

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 44.3.104, 44.3.2014, 44.3.2015,)
44.3.2109, 44.3.2113, 44.3.2114,)
44.3.2401, 44.9.202, 44.9.301,)
44.9.303, 44.9.305, 44.9.307,)
44.9.312, 44.9.315, 44.9.402, and)
44.9.404 pertaining to elections)

TO: All Concerned Persons

1. On February 25, 2010, the Secretary of State published MAR Notice No. 44-2-158 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 520 of the 2010 Montana Administrative Register, Issue Number 4.

2. On April 15, 2010, the Secretary of State published an Amended Notice and Extension of Comment Period for MAR Notice No. 44-2-158 because it revised the statements of reasonable necessity for the proposed amendments to ARM 44.3.104, ARM 44.3.2114, and ARM 44.9.315 pursuant to e-mailed comments received from David Niss on behalf of the State Administration and Veterans' Affairs Interim Committee at page 906 of the 2010 Montana Administrative Register, Issue No. 7.

3. The Secretary of State has amended the following rules as proposed: 44.3.2015, 44.3.2113, 44.9.301, 44.9.303, 44.9.305, 44.9.307, 44.9.312, 44.9.402, and 44.9.404.

4. The Secretary of State will not amend 44.3.2014 as proposed.

5. The Secretary of State has amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

44.3.104 GUIDELINES FOR POLLING PLACE ACCESSIBILITY (1) and (2) remain as proposed.

AUTH: ~~13-1-202~~, 13-3-205, MCA
IMP: ~~13-1-202~~, 13-3-205, MCA

44.3.2109 PROCEDURES FOR CHALLENGES (1) through (4) remain as proposed.

(a) If the challenge was not made in the presence of the elector being challenged, the election administrator or election judge shall notify the challenged elector of who made the challenge and the grounds of the challenge and explain

what information the elector may provide to respond to the challenge. The notification must be made: pursuant to 13-13-301(b), MCA.

- ~~(i) within five days of the filing of the challenge if the election is more than five days away; or~~
 - ~~(ii) on or before election day if the election is less than five days away.~~
- (b) through (6) remain as proposed.

AUTH: 13-13-301, MCA

IMP: 13-13-301, MCA

44.3.2114 PROVISIONAL VOTING PROCEDURES ON ELECTION DAY AFTER THE CLOSE OF POLLS - THE SIXTH DAY AFTER ELECTION DAY

- (1) through (7) remain as proposed.
- (8) Provisional ballots must be handled ~~Consistent with 13-15-107(5), MCA,~~ a provisional ballot must be removed from its provisional outer envelope, grouped with other ballots in a manner that allows for the secrecy of the ballot to the greatest extent possible, and counted as any other provisional ballot if the elector's voter information is:
 - ~~(a) verified before 5:00 p.m. on the day after the election; or~~
 - ~~(b) postmarked by 5:00 p.m. on the day after election day and received and verified by 3:00 p.m. on the sixth day after the election.~~
- (9) through (12) remain as proposed.

AUTH: 13-13-603, MCA

IMP: 13-15-107, 13-15-301, MCA

44.3.2401 BALLOT FORM AND UNIFORMITY (1) through (6)(b) remain as proposed.

- (c) A ballot requested pursuant to Title 13, chapter 21, MCA, must be ~~sent to the elector as soon as the ballot is printed or at least 45 days in advance of an election held in conjunction with a federal general election in compliance with~~ handled as provided in 13-1-104(1), MCA; and
- (d) remains as proposed.

AUTH: 13-12-202, MCA

IMP: 13-12-202, 13-13-205, MCA

44.9.202 WRITTEN PLAN SPECIFICATIONS (1) through (1)(l) remain as proposed.

- (m) ~~sample written instructions that will be sent to the electors. The instructions must include, but are not limited to:~~ shall be consistent with 13-19-205(2)(b), MCA.
 - ~~(i) information on the estimated amount of postage required to return the ballot; and~~
 - ~~(ii) the location of the places of deposit and the days and times when ballots may be returned to the places of deposit, if the information is known, or if the information on location and hours of places of deposit is not yet known, a section~~

that will allow the information to be added before the instructions are mailed to electors.

AUTH: 13-19-105, MCA

IMP: 13-19-205, MCA

44.9.315 INACTIVE ELECTORS IN MAIL BALLOT ELECTIONS (1) and (2) remain as proposed.

AUTH: 13-19-105, MCA

IMP: 13-2-222, ~~13-13-211~~, 13-19-207, MCA

6. The Secretary of State has thoroughly considered the comments received. The comments received and the Secretary of State's responses are as follows:

COMMENT #1: The Secretary of State received the following e-mailed comment from David Niss on behalf of the State Administration and Veterans' Affairs Interim Committee regarding the proposed amendment to ARM 44.3.104:

"The amendment to ARM 44.3.104 appears to delete language regarding the accessibility of polling [sic] places that is now obsolete because the date referenced in subsection (1) has now passed. However, one of the sections cited as the authorizing section, 13-1-202, MCA, has nothing to do with accessibility standards. In fact that section authorizes the Secretary to prescribe the 'design of any election form', not accessibility standards. That section of the MCA therefore cannot serve as the authority for the amendment. For the same reason, 13-1-202, MCA cannot be one of the sections implemented by the new rule. Similarly, 13-1-202, MCA, was not amended by HB 19 and cannot, therefore, be one of the MCA sections implemented by this rule, given the language of the rationale for the rule. Additionally, I can find no amended statutory language in HB 19 that concerns the subject of this rule. The rationale is therefore erroneous."

RESPONSE #1: The Secretary of State has removed 13-1-202, MCA, as an authority and implementation statute for the rule. The statement of reasonable necessity was amended in the Amended Notice and Extension of Comment Period referenced in paragraph 2 above.

COMMENT #2: The Secretary of State received the following e-mailed comment from David Niss on behalf of the State Administration and Veterans' Affairs Interim Committee regarding the proposed amendment to ARM 44.3.2014:

"The change to ARM 44.3.2014 duplicates, word for word, the change to the implemented section made by HB 19. Because of that fact, the requirements of section 2-4-305(2), MCA, must be followed. However, the required indication of statutory language has not been made in the proposed rule."

RESPONSE #2: The Secretary of State will not proceed to amend this rule.

COMMENT #3: The Secretary of State received the following e-mailed comment from David Niss on behalf of the State Administration and Veterans' Affairs Interim Committee regarding the proposed amendments to ARM 44.3.2015:

"The rationale for this rule indicates that the rule is the result of changes to law made by HB 19, yet there were no changes made by that bill to section 13-2-514, MCA. It's therefore difficult to understand how the stated rationale can apply to a rule implementing that section of law."

RESPONSE #3: Section 13-2-514, MCA, is a pre-existing implementation statute for the rule. House Bill 19 made changes to 13-2-304, MCA, which are reflected in the rule amendments. The Secretary of State will amend the rule as proposed.

COMMENT #4: The Secretary of State received the following e-mailed comment from David Niss on behalf of the State Administration and Veterans' Affairs Interim Committee regarding the proposed amendments to ARM 44.3.2109:

"The amendments to ARM 44.3.2109 add language that now make the rule read exactly like the statute [sic] implemented. For this reason, the requirements of 2-4-305(2), MCA, must be followed."

RESPONSE #4: The Secretary of State has added language to indicate the notification is pursuant to 13-13-301(b), MCA, and has eliminated (4)(a)(i) and (ii).

COMMENT #5: The Secretary of State received the following e-mailed comment from David Niss on behalf of the State Administration and Veterans' Affairs Interim Committee regarding the proposed amendments to ARM 44.3.2113:

"Regarding the changes to ARM 44.3.2113, two of the sections cited as being implemented, sections 13-13-14 [sic] and 13-13-601, MCA, were not amended by HB 19. It's therefore difficult to see how the statement of rationale applies, to implement the law changes in HB 19, can apply to those two sections of law."

RESPONSE #5: Sections 13-13-114 and 13-13-601, MCA, are pre-existing authority for this rule. House Bill 19 made changes to 13-15-107, MCA, which necessitated the proposed rule amendments. The Secretary of State will amend the rule as proposed.

COMMENT #6: The Secretary of State received the following e-mailed comment from David Niss on behalf of the State Administration and Veterans' Affairs Interim Committee regarding the proposed amendments to ARM 44.3.2114:

"The changes to subsections (8) and (10) of ARM 44.3.2114 now make those subsections read identically with subsection (5) and (6), respectively, of section 13-15-107, MCA, and for that reason the rule format must follow the requirements of 2-4-305(2), MCA. Additionally, one of the sections cited as being implemented by the

rule , 13-15-301, MCA, was not amended by HB 19, so it's difficult to see how that section is being implemented by and/or how the rationale applies in the case of that section. Finally, most of the language of the stated rationale is a restatement of the provisions of the rule, which, under sections 2-4-305(6)(b), MCA, cannot serve as a statement of reasonable necessity."

RESPONSE #6: The Secretary of State has amended (8) to eliminate the proposed language by substituting a reference to the pertinent statutory language. The implementation statute 13-15-301, MCA, is pre-existing authority for this rule. House Bill 19 made changes to 13-15-107, MCA, which necessitated the proposed rule amendments. The statement of reasonable necessity was amended in the Amended Notice and Extension of Comment Period referenced in paragraph 2 above.

COMMENT #7: The Secretary of State received the following e-mailed comment from David Niss on behalf of the State Administration and Veterans' Affairs Interim Committee regarding the proposed amendments to ARM 44.3.2401:

"The new language in subsection (c) of ARM 44.3.2401 makes this subsection read exactly like subsection (2) of the implemented statute. The format requirements of 2-4-305(2), MCA, must therefore be followed."

RESPONSE #7: Section (6)(c) has been amended to state that a ballot must be handled as provided in 13-1-104(1), MCA.

COMMENT #8: The Secretary of State received the following e-mailed comment from David Niss on behalf of the State Administration and Veterans' Affairs Interim Committee regarding the proposed amendments to ARM 44.9.202:

"The changes to ARM 44.9.202 make the section read identically to subsection (2)(b) of the implemented section. The format requirements of 2-4-305(2), MCA, must therefore be followed."

RESPONSE #8: Section (1)(m) has been amended to state that sample written instructions shall be consistent with 13-19-205(2)(b), MCA.

COMMENT #9: The Secretary of State received the following e-mailed comment from David Niss on behalf of the State Administration and Veterans' Affairs Interim Committee regarding the proposed amendments to ARM 44.9.315:

"The statutory section cited as authorizing authority for the amendments to ARM 44.9.315 authorizes the secretary of state to adopt rules for various purposes related to mail ballots only. However, there is language in the new provisions of sections (1)(a) and (b) that appears not to concern a ballot voted by mail. If that's the case, a different section must be designated as the authorizing section."

RESPONSE #9: The Secretary of State has eliminated 13-13-211, MCA, as an implementation statute for the rule and added 13-19-207, MCA, as an implementation statute for the rule. The statement of reasonable necessity was amended in the Amended Notice and Extension of Comment Period referenced in paragraph 2 above.

/s/ Jorge Quintana
JORGE QUINTANA
Rule Reviewer

/s/ Linda McCulloch
LINDA MCCULLOCH
Secretary of State

Dated this 17th day of May, 2010.