

August 1, 2016

Dear Secretary Williams,

Thank you for receiving my comments at the hearing and for the opportunity to flesh them out here. Below is further input regarding specific rule proposals:

Rule 1.1.8 (and related proposed rules)

I reiterate my unqualified support for the input you have received from Colorado Voter Group against the attempt to inappropriately redefine “Ballots Cast.” CVG has stated, “Without knowing the number of ballots cast, Colorado’s election system cannot be verified as secure and accurate.” CVG has also stated, “A temporary method for certification will need to be devised and adopted.” Please address these concerns; as Al Kolwicz, Trustee, has told you, we are willing to help.

In conjunction with the proposals to change 1.1.8 (“Ballots Cast”) and 1.1.44 (“Votes Cast”; discussed more below), it seems that the clerks are trying to be realistic about our current voting method. However, it is better to acknowledge the situation brought about by the 2013 legislation via marking all references to “Ballots Cast” as UNKNOWN so that many people beyond the clerks and you and your office have the chance to learn about and understand the dilemma and then offer their opinions and assistance in fixing the problem. You could add a rule that states the problem and instruct the clerks to include the wording of the rule in election judge and staff training, and you could add it to watcher training.

I suggest some additional steps that can help bring our elections to a “LESS UNKNOWN” condition. Steps 1 and 2 could be taken immediately, and possibly step 3 as well.

1. The clerks can require paired election judges (of opposite party affiliation if the election is partisan) to count all the ballot return envelopes received at any location before the envelopes are removed from that location and sign a triplicate form that gives the date, time, location, number of ballot return envelopes, and the election judges’ names (printed) and signatures. This process should take place at post offices, free-standing and in-building drop boxes, VSPC drop boxes, and any other drop boxes. The number of mail ballot envelopes thus received plus the number (also signed off on by paired election judges) of in-person ballots cast, and emergency and UOCAVA ballots received in various ways is a good number to start verifying the election with, although ballots lost or stolen before reception still cannot be known. Nevertheless, we need an initial number before the ballot return envelopes are taken to central counting.

2. When the ballot return envelopes arrive at central counting, the number of envelopes must be recounted by paired election judges, who must also fill out and sign the signature page. If there is a discrepancy, the cause must be determined and noted on the signature page for the canvass board's information.

a. One can imagine that ballot return envelopes can go missing, deliberately or accidentally, during transport. Steps 1 and 2 are therefore mimicking the signatures of the precinct election judges before the ballots were brought from the precinct to the central counting facility and the signatures of the election judges at the central counting facility as they received the ballots and batched them for counting.

b. The forms must be maintained, and the numbers captured and placed in a database. The original (top) sheet of each form and the database must be available to the canvass board beginning at 7:00 p.m. on election night and updated regularly as the first unofficial count is achieved and as subsequent refinements such as cured and provisional ballots and UOCAVA counts are achieved.

3. As a refinement of step 1 that could occur in many if not all counties this fall, the election judges would not just count but also capture the barcodes from the ballot return envelopes.

4. In future elections, the drop boxes can become smarter (and perhaps the U.S. Post Office can institute smart procedures as well).

a. The drop boxes should be equipped with built-in barcode-capturing scanners similar to those that check our library books back in as we return them. The paired judges should still count the number of ballot return envelopes, but it will help the accountability to have the list of voters' names, ballot style, precinct, etc. that the barcodes will reveal.

b. Cameras mounted near drop boxes can be improved by mounting them at eye level to capture the voter's face during the casting event. Eventually, a fingerprint or other biometric data could also be captured as the ballot is inserted into the slot. In addition to providing the data of timing of casting and who is dropping off the ballot(s), these approaches will help prevent fraudulent ballot harvesting activities.

c. The slots should be designed to admit envelopes one at a time. The slots could be either adjustable or exchangeable so that the slot would match the ballot return envelope thickness for the given election.

These steps will add cost to the elections, but they will also add security and accountability. Our current mail ballot elections are like a car that was bought at an advertised discount but has no engine. Chain-of-custody is the engine of a verifiable election. *We need to implement chain-of-custody at the earliest possible point.* And we can make that point earlier still by requiring use of ballot stubs, though unfortunately not in 2016 as the clerks have already ordered their ballot stock.

Future steps could begin with requiring two stubs containing the unique voter's barcode on each ballot and directions to the voter about how to deal with the stubs.

Voters would detach the top stub and place it in a separate, postage-paid mailing envelope addressed to the Secretary of State's office. The voter, if using the U.S. Post Office for ballot return, would mail the stub in a separate mail box and/or on a separate day. Voters who used a drop box would similarly mail their top stub, though the day and location would not matter. In-person voters could be provided with a postage-paid envelope in which to mail the top stub. The stubs would be scanned at the Secretary of State's Office and the information placed in SCORE as a cross-check that the voter voted. The numbers of stubs received and reported by county would be part of the data evaluated by the canvass board.

The second stub would be left on the ballot by the voter. To preserve ballot anonymity, the ballot would fit in the security sleeve with just that stub sticking out. The election judges would match the style number on the second stub to the mail ballot envelope's style number (this check could be done by scanning and having a computer do the matching with just spot checking by the election judges). The judges would then remove the second stub as the ballot was prepared for batching.

I hope that you will view the above information in the larger context of why the clerks are pushing to use a spurious definition of "Ballots Cast" and why that change not only should not be made but why other rules should be adopted instead.

Use of "county clerk"

Generally, these regulations should not reference "county clerk" because the "election official" in municipalities and special districts or the canvass board (and even SOS in certain circumstances) may be running the election or recount. Using "county clerk" will be interpreted selectively.

Rule ~~1.1.12~~ 1.1.13 (c)

The rules about duplication of identifiable ballots should be retained, despite the clerks' apparent glee at your proposal to eliminate it. Harvie Branscomb and I think a possible but

less desirable option is to make this definition optional so that counties that prefer to comply with the constitution in the most effective way may do so. Harvie has well described the benefits to election integrity if this rule is retained, and I agree with him. Not many ballots are signed by voters or otherwise made identifiable; thus the burden on counties to duplicate such ballots and scan only anonymous ballots is not heavy and the benefits are many. Counties can also step up their voter education efforts to try to stop voters from identifying themselves on ballots. And counties need to find better ways to batch ballots so that when they are scanned, the batches have at least ten ballots of a given precinct plus style. Counties that fail in that effort are likely making ballots identifiable. Here is an alternative text for the rule: “1.1.13 (c) At the discretion of the designated election official to comply with the Colorado constitution, a ballot that the elector marked in a way that would disclose his or identity via a printed or signed name or initials not located in a write-in region of the ballot.”

Rule 1.1.44

This definition is totally illogical (votes vs. ballots), as detailed by Harvie Branscomb. Please do not adopt this rule.

Rule 2.3.4

It is unclear to me why this rule is being deleted. Perhaps there was a change in statute that I am unaware of. SB16-140 did not address 42-2-505, C.R.S. I think it is important to keep this rule so that it is clear that persons who have IDs showing that they are not lawfully present in Colorado cannot vote.

Rule 2.10.2

I think the legislature, which deleted this rule, needs more information about election integrity. This rule was a good rule.

Rule 3.3.3

This rule reads oddly, and its content should instead be dependent on the bylaws of the political organization to comply with constitution.

Rules 6.9 and 6.9.2

“Confidential” should be narrowly defined for the purposes of elections. The CORA definition is not helpful. Is a background check required for Voter Registration Drive operations? Not according to Rule 14.2.2. A consistent standard is needed.

Rule 8.1.5

Requiring watcher training is outside the Secretary of State’s authority under the law. The training is a good idea, however. To expedite training in cases where watchers

appear at an election location who have not already completed the training online, each clerk should have paper copies of the PowerPoint slides that the watcher may quickly review. Watching should not be delayed by the training, however; if it becomes clear that a watcher has not grasped a slide's intent, the watcher's assigned judge or staff person can point to the printed-out slide and ask for the watcher's compliance.

Incidentally, the slide in which the watcher is watching a hand count shows the watcher too far away and at too great an angle to witness and verify the process. That slide should be corrected, as has been previously pointed out.

Rule 8.15.8

This rule is overly broad as many have said. Please make it reasonable. Watchers do not inappropriately use their cell phones to photograph or record audio or video, but should be able to appropriately use them as tools for other purposes.

Rule 8.15.10

The CORA law cited is too broad and thus not the appropriate law to define what is confidential data for work on election integrity. As mentioned in my testimony, voter registration organizers and circulators have access to many types of data forbidden under CORA. The election rules need to be consistent for election integrity, and where CORA is involved, steps should have already been taken to ensure ballot anonymity (please see my comment on Rule ~~1.1.12~~1.13 (c)). Voters are not anonymous. Ballots are. Please do not appeal to section 24-72-204(8), C.R.S. in this rule.

Rule 9.2.2

I agree with Harvie Branscomb's statement. The process needs an amplified description and an opportunity for the watcher to withdraw a challenge.

Rules that use the word "cast"

Rule 1.1.44: Votes are not cast. Ballots are cast. Votes are counted. Please revise.

Rule 10.5.2 (a): Change to "votes counted."

Rule 10.5.2 (b): Change to "votes counted" in the first place. Fix the second place to be "ballots cast" or "votes counted" as appropriate.

In Rule 10.11.2, change "county clerk" to "canvass board" as this rule refers to a recount.

In Rule 10.11.2 (a), the word "comprising" is misused as it often is. "Comprising" means "including"—for example, "the batch comprising 400 ballots was too large for the scanner's bin." In the rule's wording, "comprising" is trying to mean

“composing” or “making up.” One of those choices would be acceptable. Furthermore, restore “ballots cast.”

Rule 10.11.3 needs revision. Try “from 1% of the DREs that recorded votes on the ballot style containing the race or measure being recounted.”

Rule 10.12.4 (d) should use the original language (“ballots cast”) and should note that that number is UNKNOWN.

Rule 10.12.7: “Tabulation of ballots ~~east~~ must be ...” is a good change.

Rule 10.13.1 (a): “Sum total of votes ~~east~~ for each race ...” is a good change. But the wording might work better as “Sum total of votes counted in ~~east~~ each race”—please consider. Also “over-votes” should be “overvotes” as used elsewhere in the rules.

Rule 11.3.2 (d) (4) (B) (iii): Use of “cast” is correct.

Rule 11.3.2 (d) (4) (B) (iii): Use of “cast” is incorrect. It should read, “the ballots cast and the votes counted ... ” and should note that that number of ballots cast is UNKNOWN.

Rule 18.3.1 (a) (B): Use of “cast” is correct.

Rule 21.4.12(d)(5): Use of “cast” is correct.

Rules 21.4.15(d) (4) (5) and (12) (13): Use of “cast” is incorrect. I think this rule should read “votes counted”—please fix as appropriate.

Rule 21.5.2 (e): “Ballots must be cast and counted” should read “Ballots must be cast and VOTES counted.” Also, please change “to achieve a minimum number of ballots VOTES ~~east~~ COUNTED as follows for each group: ...”

Rule 11.3.3 ~~(k)~~ (B)

In a partisan election, the designated election official must choose those who conduct the post-election audit from the list provided by the parties (1-7-509(1)(C)(I), C.R.S.:

(c) (I) For all partisan elections, the designated election official shall select a testing board comprising at least two persons, one from each major political party, from the list provided by the major political parties pursuant to section 1-6-102.

Please revise this rule accordingly. [Please note that “comprising” is correctly used here.]

Rule 11.10.1 (b) (1)

In the third line, should it be “descending”? Maybe use a clearer term?

Rule 11.10.1 (e)

This rule is being deleted. Please be sure that split precincts will be handled in a useful way.

Rule 18.3. Uniform Ballot Counting Standards

Segments of this rule are being considered in this rulemaking effort. I suggest that some good rules for “Sort and Stack” counting be added. That method, if done carefully (not as I have seen it done in Boulder County), is more accurate than “Mark and Tally.” It is easy for a watcher to witness and verify and, if need be, to assist in the correction of discrepancies. Of course, watchers need to be present and trained in the method, and an election judge needs to be assigned to work with each watcher. I would be happy to assist in writing such rules, and I am sure that Harvie Branscomb would also. “Sort and Stack” can be used to good advantage in elections with small numbers of ballots, in auditing the election night reporting, and in recounts. Even in recounts of elections with a large number of ballots, if they are sorted with respect to the votes marked in the race in question before scanning, ballots that scan differently than humans think they should are easily detected and then can be resolved by resolution boards.

Rule 18.3.2 (c) (1)

As Harvie Branscomb has described, at least two resolution boards must be engaged per county for each election so that they can check each other’s work. This is especially important for the two-person work of duplication.

Rule 18.4.1

Add after “voter markings” in the second line, “or marks that identify the voter, if applicable,” to increase election integrity (see notes under Rule ~~1.1.12~~1.1.13 (c) above).

Rule 18.5.2 (was 18.6.1)(B)

This rule has been discussed and illustrated with actual ballot images by Harvie Branscomb. During the June primary, I saw the judges in Boulder County “boggling” over the application of the voter intent guide when X marks and other marks are used together. My immediate reaction to the current writing of this rule (it’s on p. 20 at the top of the latest Rulemaking pdf) was that it could force the judges to pick the wrong “option.” I think the judges should be given less specific guidance for complicated markings and encouraged to work together, even asking to see the paper ballot itself, to try to determine the actual voter intent. Please consider.

Watchers

Several of the rules in this rulemaking have dealt with watchers. It would be helpful to improve the watcher’s oath, so I am taking this opportunity to bring it up. Here is suggested wording that tracks the judge’s oath (as revised in SB16-142) except where a difference is required because of the different roles of watchers and judges:

I,, do solemnly swear (or affirm) that I am an eligible elector of the state of Colorado and of County where I reside; for partisan elections, that I am a member of the party (or that I am unaffiliated with a political party) as shown on the statewide voter registration system; ~~registration books of the county clerk and recorder of County where I reside~~ *[Mary: covered earlier and shorter in this version.]*; ~~that I will perform the duties of watcher according to law and the best of my ability;~~ *[Mary: Watchers don’t have “duties” in the same sense that judges have; this difference necessitates two further changes as shown.]* that I will not try to determine how any elector voted, nor will I disclose how any elector voted if in the ~~discharge~~ conduct of my ~~duties~~ role as watcher such knowledge comes to me, unless called upon to disclose the same before some court of justice; that I have never been convicted of election fraud, any other election offense, or fraud and that, if any ballots are counted before the polls close on the date of the election, I will not disclose the result of the votes until after the polls have closed.

Thank you again, Mr. Secretary, for the opportunity to comment. If you or your staff have questions or wish additional input, please do not hesitate to contact me.

Cordially,

Mary

Mary C. Eberle

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