

WSR 22-16-120

PERMANENT RULES

SECRETARY OF STATE

[Filed August 3, 2022, 11:45 a.m., effective September 3, 2022]

Effective Date of Rule: Thirty-one days after filing.

Purpose: Permanent adoption of WAC changes related to protecting county vote counting systems from unauthorized access.

Citation of Rules Affected by this Order: Amending WAC 434-335-260.

Statutory Authority for Adoption: RCW 29A.04.611.

Adopted under notice filed as WSR 22-12-015 on May 20, 2022.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 1, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 1, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 1, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: August 3, 2022.

Randy Bolerjack
Deputy Secretary of State

OTS-3705.1

AMENDATORY SECTION (Amending WSR 05-18-022, filed 8/29/05, effective 9/29/05)

WAC 434-335-260 Decertification of voting systems and vote tabulating systems. (1) The secretary of state may decertify a voting system or vote tabulating system or any component thereof and withdraw authority for its future use or sale in Washington if, at any time after certification the secretary of state determines that:

(a) The system or component fails to meet the standards set forth in applicable federal guidelines or state statutes or rules;

(b) The system or component was materially misrepresented in the certification application; (~~(c)~~)

(c) The applicant has installed unauthorized modifications to the certified software or hardware; or

(d) The system or component was operated or accessed in Washington state at any time by anyone other than an authorized staff member of the office of the secretary of state, an authorized individual employed by the county that has been delegated any task under RCW 29A.60.140(2), for the purposes of preparation, maintenance, and operation under RCW 29A.12.060, an independent testing authority designated by the United States election assistance commission, or an inde-

pendent testing authority and the test plan has received approval by both the county auditor and secretary of state.

(i) County auditors shall not provide physical, electronic, or internal access to third parties seeking to copy and/or conduct an examination of state-certified voting systems, or any components of such systems including, but not limited to: Voting software and systems, tabulators, scanners, counters, automatic tabulating equipment, voting devices, servers, ballot marking devices, paper ballot printers, portable memory media devices, and any other hardware, software, or devices being used as part of the voting system.

(ii) If access described in (d)(i) of this subsection occurs, those pieces of voting equipment will be considered no longer secure or reliable to use in subsequent elections. As a result, the incidents will be treated as a security breach under RCW 29A.12.180 and the office of the secretary of state may decertify the use of the system or component.

(2) The secretary of state must provide written notice of intent to decertify to the original applicant or its successor, if known, to all county auditors, and to the public. The notice must specify the reasons why the certification of the system may be rescinded. The applicant or successor or any county auditor may, within thirty days after the issuance of the notice, file with the secretary of state a written explanation as to why the system or component should not be decertified. The secretary of state may extend or shorten the time for filing of a written explanation for good cause. After reviewing the explanation, the secretary of state may either discontinue the decertification process, in which case the system or component remains certified, or schedule a public hearing pursuant to subsection (3) of this section. If no explanation is timely filed, the secretary of state may either discontinue the decertification process or issue a final order pursuant to subsection (4) of this section.

(3) A decertification proceeding shall constitute an adjudicative proceeding pursuant to chapter 34.05 RCW.

(a) The secretary of state adopts the model rules of procedure as set forth in chapter 10-08 WAC, except as they may be inconsistent with this chapter. The proceeding may be conducted as an emergency adjudicative proceeding pursuant to RCW 34.05.479 if the secretary of state finds that immediate action is required to preserve the integrity of the electoral process.

(b) The secretary of state shall designate the presiding officer.

(c) The certification remains valid pending resolution of the administrative proceeding, unless the secretary of state finds, following notice and opportunity for written or oral input, which may be expedited, that the public interest requires that the decertification should take effect on a temporary basis pending hearing.

(d) The argument in favor of decertification may be presented by an employee of the secretary of state or by an assistant attorney general. Other parties may be represented by a certified election administrator or by any person permitted to appear by ~~((WAC 434-180-560))~~ the county auditor.

(4) The presiding officer or secretary shall enter an order specifying the system or component at issue, whether or not it is decertified, the effective date of any decertification, and explain the basis for the decision. The effective date of decertification shall not be less than five days after the entry of the order, but may be delayed to any reasonable date. An order issued by the secretary pursuant to subsection (2) of this section is a final order. An order issued by

the presiding officer is regarded as an initial order unless the secretary of state, assistant secretary of state, deputy secretary of state, or director of elections presides, in which case the decision of the presiding officer shall be final and no further review is available within the agency.

[Statutory Authority: RCW 29A.04.611. WSR 05-18-022, § 434-335-260, filed 8/29/05, effective 9/29/05.]