

California Secretary of State
Proposed Regulatory Action: Risk Limiting Audits
Notice

NOTICE IS HEREBY GIVEN that the Secretary of State (SOS) is proposing to take the action described in the Informative Digest. Any person interested may present statements or arguments in writing relevant to the action proposed. Written comments, including those sent by mail, facsimile, or e-mail to the address listed under Contact Persons in this Notice, must be received by the SOS at its office not later than 5:00 p.m. on December 10, 2019.

A public hearing is not scheduled. A public hearing will be held if any interested person, or his or her duly authorized representative, submits a written request for a public hearing to the contact persons listed below no later than 15 days prior to the close of the written comment period. Following the public hearing, if one is requested, or following the written comment period if no public hearing is requested, the SOS, upon its own motion or at the instance of any interested party, may thereafter adopt the proposals substantially as described below or may modify such proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact persons and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

Public Comment Period: October 25, 2019, through December 10, 2019.

AUTHORITY AND REFERENCE

Under the authority established in Government Code section 12172.5, the California Secretary of State may adopt regulations to assure the uniform application and administration of state election laws.

Further authority is established in Elections Code section 15367, which states that the Secretary of State, in consultation with recognized statistical experts, election verification and integrity stakeholders, voting system manufacturers, and local elections officials, shall adopt regulations to implement and administer this article (Risk Limiting Audits).

Authority cited: Section 15367, Elections Code; Section 12172.5 Government Code.

Reference cited: Sections 320, 362, 2194, 15150, 15154, 15290, 15360, 15366, 15367, 15620, 15621 and 20194, Elections Code.

INFORMATIVE DIGEST

Elections Code sections 15365 – 15367 were enacted in 2018 through the passing of Assembly Bill (AB) 2125 (Chapter 913, Statutes of 2018) and established a post-election

risk-limiting audits pilot program. Existing law in Section 15360 of the Elections Code requires an elections official, during the official canvass of an election in which a voting system is used, to conduct a public manual tally of the ballots cast in 1% of the precincts chosen at random by the elections official. AB 2125 authorized the use of risk-limiting audits in lieu of the 1% manual tally beginning with the March 3, 2020, statewide primary election. The bill requires the Secretary of State to adopt regulations to implement and administer the risk-limiting audits pilot program. Elections Code sections 15365 – 15367 shall remain in effect only until January 1, 2021, and as of that date they will be repealed.

Pursuant to section 15367(b)(1) of the Elections Code, the Secretary of State has drafted these proposed regulations in consultation with recognized statistical experts, election verification and integrity stakeholders, voting system manufacturers, and local elections officials to implement and administer risk-limiting audits. Therefore, the Secretary of State is proposing to add sections 20110 through 20126 of Title 2, Division 7, Chapter 2 to Code of Regulations to establish the procedures for implementing and administering the risk-limiting audits pilot program.

Policy Statement Overview/Anticipated Benefits of Proposal

Risk-limiting audits provide statistical assurance that election outcomes are correct by manually examining portions of the audit trail: paper ballots or voter-verifiable paper records. Risk-limiting audits also provide efficient and cost-effective scientific verification of election results when elections officials have adequate resources and education to conduct such an audit. By definition, a risk-limiting audit strictly limits the probability that an incorrect electoral outcome will pass the audit without being corrected.

Elections Code section 15367 requires the SOS to adopt regulations that would do all of the following:

1. Require elections officials to establish appropriate audit boards and procedures to conduct risk-limiting audits.
2. Establish criteria for public education on risk-limiting audits.
3. Establish procedures to ensure the security of the ballots, the selection of ballots to be inspected during each audit, and the rules governing cast vote records and other data involved in risk-limiting audits.
4. Establish the calculations and other methods to be used in the audit to determine whether or when the audit of any contest is required to include the examination of more ballots, and to establish calculations and methods to be used in such an escalation, and to determine whether and when the audit of each contest is complete.
5. Establish procedures and requirements for testing and disclosing the algorithms and source code of any software used by the SOS for the selection of ballots to be included when elections officials conduct risk-limiting audits under this article.
6. Establish requirements for the content of the risk-limiting audit report in the certification of the official canvass of the vote.

7. Establish procedures and requirements to ensure the audit process is observable and verifiable by the public, including disclosing the methods used to select samples and to calculate the risk, providing public opportunity to verify that the correct ballots were inspected during the audit, and providing public opportunity to observe the inspection of the voters' marks on the ballots during the audit.

The proposed regulations accomplish the mandate of the statute. The benefit of these proposed regulations is that they will provide guidance to the SOS and local elections officials on the procedure for conducting risk-limiting audits. These proposed regulations will also provide the opportunity for the public to take part in and observe the audit process. Along with bringing more transparency in the post-election canvass process these proposed regulations will strengthen the public trust the State of California's election process.

Consistency/Compatibility with Existing State Regulations

After conducting an evaluation for regulations in this area, the SOS has determined that these are the only regulations dealing with the post-election risk-limiting audits pilot program. Therefore, the proposed regulations are neither inconsistent nor incompatible with existing state regulations. This regulatory proposal creates new regulations relating to Elections Code sections 15365 – 15367.

Documents Incorporated by Reference: California Post-Election Risk-Limiting Audit Ballot Manifest Format (dated October 15, 2019)

Documents Relied Upon in Preparing the Regulations: None

FISCAL IMPACT ESTIMATES AND RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None

Nondiscretionary Costs/Savings to Local Agencies: None

Local Mandate: No

Cost to Any Local Agency or School District for Which Government Code Sections 17500 - 17630 Require Reimbursement: None

Business Impact: The SOS has made an initial determination that the proposed regulatory action will have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The proposed changes provide regulations that would give county elections officials an option to conduct a comprehensive post-election audit in lieu of their current practice of 1% manual tally. As stated in the Policy Statement and Overview/Anticipated Benefits of the Proposal found above, the benefits of the regulation to the health and welfare of California residents lies in the fact that these regulations will also provide the opportunity for the public to take part in and observe the audit process. Along with bringing more transparency in the post-election canvass process, these proposed regulations will strengthen the public trust in the State election process.

Significant Statewide Adverse Economic Impact Directly Affecting Business, Including the Ability to Compete: The SOS has made an initial determination that this regulatory action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Cost Impact on Representative Private Person or Business: The SOS is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Effect on Housing Costs: None

Effect on Small Business: The SOS has determined that the proposed regulations would not affect small businesses. The proposed regulations would give county elections officials an option to conduct a comprehensive post-election audit in lieu of their current practice of 1% manual tally. The proposed regulations affect counties and individuals, neither of which are small businesses.

Result of Economic Impact Assessment/Analysis Summary Comments: The full Economic Impact Statement is presented in the Initial Statement of Reasons. These regulations are not anticipated to create or eliminate jobs within the State of California, create or eliminate existing businesses within the State of California, or expand or eliminate existing businesses within the State of California. The benefits of these regulations are to comply with a legislative mandate and to strengthen the public trust in the State of California's election process.

CONSIDERATION OF ALTERNATIVES

The SOS must determine that no reasonable alternative to the regulations it considered or that has otherwise been identified and brought to its attention would either be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposal described in this Notice.

The SOS has determined that regulations are necessary because Elections Code section 15367(b)(1) expressly requires regulations.

Any interested person may present statements or arguments relevant to the above determinations.

AVAILABILITY OF THE INITIAL STATEMENT OF REASONS, THE TEXT OF PROPOSAL AND THE RULEMAKING FILE

The SOS has prepared an Initial Statement of the reasons for the proposed action and has available all the information upon which the proposal is based. The Initial Statement of Reasons is available on the SOS's website.

Copies of the express language of the proposed regulations, any document incorporated by reference, the initial statement of reasons, and all of the information upon which the proposal is based, may be obtained throughout the rulemaking process upon request from the SOS contact or on the website listed below.

AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

A Final Statement of Reasons will be created after the closing of the public comment period. A copy of the final statement of reasons can be obtained once it has been prepared from the contact persons named below or by accessing the website listed below.

CONTACT PERSONS

Inquiries or comments concerning the proposed rulemaking action may be addressed to:

Raj Bathla
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The backup contact person is:

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Website Access: Materials regarding this proposal can be found at www.sos.ca.gov.