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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

ELECT 7-2021

CHAPTER 165
SECRETARY OF STATE
ELECTIONS DIVISION

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ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Clarifies when hand counts are required to be conducted.

EFFECTIVE DATE: 09/10/2021 THROUGH 03/08/2022

AGENCY APPROVED DATE: 08/31/2021

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NEED FOR THE RULE(S):

The changes to this rule clarify the elections at which a hand count is required to be conducted. ORS 254.529 does not define the term "special election" and this clarification is needed to ensure a consistent interpretation and application of the law and to be transparent about when hand counts are required to be conducted. These changes also allow the Elections Division to send an email to stakeholders notifying them if they will be affected by the hand count process.

JUSTIFICATION OF TEMPORARY FILING:

The Secretary of State, Elections Division finds that failure to act promptly will result in serious prejudice to the public interest. County elections officials and the public will be affected if these rules are not effective in time for the September 2021 local election. The Elections Division will separately be conducting a permanent rulemaking process to allow for public comment on these changes.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

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

AMEND: 165-007-0290

RULE TITLE: Hand Count of Ballots

RULE SUMMARY: The changes to this rule clarify the elections at which a hand count is required to be conducted and outline the responsibility of the county elections officials to determine the type of post-election verification procedure to be conducted. Allows the Elections Division to send notices by email.

RULE TEXT:

- (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. 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 the margin of victory, which will be determined by the results posted to the Secretary of State's electronic reporting system for unofficial results, as of noon the day after the date of the election, 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 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 30th 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