

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the adoption of New) NOTICE OF PUBLIC HEARING ON
Rules I, II, and III pertaining to) PROPOSED ADOPTION
postelection audits)

TO: All Concerned Persons

1. On March 18, 2010, at 10:00 a.m., the Secretary of State will hold a public hearing in Room 206 of the Capitol Building, at Helena, Montana, to consider the proposed adoption 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. on March 11, 2010, to advise us of the nature of the accommodation that you need. Please contact Jorge Quintana, Secretary of State's Office, P.O. Box 202801, Helena, Montana, 59620-2801; telephone (406) 461-5173; fax (406) 444-4240; TDD/Montana Relay Service (406) 444-9068; or e-mail jquintana@mt.gov.

3. The rules as proposed to be adopted provide as follows:

NEW RULE I DEFINITIONS (1) "Blind count" means that the members of the county audit board do not know the vote totals in the precinct(s) being audited prior to conducting the postelection audit.

(2) "Board" is defined as the state board of canvassers consisting of the attorney general, the state auditor, and the superintendent of public instruction.

AUTH: 13-17-503, MCA

IMP: 13-17-503, MCA

REASON: The 2009 Legislature enacted SB 155, which requires a random-sample audit of vote-counting machines after a federal election. This proposed new rule defines "Blind count" to clarify its meaning as used in New Rule II and defines "Board" as the State Board of Canvassers. The term "board" is used throughout the new rules which set forth the procedures for conducting the random-sample audit. This definition is necessary to eliminate the need to spell out the State Board of Canvassers each time the board is referenced.

NEW RULE II SELECTION PROCESS FOR RANDOM-SAMPLE AUDIT

(1) Within seven to nine days after a federal election, the Secretary of State shall call a public meeting of the board to randomly select the races, ballot issues, and precincts to be audited pursuant to the Postelection Audit Act. Such public meeting will be posted no later than five days prior to the meeting date on the Secretary of State's web site.

(2) A county exempt from the postelection audit requirements because it does not use a vote-counting machine or 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 request for exemption on the form approved by the Secretary of State.

(3) Pursuant to 15-17-503, MCA, at least 5% of the precincts in each county, or a minimum of one precinct in a county, shall be audited, whichever is greater. The board 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 in each county will be selected pursuant to 15-17-505, 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.

(5) 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 shall record the results on the prescribed form.

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

(7) The Secretary of State in collaboration with the counties will prescribe 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 prescribed method will ensure that the postelection audit is a blind count.

AUTH: 13-17-503, MCA

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

REASON: The 2009 Legislature enacted SB 155, which requires a random-sample audit of vote-counting machines after a federal election. This proposed new rule sets forth the process to be used for selecting precincts, races, and ballot issues for the postelection audit. This rule is necessary to provide guidance and direction to the State Board of Canvassers as to how to conduct the random selection process and to provide guidance to the counties regarding the postelection audit process. A review of other states' postelection audit information revealed that the use of ten-sided dice is an effective and simple way to conduct a random selection process and the best practice to ensure a fair and random sample. The random selection process set forth in this rule is based on procedures utilized in Marin County, California (3/11/07), that were developed by Arel Cordero and David Wagner, University of California, Berkeley, CA, and David Dill, Stanford University, Stanford, CA, and published in an abstract entitled "The Role of Dice in Election Audit—Extended Abstract," June 16, 2006.

NEW RULE III REPORTING PROCESS FOR RANDOM-SAMPLE AUDIT

(1) Once the county audit committee has performed the random-sample audit pursuant to the procedures specified in 13-17-503 and 13-17-504, MCA, the county election administrator shall notify the Secretary of State of the results by submitting the information on a form approved by the Secretary of State.

(2) The Secretary of State shall post the results of the random-sample audit on its web site.

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

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

REASON: This rule sets out the process to be followed by the county election administrator to provide the random-sample audit results to the Secretary of State and also instructs the Secretary of State to post the results on its web site. This is necessary to ensure that the results are reported in a timely and uniform manner and that the information is made available to the public.

4. 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: Jorge Quintana, Secretary of State's Office, P.O. Box 202801, Helena, Montana 59620-2801; telephone (406) 461-5173; fax (406) 444-4240; or e-mail jquintana@mt.gov, and must be received no later than 5:00 p.m., March 25, 2010.

5. Jorge Quintana, Secretary of State's office, has been designated to preside over and conduct this hearing.

6. 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 shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above or may be made by completing a request form at any rules hearing held by the Secretary of State.

7. An electronic copy of this Proposal Notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by letter via U.S. Mail on October 28, 2010.

/s/ Jorge Quintana
JORGE QUINTANA
Rule Reviewer

/s/ Linda McCulloch
LINDA MCCULLOCH
Secretary of State

Dated this 16th day of February, 2010.