

Final RLA rulemaking comments, July 18, 2017

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We regret not having more opportunity to respond to many recently published thoughtful comments by election officials. The few points here represent some of the most important topics currently under discussion. Where applicable, page and line(s) of the revised draft rules of July 6 are referenced as page/line(s).

Risk limits (Rule 25.2.2(A), 17/20-21). ESRC has commented that they “Support the risk limit not exceeding 5% for [a] statewide audit but recommend increasing it to 10% for countywide and below.” We acknowledge that these ‘smaller’ contests can be more challenging for RLAs because the auditing is not shared across multiple counties. We think that in the long run, 5% risk limits are more conducive to public confidence than 10% risk limits, and not very hard to attain.¹ However, most of us think that in 2017, especially given a difficult election calendar, a 10% risk limit for countywide and intra-county contests is acceptable. (If federal contests were on the ballot in 2017, we would advocate a risk limit no greater than 5% for them.)

Auditing all contested contests on ballots selected for audit (Rule 25.2.3(B), 21/4-5). We interpret this rule as stating that the audit board interprets and records *all* voter markings on every ballot selected for audit – thus providing for what we call **opportunistic auditing** of contests that are not subject to a risk limit. Opportunistic auditing is important because it allows the scrutiny provided by the audit to extend well beyond the contests with mandatory risk limits, at relatively little additional cost. In modern election systems, the fact that one contest is counted accurately does not assure that others were. For example, if the ballot definition file is incorrect, it might affect a single contest or more than one contest. (In 2006, an Iowa contest was recounted by hand after election officials discovered a ballot definition error that the Logic & Accuracy testing had missed.)

As we have said before, we actually would waive this requirement for uncontested “contests” and in some cases for larger audit samples. In particular, if a contest being audited opportunistically has already met a 5% risk limit, we would exempt it from additional auditing. We recommend clarifying or extending the rule.

We recommend that when contests are audited opportunistically, results reporting should include an estimate of how many additional ballots would need to be inspected to attain a risk limit of 5%. Those calculations are already in the “audit tools” that the SoS plans to adopt and extend. For comparison audits, the calculation can include the assumption that rate of discrepancies observed in the sample would hold constant as more ballots are inspected.

We again recommend a minimum audit sample of 16 in each county, among other reasons, in order to deliver consistent benefits from these opportunistic audits.

¹ Typically, one might have to audit about 30% more ballots.

Duplicate ballots. While on rule 25.2.3(B), we note Boulder County’s objection, at lines 9-11, to retrieving and comparing the markings on the original ballot if a duplicate has been created. We do not agree that “This exceeds the purpose and authority of an RLA.” Although we do not treat auditing the judges’ work as an end in itself, we believe that voter-marked ballots should always be treated as authoritative. Indeed, from our perspective, it is far more important to audit the original ballot than the duplicate – so we would not object to removing the word “also” at line 10. (However, if the audit interpretation of the original ballot does differ from the CVR, it would be natural to examine the duplicated ballot in the course of investigating the discrepancy.)

Audit board independence of election officials (Rule 25.2.2(B), 17/34-36). Boulder recommends that the Clerk or a designated representative should also be part of the audit board because the clerk is accountable for the official results. Our interpretation of the draft rules is that the clerk should cooperate with the audit board, but should not participate directly in its decisionmaking. We support that separation of powers.

Audit board interpretations control results (Rule 10.4 on “manually adjust[ing]” canvass results, 9/28; ESRC and Boulder comments on Rule 25.2.3(C), 21/15-17). On Rule 10.4, Boulder asks for a definition of “what makes an actual discrepancy.” In our view, any difference between the audit board’s interpretation of a ballot and the corresponding CVR is a discrepancy – whether it is attributable to machine error, “voter error” (e.g., an improperly marked ballot for which the audit board’s determination of voter intent differs from the voting equipment’s), or other (or unknown) causes. Regardless of the cause of discrepancies, a sufficient number can result in an incorrect electoral outcome. We are not in a position to comment on the logistics of manually correcting canvass results in light of the audit results, but conceptually that is the right thing to do.

On Rule 25.2.3(C), a discrepancy does not exist until the audit board has determined voter intent, and we believe that this determination should take the Voter Intent Guide into account, so we do not see how the rule can be limited to discrepancies, as ESRC proposes.

(In response to Boulder’s question about the escalation path, for us, “escalation” refers to auditing additional ballots – which may or may not be necessary, depending on the other results. We believe escalation in that sense is already handled in the draft rules. If Boulder here is asking about further steps to investigate and resolve the discrepancy, and to report the resolution, we believe that the draft rules and our recent comment on reporting audit results provide some basis for further discussion. But we anticipate that the details of the workflow will be refined based on election official input and audit experience. We are glad to have experienced election officials wrestling with these questions.)

Full hand counts (Rule 25.2.3(D), 21/23). Boulder’s question about “what triggers a hand count” is exactly on point, yet we think it is better to leave the decision to counties than to prescribe it in rule, because the decision can depend on how counties store and retrieve ballots,

staffing levels, contest sizes, and other variables. We think the most likely scenario that will lead to a full hand count is that before a required risk limit is attained, local election officials decide it would be more efficient to perform a full hand count than to continue to sample ballots at random and compare them with the corresponding CVRs. We think that is likely to happen if the sample size required to attain the risk limit becomes an appreciable percentage of the number of ballots cast, but the counties would be better judges of how to manage their own workloads. (Such relatively large sample sizes may be required if the reported diluted margin is very small and/or if the audit finds discrepancies large enough to raise doubts about the outcome.) Given all the circumstances that vary from county to county, we advocate leaving local election officials broad discretion over when to resort to a full hand count, provided that mandatory risk limits are honored.

Harvie Branscomb has drafted a possible protocol for full hand counts, which we generally support.

Batch association (Rule 7.5.10). ESRC states that counties “**strongly** oppose” the requirement to dissociate counting batches from any SCORE batch number that could trace a ballot back to the specific voter who cast it. We respect this point of view, but we believe it is important that the public has access to the CVRs in order to verify the results – and that being the case, we further believe that the dissociation requirement is needed in order to preserve voter privacy. We therefore recommend that counties give careful attention to how to implement this requirement while fulfilling the other functions mentioned by ESRC.