proposed to be amended is as follows, stricken matter interlined, new matter underlined:

44.3.1719 SELECTION PROCESS FOR RANDOM-SAMPLE AUDIT

POSTELECTION AUDIT PROCESS FOR A FEDERAL ELECTION (1) Within seven to nine days after a federal election, the Secretary of State shall will call a public meeting of the state board of canvassers, to randomly select the races, ballot issues, and precincts to be audited pursuant to the Postelection Audit Act, Title 13, chapter 17, part 5, MCA. ~~Such~~ The public meeting will be posted no later than five days prior to the meeting date on the Secretary of State's ~~web site~~ website.

(2) A county ~~exempt from the postelection audit requirements because it does not use a vote counting machine or~~ that has a race that is within the margins of a recount pursuant to Title 13, chapter 16, part 2, MCA, shall notify the Secretary of State of its exemption no later than seven days after the election by submitting a notice for exemption on the form approved by the Secretary of State.

(3) Pursuant to 13-17-503, MCA, at least ~~5~~ 10% of the precincts in each county, or a minimum of ~~one~~ two precincts in a each county, shall be audited, whichever is greater. If there is only one precinct, that precinct is automatically selected. The state board of canvassers shall utilize current official precinct information provided by the counties to the Secretary of State to determine the number of precincts to be audited per county. Three additional precincts, or as many as possible up to three, in each county will be selected pursuant to ~~13-17-505, MCA~~, in case a discrepancy in vote tallies occurs that necessitates further auditing.

~~(4) To select the specific races and precincts to be audited, the board shall use ten-sided dice with numerals from 0 to 9 as the method of random selection. One, two, or three dice shall be used as specified below. The dice shall be red, white, and blue in color where red is the first number, white is the second number, and blue is the third number, if necessary.~~

~~(a) The precincts shall be numbered with consecutive numbers from 00 up to the actual number of precincts for counties having from 11 to 100 precincts, i.e., precinct 1 is numbered 01, precinct 2 is numbered 02 and so on until all the precincts in a county have been numbered. Precinct 100 will be numbered 00. For counties with 101 or more precincts, the precincts shall be numbered with consecutive numbers from 101 up to the actual number of precincts.~~

~~(b) One or two ten-sided dice shall be used to select one statewide office race, if any, one federal office race, one legislative office race, and one statewide ballot issue, if any, by assigning a number to each district or race based on its order of placement on the ballot.~~

~~(c) One ten-sided die shall be used to select the precinct to be audited for counties consisting of ten or less precincts, with 0 representing precinct 10.~~

~~(d) Two ten-sided dice shall be utilized to select the precinct or precincts to be audited for those counties consisting of 11 to 100 precincts.~~

~~(e) Three ten-sided dice shall be utilized to select the precincts to be audited for any counties consisting of more than 100 precincts.~~

~~(f) The board may decide to assign a number range of equal intervals to each precinct to reduce the number of dice throws needed, e.g., 0 – 2 = precinct 1, 3 – 5 = precinct 2, 6 – 8 = precinct 3, etc.~~

(4) The state board of canvassers shall select the races, ballot issues, and precincts by rolling ten-sided dice with numerals from 0 to 9. The dice shall be red, white, and blue, with red as the first digit, white the second, and blue the third. For

example, rolling 1 on a red die, 2 on a white die, and 3 on a blue die, would indicate the number 123.

(5) To select precincts, each shall be assigned numbers which, when matched with dice rolls, indicate the precincts to be audited.

(a) For counties consisting of ten or fewer precincts, each shall be assigned numbers 1-10. One red, ten-sided die shall be rolled. The number on the die shall be the precinct audited. (The number zero shall represent precinct 10).

(b) For counties having from 11 to 100 precincts, since two dice will be needed, each precinct must be assigned two-digit numbers. For example, number 1 is 01, 2 is 02, and so on up to the number of precincts in the county. Precinct 100 shall be assigned 00. A red and a white ten-sided die shall be rolled, with red indicating the first digit, and white the second digit. The number rolled shall be the precinct audited (i.e., a red 3 and white 2 shall designate precinct 32.).

(c) For counties with 101 or more precincts, three dice will be needed, and precincts shall be assigned three-digit numbers from 001 up to the actual number of precincts. The red die indicates the first digit, white the second, and blue the third.

(d) The board may decide to assign a number range of equal intervals to each precinct to reduce the number of dice throws needed, e.g., 0 - 2 = precinct 1, 3 - 5 = precinct 2, 6 - 8 = precinct 3, etc.

(5)(6) The board shall determine the order in which board members will throw the dice. Board members will rotate dice throwing after each 30-minute interval. A ribbed tumbler and dice tray shall be utilized to accomplish the dice throw. The Secretary of State ~~will shall~~ record the results on the prescribed form.

(7) The selection of races and ballot issues designated in 13-17-503, MCA, shall be made in the same manner as described above for precincts. Each race or ballot issue shall be assigned a number using placement on the ballot to determine the order. One red die shall be rolled for 10 or fewer races and a red and a white die for 11 or more. The number rolled shall indicate the race or ballot issue to be audited in the precincts previously selected.

(6)(8) Once the races and the precincts to be audited have been selected, the Secretary of State ~~will shall~~ notify each county election administrator of the race and precinct selections and post the selections on the Secretary of State's ~~web site~~ website.

(9) If a request is made to audit a countywide race pursuant to 13-17-503, MCA, selection of the race(s) must be done by using a statistically random technique chosen by the board of county commissioners. The precincts used for the audit must be the same precincts selected by the state board of canvassers.

(7) ~~The Secretary of State in collaboration with the counties will provide guidance to the counties as to the method the counties will use to ensure all individual precinct ballots, including but not limited to each precinct's absentee ballots, are accounted for in a manner that will correlate to a specific vote-counting machine. The method will ensure that the postelection audit is a blind count.~~

(10) For elections where ballots were hand-counted, the audit committee, selected pursuant to 13-17-504, MCA, shall use the method to count ballots outlined in 13-15-206, MCA. If the random-sample audit results in a discrepancy of more than 0.5% of total ballots cast or five ballots, whichever is greater, another full count of the race(s) and/or ballot issue(s) shall be performed. If the discrepancy remains,

the audit committee shall count the selected race(s) and/or ballot issue(s) from the three additional precincts selected per (3). The results of all audits shall be reported to the county board of canvassers.

(11) For elections where a voting system was used to count votes, the method for the audit must be conducted as outlined in 13-17-506, MCA, and must comply with 13-17-503 and 13-17-504, MCA. Discrepancies in results must be addressed pursuant to 13-17-507, MCA.

(12) Once the county audit committee has conducted a random-sample audit, the county election administrator shall submit the results to the Secretary of State on an approved form. These will be posted on the Secretary of State's website.

AUTH: 13-17-503, MCA

IMP: 13-17-503, 13-17-504, 13-17-505, 13-17-506, 13-17-507, MCA

REASONABLE NECESSITY: On June 29, 2023, the Governor of Montana signed into law Senate Bill (SB) 254. SB 254 removes the exemption from a postelection audit for counties that tabulate their votes by hand. The proposed amendment provides the audit process for elections where ballots are hand counted. On May 2, 2023, the Governor of Montana signed into law Senate Bill (SB)197 which increases the number of races included in the postelection audit. The proposed amendment increases the number of races to reflect the numerical change established in SB 197. On April 19, 2023, the Governor of Montana signed into law House Bill (HB) 172 which permits boards of county commissioners to request the addition of a countywide race to the random-sample audit of vote-counting machines after a federal election. The Office of the Secretary of State is proposing amendments to ARM 44.3.1719 to reflect the changes in statute applicable to a postelection audit for a federal election. The proposed rules incorporate the legislature's amendments to 13-1-101, 13-17-503, and 13-17-505, MCA. Additional proposed amendments include revisions to the current selection process to enhance readability and clarification of the meaning of "board."

5. The rules proposed to be repealed are as follows:

44.3.1718 DEFINITIONS

AUTH: 13-17-503, MCA

IMP: 13-17-503, MCA

REASONABLE NECESSITY: The Office of the Secretary of State is proposing repeal of ARM 44.3.1718. The definition of "blind count" is no longer necessary because the proposed amendments to ARM 44.3.1719 remove use of the term. Also, the definition of "board" does not apply to all rules of subchapter 17. "Board" in ARM 44.3.1719 refers to the state board of canvassers for a federal election, defined in 13-15-502, MCA. The board in proposed NEW RULE I, describing a nonfederal election, refers to the board of county commissioners.

44.3.1720 REPORTING PROCESS FOR RANDOM-SAMPLE AUDIT

AUTH: 13-1-202, 13-17-503, MCA

IMP: 13-17-505, 13-17-506, 13-17-507, MCA

REASONABLE NECESSITY: The Office of the Secretary of State is proposing a repeal of ARM 44.3.1720 because it is no longer necessary. The process for reporting results and for performing random-sample audits for a federal election has been incorporated into the proposed amendments to ARM 44.3.1719.

6. With regard to the requirements of 2-4-302(1)(c), MCA, it has been determined that these proposed rule changes will not have a fiscal impact and no persons will be affected.

7. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Angela Nunn, Secretary of State's Office, P.O. Box 202801, Helena, Montana 59620-2801, or by e-mailing angela.nunn@mt.gov, and must be received no later than 5:00 p.m., January 19, 2024.

8. Austin James, Chief Legal Counsel, Secretary of State's Office, has been designated to preside over and conduct the hearing.

9. The Secretary of State maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list may submit their request online at <https://sosmt.gov/arm/secretary-of-state-administrative-rules/> or submit a written request which includes the name and contact information of the person who wishes to receive notices. Written requests may be mailed or delivered to the Secretary of State's Office, Administrative Rules Services, 1301 E. 6th Avenue, P.O. Box 202801, Helena, MT 59620-2801, or emailed to sosarm@mt.gov.

10. With regard to the bill sponsor contact requirements of 2-4-302, MCA, the primary bill sponsors, Representative David Bedey, Senator Kenneth Bogner, and Senator Mike Cuffe, were contacted by phone on August 3, 2023, and by email on October 13, 2023.

11. With regard to the requirements of 2-4-111, MCA, the Secretary of State has determined that the adoption, amendment, and repeal of the above-referenced rules will not significantly and directly impact small businesses.

/s/ AUSTIN MARKUS JAMES
Austin Markus James
Rule Reviewer

/s/ CHRISTI JACOBSEN
Christi Jacobsen
Secretary of State

Dated this 12th day of December, 2023.