

OFFICE OF THE SECRETARY OF STATE

SHEMIA FAGAN
SECRETARY OF STATE

CHERYL MYERS
DEPUTY SECRETARY OF STATE



ARCHIVES DIVISION

STEPHANIE CLARK
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 165
SECRETARY OF STATE
ELECTIONS DIVISION

FILED

08/10/2022 5:37 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Changes the date and time of the data used in hand count calculations

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 10/07/2022 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

CONTACT: Bob Roberts
503-986-1518
elections.sos@sos.oregon.gov

Public Service Building
255 Capitol St NE Suite 126
Salem, OR 97310

Filed By:
Bob Roberts
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 10/06/2022

TIME: 2:00 PM - 2:30 PM

OFFICER: Bob Roberts

ADDRESS: Public Service Building
255 Capitol Street NE, Suite 126
Salem, OR 97310

SPECIAL INSTRUCTIONS:

The hearing will be held via Microsoft Teams. A link to the hearing will be posted on the Elections Division website at oregonvotes.gov.

NEED FOR THE RULE(S)

This rule changes the deadline to capture the data used in hand count calculations from 12:00 p.m. the day after the date of the election, to 5:00 p.m. the fourteenth day after the date of the election. This change is necessary so that ballots that arrive timely, but after the date of the election, can be counted and reflected in the data used to determine the percentage of precincts or ballot count batches to be hand counted.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

ORS 254.529 available online at www.oregonlegislature.gov or from the agency.

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

This rule is likely to have a minimal impact on racial equity. ORS 254.529 adopts specific parameters the Secretary must apply to determine the ballots to be hand counted. This rule adopts additional parameters that require the Secretary to select the contests and ballots by random sample and to provide notification to those individuals that may be affected by the results of the hand count.

By requiring random selection of the contests and ballots, instead of selection based on content and location, this rule protects against implicit bias. Additionally, to the extent that affected parties include racially diverse individuals and organizations, this rule may increase racial equity by ensuring that historically less-involved populations are aware of the opportunity to observe the hand count process.

FISCAL AND ECONOMIC IMPACT:

The proposed rule may cause minimal fiscal or economic impact to state agencies or local governments.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) There may be minimal fiscal impact for the Elections Division to perform the task required by this rule, to answer questions regarding compliance with this rule, or for other unanticipated reasons. There may be minimal fiscal impact to county election offices, who must comply with this rule. (2) (a)-(c) This rule is not expected to impact small businesses.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

They were not as this rule does not directly affect small businesses.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

The rule is proposed for amendment to allow the process to capture ballots mailed timely, received after election day – a recent statutory change. Further, any fiscal impact of these amendments is expected to be minimal at most.

AMEND: 165-007-0290

RULE SUMMARY: This amendment provides that the results posted to the Secretary of State's electronic reporting system for unofficial results as of 5 p.m. the fourteenth day after the date of the election will be used calculate the margin of victory and to determine the percentage of precincts or ballot count batches to be hand counted.

CHANGES TO RULE:

165-007-0290

Hand Count of Ballots ¶

(1) This rule is adopted to implement hand counts of ballots counted by the vote tally system in the county at every primary, general, or special election as required by ORS 254.529.¶

(2) At every election (whether primary, general, or special), a county elections official shall determine whether to conduct:¶

(a) A hand count, as described in ORS 254.529, which shall only be required in an election where a state contest may be held regarding candidates or measures; or¶

(b) A risk limiting audit in the manner described in ORS 254.532.¶

(3) The hand count must be compared to the tally of votes produced by a vote tally system for the same ballots.¶

(a) The number of ballots that must be hand counted is dependent on the margin of victory between the two candidates in the same race receiving the largest number of votes in the county, as determined by the unofficial tally of ballots. Depending on t.¶

(b) The margin of victory, which will be determined by the using the unofficial results posted to the Secretary of State's electronic reporting system for unofficial results, as of non-5 p.m. the fourteenth day after the date of the election.¶

(c) Depending on the margin of victory, either 10%, 5% or 3% of all precincts or of ballots in ballot count batches

will be hand counted.¶

(4) For purposes of implementing ORS 254.529 and this rule:¶

(a) "Margin of victory" means the percentage difference between the first and second place candidates in a given contest. For a contest for state measure the "margin of victory" is the difference between the "yes" and "no" votes.¶

(b) "Precinct" means any precinct with registered voters.¶

(c) "Ballot count batch" means a subset of ballots which can be associated with a subtotal in the vote tally system.¶

(5) Not later than 5 p.m. on the 15th business day after the date of the election the Secretary shall randomly select the election contests for which the county elections official is to conduct the hand count. The Secretary shall randomly draw for each county to select:¶

(a) An office to be voted on in the state at large and state measure contests, if available, for which ballots are to be hand counted; and¶

(b) The precincts or ballot count batches in which ballots are to be hand counted. The same precincts or ballot count batches will be used to conduct the hand counts on all three election contests to be hand counted.¶

(c) If the randomly selected office to be voted on in the state at large is the same contest in the county receiving the largest number of votes between two candidates, another office to be voted on in the state at large will be randomly selected.¶

(6) Once the Secretary has randomly selected the election contests and the precincts or ballot count batches in which ballots are to be hand counted, the Secretary of State will notify county elections officials. In addition to identifying the precincts or ballot batches to be hand counted, the notification will include the office to be voted on in the state at large, the state measure and the contest between the two candidates receiving the largest number of votes in the county.¶

(7) Not later than the 2nd business day after the date the sample is generated the Secretary of State will notify all affected candidates for selected election contests, chief petitioners or legislative sponsor of the state measure selected and any registered opponent of the measure. Notification shall be by email, or first-class mail, if an email address is unavailable. ¶

(8) Members of the public may observe the hand count. The County Elections Official shall permit only so many observers as will not interfere with an orderly procedure. ¶

(9) A county elections official may only begin the hand count after certification of the official results to the Secretary of State, but not later than the ~~30~~²⁷th day after the election. All hand counts must be completed no later than the 35th day after the election.¶

(10) If a comparison of the tally of votes produced by a vote tally system with the tally of votes produced by the hand count shows that the tally of votes produced by the vote tally system differs by no more than one-half of one percent of the total votes cast in the contest, from the tally of votes produced by the hand count, the hand count is complete and the county elections official reports the results as provided in subsection (12). If the difference exceeds one-half of one percent of the total votes cast in the contest, a second hand count is conducted as provided in subsection (13).¶

(11) Valid votes that have been marked by the voter outside the vote targets or using a marking device that cannot be read by the vote tally system shall not be included in making the determination whether the voting system has met the standard of acceptable performance for any precinct or ballot batch under ORS 254.529(7)(a) through (c).¶

(12) Upon completion of the hand count, but not later than the 37th day after the election, the county elections official must submit to the Secretary of State form SEL 798 detailing any difference and providing an explanation of the difference between the hand count and the tally of votes produced by the vote tally system in the county. Over votes and under votes are excluded from the totals on the SEL 798. Valid votes referenced in (11) of this rule, are to be listed as exceptions on the SEL 798.¶

(13) If after the first hand count, a second hand count is required to be conducted, the county elections official must again upon completion, but not later than the 37th day after the election, submit to the Secretary of State form SEL 798 detailing any difference and providing an explanation of the difference between the hand count and the tally of votes produced by the vote tally system in the county.¶

(14) If the county elections official is required under ORS 254.529(7)(d) to conduct a hand count of all ballots counted by the vote tally system, the county elections official not later than the 37th day after the election must certify to the Secretary of State and any other appropriate elections official an amended abstract of votes.

Statutory/Other Authority: ORS 246.150

Statutes/Other Implemented: ORS 254.529