WSR 22-09-039
PROPOSED RULES
SECRETARY OF STATE
[Filed April 13, 2022, 1:25 p.m.]

Original Notice.
Preproposal statement of inquiry was filed as WSR 21-13-076.
Title of Rule and Other Identifying Information: Permanent adoption of WAC changes related to risk limiting audit processes and procedures.
Hearing Location(s): On May 24, 2022, at 3:00 p.m., at 520 Union Avenue, Olympia, 98504. The hearing will be conducted using Microsoft Teams. To join the hearing, call phone 206-899-2560 and enter attendance code 899 460 273#. People will be able to hear and comment.
Date of Intended Adoption: May 25, 2022.
Submit Written Comments to: Fina Ormond, P.O. Box 40229, Olympia, WA 98504, email fina.ormond@sos.wa.gov, fax 360-664-4169.
Assistance for Persons with Disabilities: Contact Fina Ormond, phone 360-902-4146, fax 360-664-4169, email Fina.ormond@sos.wa.gov.
Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Update rules to make the post-election risk limiting audit more easily understood and efficient.
Reasons Supporting Proposal: Consistency in operation in all county election offices within the state.
Statutory Authority for Adoption: RCW 29A.04.611.
Rule is not necessitated by federal law, federal or state court decision.
Name of Proponent: Randy Bolerjack, deputy secretary of state, governmental.
Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Stuart Holmes, Olympia, 360-902-4151.
A school district fiscal impact statement is not required under RCW 28A.305.135.
A cost-benefit analysis is not required under RCW 34.05.328.
This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:
Is exempt under RCW 19.85.025(3) as the rules relate only to internal governmental operations that are not subject to violation by a nongovernment party.

April 13, 2022
Randy Bolerjack
Deputy Secretary of State

OTS-3105.6

AMENDATORY SECTION (Amending WSR 19-01-102, filed 12/18/18, effective 1/18/19)

WAC 434-261-114 Definitions. As used in this rule, unless stated otherwise:
(1) "Audit board" means a team of two people assigned to review voter choices on ballots selected for audit.

(2) "Ballot comparison audit" means a type of risk-limiting audit in which the audit board examines and reports voter markings for a designated contest (or contests) on randomly selected ballots, then compares them to the corresponding cast vote records until the audit results reflect with a strong amount of certainty that the reported tabulation outcome is correct.

(3) "Ballot manifest" means a ((report that describes in detail)) document that indicates how the ballots are organized and stored, including identification of each batch of ballots by the voting system batch number, as well as the number of ballots in each batch.

((~~(2)~~)) (4) "Ballot polling audit" means a type of risk-limiting audit in which the audit board examines and reports ((to the secretary of state)) voter markings for a ((particular race)) designated contest on ballots selected randomly until the audit results reflect with a strong amount of certainty that the reported tabulation outcome is correct.

((~~(3)~~)) (5) "Cast vote record" or "CVR" means a record of all ((votes)) voter markings produced by a single voter on a ballot card, presented in electronic form, and is defined as a ballot in accordance with RCW 29A.04.008.

((<del>(4) "Comparison audit" means a type of risk-limiting audit in which the audit board examines and reports to the secretary of state voter markings on randomly selected ballots, then compares them to the voting system's tabulation as reflected in the corresponding cast vote records.

(5) "Hash" is a number generated from a string of text. The hash must be generated by a formula in such a way that it is extremely unlikely that some other text will produce the same hash value.</del>))

(6) "Reported tabulation outcome" means the presumed winning and losing candidates or voting choices of a ballot contest as reflected in preliminary results.

(7) "Unofficial results" means the tabulation results produced by the voting system at a specific point in time that will be used for comparison during the audit process.

(8) "Risk limit" means the largest statistical probability that an incorrect reported tabulation outcome is not detected ((and corrected)) in a risk-limiting audit.

((~~(8)~~)) (9) "Risk-limiting audit" or "RLA" means a post-election audit of votes on paper ballots and voter-verifiable paper audit trail (VVPAT) records that makes use of statistical principles and methods, is designed to limit the risk of certifying an incorrect election outcome, and is conducted in accordance with RCW 29A.60.185. ((Ballot polling audits and comparison audits are two types of risk-limiting audits.

(9) "RLA tabulation" means the tabulation of all randomly selected ballots cast by voters registered in the county, and any accepted provisional ballots that the county opts to include.))

(10) "Risk-limiting audit tool" or "RLA tool" means the software and user interfaces provided by the secretary of state in order to ((compare the randomly selected ballots to the cast vote record for the RLAs)) conduct the risk-limiting audit.

(11) "Target contest" means a contest selected by the secretary of state or county auditor for a risk-limiting audit that will determine whether the risk limit has been met.

[Statutory Authority: RCW 29A.04.611, 29A.24.091, 29A.24.311, 29A.60.021, 29A.60.185, 29A.60.170, 29A.60.110, and 29A.60.235. WSR 19-01-102, § 434-261-114, filed 12/18/18, effective 1/18/19.]

AMENDATORY SECTION (Amending WSR 19-01-102, filed 12/18/18, effective 1/18/19)

WAC 434-261-115 Post-election audits. If the county auditor chooses to conduct a post-election risk-limiting audit under RCW 29A.60.185, the auditor must ((conduct)) use one of the types of audits listed in RCW 29A.60.185. ((The county auditor may choose a risk-limiting audit, one of the options available under RCW 29A.60.185 and this rule.

(1) If choosing a risk-limiting audit, counties that use a voting system capable of exporting CVRs must conduct a comparison audit.

(2) If choosing a risk-limiting audit, counties that use a voting system incapable of exporting CVRs must conduct a ballot polling audit.))

[Statutory Authority: RCW 29A.04.611, 29A.24.091, 29A.24.311, 29A.60.021, 29A.60.185, 29A.60.170, 29A.60.110, and 29A.60.235. WSR 19-01-102, § 434-261-115, filed 12/18/18, effective 1/18/19.]

AMENDATORY SECTION (Amending WSR 19-19-033, filed 9/11/19, effective 10/12/19)

WAC 434-261-116 Preparing for a risk-limiting audit. (1) At least ((ninety)) 45 days before a primary or election, a county intending to conduct a risk-limiting audit must notify the secretary of state. This notification must include information about the districts and offices to be included in the audit.

(2) After receiving notice from a county of the intent to conduct a risk-limiting audit and no later than ((thirty)) 30 days before the primary or election, the secretary of state will establish and publish the risk limit(s) that will apply in ((RLAs)) risk-limiting audits for that election. The secretary of state may establish different risk limits for ballot comparison audits and ballot polling audits, and for audits of statewide and county contests. In ballot comparison audits, the risk limit will not exceed five percent for statewide contests, and ((ten)) 10 percent for county contests.

(3) ((No later than eighteen days before the primary or election, the county auditor must appoint an audit board to conduct the risk-limiting audit. Observers nominated by the major political party county chairpersons in accordance with RCW 29A.60.170 may be present during the audit. Members of the canvassing board may serve as members of the audit board. The county auditor or members of their staff may assist the audit board in conducting the audit. All)) Observers are allowed in ((accordance with)) the same manner as RCW 29A.60.170 and WAC 434-261-020.

(4) The county must maintain an accurate ballot manifest in a form approved by the secretary of state and independent of the voting system.

((~~(a) In the case of centrally counted paper ballots, the ballot manifest must uniquely identify for each tabulated ballot the scanner on which the ballot is scanned, the ballot batch of which the ballot is a part, the number of ballots in the batch, and the storage container in which the ballot batch is stored after tabulation.~~))

<u>(5)</u> The county must secure and maintain in sealed ballot containers all tabulated ballots in the batches and order they are scanned. The county must maintain and document uninterrupted chain-of-custody for each ballot storage container.

((~~(b) In the case of electronic ballots cast on direct recording electronic voting devices (DREs), the ballot manifest must uniquely identify the device on which the ballot was cast or tabulated, the number of ballots cast or tabulated on the device, and the storage container or location in which each paper ballot or VVPAT is stored. The county must maintain and document uninterrupted chain-of-custody for each DRE and VVPAT. Ballots cast on each DRE and VVPAT must constitute a single batch.~~

~~(5)~~)) <u>(6)</u> No later than the sixth day after election day, the county must pause or finish tabulating all ballots cast by voters registered in the county received ((~~through that day~~)) <u>and ready for counting. The results produced at this time constitute the unofficial results to be used in the risk-limiting audit</u>. The county may, but is not required to, include in the ((~~RLA tabulation~~)) <u>unofficial results</u> any provisional ballots that have been verified and accepted on or before the sixth day after election day. Immediately after ((~~completing~~)) <u>producing</u> the ((~~RLA tabulation~~)) <u>unofficial results</u>, and to the extent permitted by its voting system, the county must also generate and preserve:

(a) ((~~A summary~~)) <u>An unofficial</u> results report, showing overvotes, undervotes, and <u>the number of</u> valid write-in votes<u>, if conducting a ballot polling audit</u>; <u>or</u>

(b) ((~~A results file export suitable for uploading to the secretary of state's election night reporting system; and~~

~~(c)~~)) A ((~~CVR~~)) <u>cast vote record</u> export, if conducting a <u>ballot</u> comparison audit.

((~~(6)~~)) <u>(7)</u> Counties conducting a <u>ballot</u> comparison audit must verify that((~~:~~

~~(a)~~)) <u>the</u> number of individual ((~~CVRs~~)) <u>cast vote records</u> in its ((~~CVR~~)) <u>cast vote record</u> export equals the aggregate number of ballot((~~s~~)) <u>cards</u> reflected in the county's ballot manifest ((~~as of the sixth day after election day; and~~

~~(b) The vote totals for all choices in all ballot contests in the CVR export equals the vote totals in the summary results report for the RLA tabulation.~~

~~After verifying the accuracy of the CVR export, the county must apply a hash value to the CVR export file using the hash value utility provided by the secretary of state.~~

~~(7) Comparison audit uploads.~~)) <u>at the time the unofficial results are produced.</u>

<u>(8) Copies of cast vote records used during the risk-limiting audit will be destroyed no later than 10 days following county certification.</u>

<u>(9)</u> No later than 5:00 p.m. on the sixth day after election day, each county conducting a <u>ballot</u> comparison audit must ((~~upload~~)) <u>submit as directed by the secretary of state</u>:

(a) Its verified ((~~and hashed~~)) ballot manifest((~~, and the ballot manifest's hash value, to the secretary of state's office~~)); <u>and</u>

(b) Its verified ((~~and hashed CVR~~)) cast vote record export((~~, and the CVR export's hash value, to the secretary of state's office; and~~

~~(c) Its RLA tabulation results export to the secretary of state's election night reporting system.~~

~~(8) Ballot polling audit uploads~~)).

The secretary of state may direct counties to submit additional materials as required to conduct the risk-limiting audit.

(10) No later than 5:00 p.m. on the sixth day after election day, each county conducting a ballot polling audit must submit ((~~or upload:~~

~~(a)~~)) as directed by the secretary of state:

(a) Its verified ((~~and hashed~~)) ballot manifest((~~, and the ballot manifest's hash value, to the secretary of state's office;~~

~~(b) Its cumulative tabulation report, to the secretary of state's office; and~~

~~(c) Its RLA tabulation results export to the secretary of state's election night reporting system~~)); and

(b) Its unofficial results report, showing overvotes, undervotes, and the number of valid write-in votes.

The secretary of state may direct counties to submit additional materials as required to conduct the risk-limiting audit.

((~~(9)~~)) (11) The secretary of state will convene a public meeting on the seventh day after election day to establish a random seed for use with the ((~~secretary of state's RLA~~)) risk-limiting audit tool's ((~~random~~)) pseudorandom number generator.

((~~(10)~~)) The seed is a number consisting of at least ((~~twenty~~)) 20 digits, and each digit will be selected in order by sequential rolls of a ((~~ten-sided~~)) 10-sided die. The secretary of state will designate ((~~one or more staff members~~)) individuals to take turns rolling the die. The secretary of state will publish online the random seed after it is established.

((~~(11)~~)) (12) No later than 5:00 p.m. on the Friday after election day, the secretary of state will create a list of potential statewide contests using the criteria in (a) through (e) of this subsection, and then select by lot a statewide contest from that list. The secretary of state will also create for each county a list of potential contests wholly contained within that county using the criteria in (a) through (e) of this subsection, and select a contest by lot for each county ((~~at least one ballot contest other than the selected statewide contest. The county auditor shall randomly select a ballot contest for audit if in any particular election there is no statewide contest. These will be considered the target contests for the RLA. The secretary of state will publish online a complete list of all target contests.~~

~~(12) The target contest with the closest diluted margin for each county determines the number of ballots that must be examined during the RLA.~~

~~(13) The secretary of state will determine the number of ballots to audit to satisfy the risk limit for the target contests based on the ballot manifests submitted by the counties. The number of ballots to audit will be determined according to the formulas maintained on file in the secretary of state's office.~~)) from that list. These will be considered the target contests for the risk-limiting audit. The secretary of state will publish online a complete list of all target contests.

The secretary of state will consider at least the following factors in selecting the potential target contests:

(a) Contests that contain two or more positions/candidates;

(b) The geographical scope of the contests;

(c) The number of ballots counted in the contests;

(d) The closeness of the reported tabulation outcome of the contests; and

(e) The ability of the county staff to complete the audit before the canvass deadline.

(13) In addition to the randomly selected contest(s) and in coordination with the secretary of state's office, counties may choose to conduct a risk-limiting audit of a congressional or legislative district if all counties represented by the district agree to participate.

(14) The ((secretary of state)) risk-limiting audit tool will randomly select the individual ballots to audit. The ((secretary of state)) risk-limiting audit tool will use a ((random)) pseudorandom number generator with the seed established under ((subsection (10) of)) this section to identify individual ballots as reflected in the county ballot manifests. No later than the seventh day after election day, the secretary of state will notify each county of the randomly selected ballots that each county must audit ((no later than the seventh day after election day)).

[Statutory Authority: RCW 29A.04.611. WSR 19-19-033, § 434-261-116, filed 9/11/19, effective 10/12/19. Statutory Authority: RCW 29A.04.611, 29A.24.091, 29A.24.311, 29A.60.021, 29A.60.185, 29A.60.170, 29A.60.110, and 29A.60.235. WSR 19-01-102, § 434-261-116, filed 12/18/18, effective 1/18/19.]

AMENDATORY SECTION (Amending WSR 19-01-102, filed 12/18/18, effective 1/18/19)

WAC 434-261-117 Conducting a risk-limiting audit. ((The audit board)) County elections staff must locate and retrieve((, or observe as county election staff locate and retrieve,)) each randomly selected ballot ((or VVPAT record)) from the appropriate storage container. ((The audit board)) This process may be observed according to WAC 434-261-020. County elections staff must verify that the seals on the appropriate storage containers are those recorded on the applicable chain-of-custody logs.

(1) ((In counties conducting comparison audits,)) The county auditor will determine the number of audit boards needed to perform the audit and assign two people to each audit board. The audit board(s) will review each randomly selected paper ballot ((must be examined)) and report voter markings or choices in ((all)) the designated contests ((must be reported)) using the ((RLA)) risk-limiting audit tool or other means specified by the secretary of state. ((The audit board may refer to the digital image of the audited ballot captured by the voting system in order to confirm it retrieved the correct ballot randomly selected for audit.)) The audit board(s) must complete the audit of all ballots randomly selected for audit within ((four)) two business days to allow time for additional ballots to be included if a discrepancy is identified in accordance with RCW 29A.60.185(3).

(2) ((In counties conducting ballot polling audits, the audit board must examine and report the voter markings or choices in only the target contest on each randomly selected ballot in a form approved

~~by the secretary of state. The audit board may refer to the digital~~ ~~image of the audited ballot captured by the voting system in order to~~ ~~confirm it retrieved the correct ballot. The audit board must complete~~ ~~its reports of all ballots randomly within four business days to allow~~ ~~time for additional ballots to be included if a discrepancy is identi-~~ ~~fied in accordance with RCW 29A.60.185(3).~~

~~(3)~~)) The audit board(s) must interpret voter markings on ballots selected for audit in accordance with WAC 434-261-086. If the audit board members cannot unanimously agree on the voter's intent, they must indicate the inability to agree in the appropriate contest in the ((~~RLA~~)) risk-limiting audit tool's audit board user interface, or ((~~the ballot polling audit form approved~~)) other means specified by the secretary of state.

((~~To the extent applicable, the secretary of state will compare~~ ~~the audit board's reports of the audited ballots to the corresponding~~ ~~CVRs~~)) (3) In order to maintain voter privacy, the secretary of state will review the results of the audit as presented by the risk-limiting audit tool, and post the summary results of the ((~~comparison~~)) audit online.

(4) If there is a discrepancy in a target contest that exceeds the risk limit, the ((~~RLA~~)) risk-limiting audit will continue until the risk limit for the target contest((~~s~~)) is met or until a full hand count results. ((~~If the county audit reports reflect that the risk~~ ~~limit has not been satisfied in a target contest, the secretary of~~ ~~state will randomly select additional ballots for audit using the same~~ ~~procedures described in WAC 434-261-116.~~

~~The formula used to determine if the risk limit has been satis-~~ ~~fied will be maintained on file in the secretary of state's office.~~

~~The audit board~~)) The secretary of state may order a full hand recount of a target contest at the secretary's discretion if that de-cision would be more efficient than multiple iterations of risk-limit-ing audit processes.

(5) Each audit board participating in a risk-limiting audit must sign, date, and submit to the secretary of state a report of the re-sults of the risk-limiting audit on the approved form within ((~~four~~)) two business days. The report must include any discrepancies found.

((~~The secretary of state will review the audit board's report and~~ ~~may direct the county auditor to conduct additional audit rounds, a~~ ~~random audit, a full hand count, or other action. The secretary of~~ ~~state may instruct the county to delay canvass until it completes any~~ ~~additional audit or other action.~~))

[Statutory Authority: RCW 29A.04.611, 29A.24.091, 29A.24.311, 29A.60.021, 29A.60.185, 29A.60.170, 29A.60.110, and 29A.60.235. WSR 19-01-102, § 434-261-117, filed 12/18/18, effective 1/18/19.]

AMENDATORY SECTION (Amending WSR 19-01-102, filed 12/18/18, effective 1/18/19)

WAC 434-261-118 Risk-limiting audit reports. ((~~The designated~~ ~~election official~~)) At the conclusion of a risk-limiting audit, the county auditor must segregate and seal the materials used during the post-election audit, including copies of all tabulation reports, the audited ballots, and a copy of the audit board report. These materials must be returned to secure storage with the ballots from that election

and are subject to the same retention period as the materials for that election.

[Statutory Authority: RCW 29A.04.611, 29A.24.091, 29A.24.311, 29A.60.021, 29A.60.185, 29A.60.170, 29A.60.110, and 29A.60.235. WSR 19-01-102, § 434-261-118, filed 12/18/18, effective 1/18/19.]

AMENDATORY SECTION (Amending WSR 19-01-102, filed 12/18/18, effective 1/18/19)

　　WAC 434-261-119 Removal of risk-limiting audit board members. ((Removal and replacement of audit board members.)) The county auditor may remove from the audit board any persons who indicate to the county auditor that they cannot or do not wish to serve as audit board members, and/or who, in the judgment of the county auditor, lack the ability to properly serve as audit board members. ((If the county auditor removes an audit board member, the auditor must notify the secretary of state and appoint a replacement in the same manner as described in WAC 434-261-116.))

[Statutory Authority: RCW 29A.04.611, 29A.24.091, 29A.24.311, 29A.60.021, 29A.60.185, 29A.60.170, 29A.60.110, and 29A.60.235. WSR 19-01-102, § 434-261-119, filed 12/18/18, effective 1/18/19.]