

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I pertaining to processes and procedures for early preparation of absentee ballots) NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION)))

TO: All Concerned Persons

1. On September 20, 2011, at 9:00 a.m., the Secretary of State will hold a public hearing in the Secretary of State's Conference Room, Room 206 of the State Capitol Building, at Helena, Montana, to consider the proposed adoption of the above-stated rule.

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 September 13, 2011, 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 rule as proposed to be adopted provides as follows:

NEW RULE I PROCESSES AND PROCEDURES FOR EARLY PREPARATION OF ABSENTEE BALLOTS (1) The processes and procedures for early preparation of absentee ballots are conducted after completion of or in conjunction with the processes and procedures in 13-13-241(1) through (7), MCA.

(2) The following processes and procedures, when implemented by the election administrator, are intended to ensure the security of ballots and secrecy of votes during the early preparation of ballots not sooner than one business day before election day. The election administrator shall ensure that the early absentee ballot preparation area:

- (a) permits observers to view all procedures;
- (b) is arranged to ensure that observers do not interfere with the procedures, view the votes cast on individual ballots, or knowingly or unintentionally compromise the secrecy of the ballots;
- (c) subject to (2)(a) and (2)(b), allows observers to be located not less than 10 feet or more than 20 feet from the boundaries of the area, or a distance determined by the election administrator based on space constraints if these distances are not feasible; and
- (d) only allows access by the following, after they have taken and subscribed the official oath prescribed under Article III, section 3 of the Montana constitution:

(i) officials preparing absentee ballots, who must have identifying badges so that observers can clearly identify who is authorized to prepare ballots; and

- (ii) staff authorized by the election administrator.
- (3) The election administrator shall maintain the security of the observation area as specified in (2) and by:
 - (a) ensuring that all individuals in the observation area sign in before being permitted to be present;
 - (b) prohibiting electronic recording devices in the observation area; and
 - (c) contacting local law enforcement officials upon the occurrence of any potential or actual breach of security.
- (4) The election administrator shall maintain the secrecy of votes during the early preparation of absentee ballots by:
 - (a) following the procedures specified in (2) and (3);
 - (b) requiring that election officials open signature envelopes and secrecy envelopes in a manner to ensure that the identity of the voter cannot be connected to the voter's ballot, either by observers, by election officials, or by any authorized staff participating in the early preparation process;
 - (c) directing election officials to place the ballots in secure containers sealed with numbered security seals as necessary and when the early preparation process is completed;
 - (d) handling the ballot as provided in 13-15-201, MCA, for an elector who provides identifying information on the elector's ballot and announcing that an elector has provided identifying information, but not providing the elector's identity; and
 - (e) instructing election officials to secure all absentee voting materials consistent with the procedures specified in 13-15-205, MCA.
- (5) An absentee ballot early preparation reconciliation form:
 - (a) must be in the form prescribed by the Secretary of State;
 - (b) must be provided upon request to any observer;
 - (c) must be completed as specified on the form; and
 - (d) when completed, must be posted in the early preparation area at the conclusion of early preparation procedures.
- (6) Immediately after early preparation of absentee ballots and until ballot counting begins on election day, the prepared absentee ballots in secure containers with numbered security seals:
 - (a) must be placed in a secure location that prevents unauthorized access;
 - (b) must not be accessed except by at least two election officials acting together who:
 - (i) are authorized by the county election administrator;
 - (ii) have each taken and subscribed the official oath prescribed under Article III, section 3 of the Montana constitution; and
 - (iii) sign a log sheet each time that they access the secured ballots.
- (7) Election administrators shall maintain and make available for public inspection a security log in a form prescribed by the Secretary of State that accurately tracks seals placed on and removed from any early preparation absentee ballot container.
- (8) Nothing in this rule shall be construed to permit an election official to count absentee ballots or other ballots before election day.

AUTH: Chapter 331, Section 2, L. 2011

IMP: Chapter 331, Section 1, L. 2011

REASON: This proposed rule is consistent with the 2011 Legislature's rulemaking mandate in House Bill 530. The Legislature specified the rulemaking topics, mainly the security and secrecy of pre-election day absentee ballot preparation, but left the Secretary of State with the latitude to determine the actual processes and procedures. As required, the proposed rule provides for the allowable distance from the observers to the judges and ballots, the security in the observation area, secrecy of votes during the preparation of the ballots, and security of the secured ballot boxes in storage until tabulation procedures begin on election day.

The distance between observers and the judges and ballots is the least amount of space required to ensure the secrecy of the ballot while allowing the process to be as open as possible. The distances were determined by the Secretary of State in consultation with county election administrators, to maintain the security of the process, while allowing the process to be open, leaving some flexibility for physical space constraints. A lesser distance would not protect ballot secrecy while a greater distance would make observation of the procedures difficult. All election officials and election judges currently must have sworn or affirmed to the official oath before commencing election day duties. Because the legislation adopted in House Bill 530 permits election administrators and election judges to commence their ballot preparation duties before election day, the oath must be taken on or before the day of early preparation.

In order to maintain security in the observation area, the election administrator, election judges, and observers must understand who is authorized to perform specific tasks. By wearing identifying badges, everyone in the room will be able to clearly see who is allowed to prepare ballots, making it difficult for unauthorized persons to handle ballots. Likewise, by requiring observers to sign in, the election administrator will be able to identify those in the observation area and, if necessary, preserve a record of witnesses to any events. Electronic recording devices could allow the recording of information that may compromise the secrecy of votes. Ever increasing technological advancements could allow those in the observation areas to view and record information via an electronic device that the allowable distances discussed above are designed to protect. Consequently, the use of recording devices cannot be allowed.

The use of the ballot reconciliation forms as specified in the rule helps to create a written record of the number of absentee ballots issued, the number of absentee ballots received back, and the number of absentee ballots prepared. The use of a ballot reconciliation form for early preparation of absentee ballots is consistent with the administrative procedure already in place to reconcile all ballots on election day.

The use of tamper-proof, numbered security seals and restrictions on access to the absentee ballots allows for the creation of a paper trail as to who accessed the

containers as well as an easily identifiable method to indicate if the containers have been opened.

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., October 28, 2011.

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 U.S. mail on August 2, 2011.

/s/ JORGE QUINTANA
Jorge Quintana
Rule Reviewer

/s/ LINDA MCCULLOCH
Linda McCulloch
Secretary of State

Dated this 15th day of August, 2011.