Secretary of State
Statement of Need and Reasonableness (SONAR)
Proposed Permanent Rules Relating to Elections

INTRODUCTION

The Secretary of State is the chief elections official in Minnesota who partners with local election professionals to administer elections in this state. The US Senate recount and subsequent court contest process yielded a unique, in-depth examination of our elections system and proved that it has a solid foundation. This examination also revealed that there are ways to make our great election system even better. The instructions provided to absentee voters can be redesigned to help ensure that Minnesota voters make fewer mistakes that lead to their ballots being rejected. Also, changes can be made to the recount procedures to streamline the process and prevent many of the frivolous challenges made by candidate representatives in future recounts. In addition, there are provisions in the rules that need to be updated to reflect statutory changes and court rulings. There are also ways in which the rules can be reordered to make them easier to use, as well as burdensome and obsolete provisions that should be repealed. A Request for Comments was published in the State Register on July 17, 2009 and a number of responses were received. The Request for Comments was also sent to a broad spectrum of interested parties pursuant to an Additional Notice plan similar to that described on page 11 of this SONAR. The Secretary also asked his staff, the public, and local election officials to review all the election-related rules and to suggest amendments that would improve the rules and remove obsolete provisions. The secretary's staff used these suggestions, lessons from the recount, legislative mandates and court rulings to draft the proposed rules.

ALTERNATIVE FORMAT

Upon request, this Statement of Need and Reasonableness can be made available in an alternative format, such as large print, Braille, or cassette tape. To make a request, contact Bert Black at Office of the Secretary of State, 180 State Office Building, 100 Rev. Dr. Martin Luther King, Jr. Boulevard, Saint Paul MN 55155, Bert.Black@state.mn.us, 651-201-1326, 651-215-0682 (fax).TTY users may call the Minnesota Relay Service at 1-800-627-3529.

STATUTORY AUTHORITY

Petitions, Minnesota Rules, Chapter 8205

Minnesota Statutes, sections 204B.071, 211C.03, 211C.04 and 211C.06 authorize the adoption of rules regarding petitions.

204B.071 states:

> The secretary of state shall adopt rules governing the manner in which petitions required for any election in this state are circulated, signed, filed, and inspected. The secretary of state shall provide samples of petitions forms for use by election officials.

(Laws 1999, Chapter 132, Section 16)

This law was effective August 1, 1999. A Notice of Intent to Adopt Rules was published May 30, 2000 and rules were first adopted September 5, 2000, within the time frame required pursuant to Minnesota Statutes, section 14.125. The Secretary of State therefore has the authority to amend these rules.

211C.03 states:

The secretary of state shall prescribe by rule the form required for a recall petition.

(Laws 1996, Chapter 469, Article 2, Section 4)

This law was effective upon ratification of the associated constitutional amendment by the voters, which occurred at the November 1996 election and was formalized by the report of the State Canvassing Board on November 19, 1996. A Notice of Intent to Adopt Rules was published November 24, 1997 and rules were first adopted on March 23, 1998, within the time frame required pursuant to Minnesota Statutes, section 14.125. The Secretary of State therefore has the authority to amend these rules.

211C.04 states:

The proposed petition must be submitted to the secretary of state in the manner and form required by the secretary of state …

(Laws 1996, Chapter 469, Article 2, Section 5)

This law was effective upon ratification of the associated constitutional amendment by the voters, which occurred at the November 1996 election and was formalized by the report of the State Canvassing Board on November 19, 1996. A Notice of Intent to Adopt Rules was published November 24, 1997 and rules were first adopted on March 23, 1998, within the time frame required pursuant to Minnesota Statutes, section 14.125. The Secretary of State therefore has the authority to amend these rules.

211C.06 states:

… the secretary of state shall verify the number and eligibility of signers in the manner provided by the secretary of state.

(Laws 1996, Chapter 469, Article 2, Section 7)

This law was effective upon ratification of the associated constitutional amendment by the voters, which occurred at the November 1996 election and was formalized by the report of the State Canvassing Board on November 19, 1996. A Notice of Intent to Adopt Rules was published November 24, 1997 and rules were first adopted on March 23, 1998, within the time frame required pursuant to

Minnesota Statutes, section 14.125. The Secretary of State therefore has the authority to amend these rules.

Absentee and Mail Balloting, Minnesota Rules, Chapter 8210

Minnesota Statutes, sections 203B.08, 203B.09, 203B.125, and 204B.45 authorize the Office to adopt rules for absentee and mail balloting.

The Secretary's statutory authority to adopt rules governing **absentee voting** is set forth in:

Minnesota Statutes, section 203B.08, subd. 4 which provides:

> The secretary of state shall adopt rules establishing procedures to be followed by county auditors and municipal clerks to assure accurate and timely return of absentee ballots.
>
> (Laws 1981, Chapter 29, Article 3, Section 8)

Minnesota Statutes, section 203B.09 which provides:

> The secretary of state shall adopt rules establishing the form, content, and type size and style for the printing of blank applications for absentee ballots, absentee voter lists, return envelopes, certificates of eligibility to vote by absentee ballot, ballot envelopes and directions for casting an absentee ballot. Any official charged with the duty of printing any of these materials shall do so in accordance with these rules.
>
> (Laws 1981 Chapter 29, Article 3, Section 9, amended by Laws 1990, Chapter 585, Section 20)

Minnesota Statutes, section 203B.125 which provides:

> The secretary of state shall adopt rules establishing methods and procedures for issuing ballot cards and related absentee forms to be used as provided in section 203B.08, subdivision 1s, and for the reconciliation of voters and ballot cards before tabulation under section 203B.12.
>
> (Laws 1983, Chapter 253, Section 7)

Mail balloting:
204B.45, subd. 3, which states:

> The secretary of state shall adopt rules for the conduct of mail balloting, including instructions to voters, procedures for challenge of voters, public observation of the counting of ballots, and procedures for proper handling and safeguarding of ballots to ensure the integrity of the election.

(Laws 1987, Chapter 212, Section 8)

Voting System Testing, Minnesota Rules, Chapter 8220 and Optical Scan Voting Systems, Minnesota Rules, Chapter 8230

Minnesota Statutes, sections 206.57, 206.82 and 206.84, subd.3 authorize the Office to adopt rules for voting system testing and optical scan voting systems.

206.57, subd. 1, states:

> The secretary of state may adopt permanent rules consistent with sections 206.55 to 206.90 relating to the examination and use of electronic voting systems.
>
> (Laws 1984, Chapter 447, Section 3)

206.82, subd. 3 states:

> The secretary of state shall adopt rules further specifying test procedures.
>
> (Laws 1984, Chapter 447, Section 24)

206.84, subd. 3 states:

> The secretary of state shall provide by rule for standard ballot formats for electronic voting systems.
>
> (Laws 1986, Chapter 362, Section 10, effective January 1, 1987)

Recounts, Minnesota Rules, Chapter 8235

Minnesota Statutes, section 204C.361 authorizes the Office to adopt rules for recounts.

204C.361, (a) states:

> The secretary of state shall adopt rules according to the Administrative Procedure Act establishing uniform recount procedures. All recounts provided for by sections 204C.35, 204C.36, and 206.88, shall be conducted in accordance with these rules.
>
> (Laws 1983, Chapter 253, Section 18, amended Laws 1989, Chapter 291, Article 1. Section 16 and Laws 1990, Chapter 426, Article 1, Section 25)

Election Judge Training Program, Minnesota Rules, Chapter 8240

Minnesota Statutes, section 204B.25 authorizes the Office to adopt rules for election judge training programs.

204B.25, subd. 2 states:

> The secretary of state shall adopt rules establishing programs for the training of county auditors, local election officials, and election judges by county auditors as required by this section.

(Laws 1981, Chapter 29, Article 4, Section 25, amended by Laws 1999, Chapter 250, Article 1, Section 86,)

This law was effective with respect to the training of election judges by county auditors on August 1, 1981, and with respect to the training of county auditors and local election officials on July 1, 1999. A Notice of Intent to Adopt Rules governing the training of county auditors and election officials was published March 13, 2000 and rules were first adopted July 24, 2000, within the time frame required pursuant to Minnesota Statutes, section 14.125. The Secretary of State therefore has the authority to amend these rules.

Ballot Preparation Minnesota Rules, Chapter 8250

Minnesota Statutes, sections 204D.08, 204D.11, 205.17, 205A.08, 206.84, and 447.32 authorize the Office to adopt rules regarding ballot preparation.

204D.08, subd. 1 states:

The secretary of state shall adopt rules for the format and preparation of the state primary ballot.

(Laws 1989, Chapter 291, Section 17)

Statutory authority:

204D.11, subd. 1, " the secretary of state shall adopt rules for preparation and time of delivery of the white ballot"
Subd. 2 The pink ballot shall be prepared by the county auditor, in the manner provided in the rules of the secretary of state.
Subd. 3 The canary ballots shall be prepared by the county auditor, in the manner provided in the rules of the secretary of state.
Subd. 4. The ballot shall be prepared by the county auditor, in the same manner as the white ballot and shall be subject to the rules of the secretary of state pursuant to subdivision 1.
Subd. 6 The gray ballot shall be prepared by the county auditor in the manner provided in the rules of the secretary of state.

(Laws 1981, Chapter 29, Article 6, Section 11, with respect to Subds.1 and 4; Laws 1992, Chapter 223, Sections 16,17 and 18 with respect to subds. 2,3,and 6)

205.17, subd. 6, states:

The ballots for municipal elections must be prepared by the municipal clerk in the manner provided in the rules of the secretary of state.

(Laws 1997, Chapter 147, Section 44, effective August 1, 1997)

The Secretary's office, however, published a notice of intent to adopt initial rules under these provisions on June 15, 1998, well within the 18-month time limit specified in Minnesota Statutes, section 14.125. The Secretary of State therefore has the authority to amend these rules.

205A.08, subd. 5, states:

The ballots for school district elections must be prepared by the school district clerk in the manner provided in the rules of the secretary of state.

(Laws 1997, chapter 147, Section 46, effective August 1, 1997)

The Secretary's office, however, published a notice of intent to adopt initial rules under these provisions on June 15, 1998, well within the 18-month time limit specified in Minnesota Statutes, section 14.125. The Secretary of State therefore has the authority to amend these rules.

206.84, subd. 3, which provides:

The secretary of state shall provide by rule for standard ballot formats for electronic voting systems.

(Laws 1986, Chapter 362, section 10)

447.32, subd. 4, which states:

Ballots must be printed on tan paper and prepared as provided in the rules of the secretary of state.

(Laws 1999, Chapter 132, Section 44 , effective August 1, 1999)

A Notice of Intent to Adopt Rules was published May 30, 2000 and rules were first adopted September 5, 2000, within the time frame required pursuant to Minnesota Statutes, section 14.125. The Secretary of State therefore has the authority to amend these rules.

Any sources of statutory authority listed above and where first rule adoptions are not specifically noted were adopted and effective prior to January 1, 1996, and so Minnesota Statutes, section 14.125, does not apply. See Laws 1995, Chapter 233, Article 2, Section 58. Also, this rulemaking is primarily an amendment of rules and to that extent, Minnesota Statutes, section 14.125, does not apply. Under these statutes, the Secretary of State has the necessary statutory authority to adopt the proposed rules.

REGULATORY ANALYSIS

Minnesota Statutes, section 14.131, sets out seven factors for a regulatory analysis that must be included in the SONAR. Paragraphs (1) through (7) below quote these factors and give the agency's response.

"(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule"

The **Secretary of State's office** will benefit from the proposed rules because they clarify provisions currently governing petitions, absentee and mail balloting materials, and recounts, they update the rules in many areas to mirror statutory requirements and remove obsolete rules, and they make changes requested by local election officials. The more voters understand these processes, the less resources the Office of the Secretary of State must expend to answer questions.

Election officials and local governments will benefit from the proposed rules because they clarify current rule provisions governing absentee and mail balloting materials, thereby making it easier for these officials to administer these procedures, and leading to fewer calls from confused voters. Changing the requirements for verifying petitions will make this task less burdensome for local election officials. Clarifying the procedures used in recounts and challengers' roles will make it easier for local election officials serving as recount officials to manage the process efficiently. Making changes to the rules related to optical scan voting equipment will protect local governments' investment and help election judges, who are hired by and ask questions of municipal clerks. Changes related to qualifications of election judge trainees will mean that more individuals are eligible to serve in this role, easing local election officials' task of recruiting these workers. Updating the rules so that they uniformly reflect the statute means that local election officials can better rely upon the rules as a guide.

Eligible voters will benefit from the proposed rules because they provide more user-friendly and intuitive absentee and mail balloting certifications and instructions, making it easier to successfully complete these processes. Voters will also benefit from more user-friendly instructions for electronic ballot markers.

Candidates involved in recounts and their representatives will benefit from the proposed rules because they allow the candidates to approach the recount with a better understanding of the exact procedures that will be used and the role that their representatives can play.

Many of the groups that benefit from the proposed rules will also bear some of the costs associated with implementing the rules.

The **Secretary of State's Office**, for example, will bear some of the costs of the proposed rules. The Secretary's office will incur some staff costs, for example, to prepare new sample instructions and certificates that comply with the changes made in the proposed rules. These costs should be minimal, however, because the Secretary's staff simply will make the changes to the current electronic versions of the forms and print these new samples.

Election officials and the local governments for whom they work will bear some costs related to printing new absentee ballot envelopes, but these costs should be minimal.

"(2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues"

The Secretary of State is already required to conduct training for election officials. The provisions of the new rules will be incorporated into the current training session and will replace material currently discussed. Accordingly, the new rules will not increase the length or cost of the current training seminar.

Also, as discussed in factor one, the Secretary's office already provides samples of the instructions and certificates discussed in the rules to local governments and does not expect to incur any additional costs due to the proposed rules.

The proposed rules probably will not cause any other state agency to incur any costs.

To the best of the knowledge and belief of the Office of the Secretary of State, there will be no impact on state or local revenues.

"(3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule"

This factor is discussed in the rule-by-rule section of the analysis.

"(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule"

This factor is discussed in the rule-by-rule section of the analysis.

"(5) the probable costs of complying with the proposed rule including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;"

There will be some limited cost increases to county election officials from the addition of 8210.2700, which requires that a Federal Write-in Absentee Ballot serve as a voter registration and absentee ballot request in lieu of having received a Federal Postcard Application from the voter. These costs will stem from the need to send ballots to these voters in future elections. However the number of voters using the FWAB is small, so the costs should be as well, especially if these voters provide an email address, allowing future ballots to be transmitted to these voters by email.

There are a variety of provisions in the proposed rules that will lead to cost savings for local election officials that should more than offset any of the increases described above. These cost savings stem from:

1. streamlining the absentee ballot instructions and certificates which will reduce voter errors and lead to more ballots being accepted, thereby reducing resources used by local election officials in issuing replacement ballots
2. allowing election judges in mail ballot precincts to process absentee ballots throughout election day will reduce the number of hours for which they need to be paid to work
3. reducing frivolous challenges in recounts, saving costs related to processing the challenges, making copies, transporting and securing these ballots
4. grouping all of the instructions for preparing ballots in one rule part, thereby making this job less time consuming
5. reducing the workload usually generated by the postcard absentee ballot applications distributed by third party groups

In addition, printing absentee balloting materials that comply with the changes in 8210 will not cost local governments more if they wait to print them until these rules are finalized.

"(6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals"

The US Senate recount and subsequent election contest revealed our election system is the best in the country and that there are ways to make it even better, especially as it relates to absentee ballots. This office believes that the proposed changes to the absentee ballot instructions and certificates will help voters understand the requirements that must be met to have their ballots accepted and counted. Not making these changes could result in voters continuing to make mistakes that lead to their ballots being rejected. Rejected absentee ballots were an item of significant interest during the recount and contest and we expect that interest will continue. Copies of each rejected absentee ballot envelope and application were requested time and again by candidates, political parties and the media, as everyone tried to analyze why ballots were accepted or rejected. As such, not adopting the rules with the resulting continued level of rejected absentee ballots will lead to costs for local governments that could be avoided, if the proposed rules are adopted.

In addition, laying out a process for issuing replacement absentee ballots and for accepting Federal Write-in Absentee Ballots in cases in which a Federal Post-Card Application has not been received will provide clear guidance to local election administrators and allow for consistent treatment of these ballots across the state. Not adopting these procedures will almost certainly lead to lawsuits about differential treatment of similarly situated voters.

"(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference"

Nothing in the proposed rules is in conflict with federal regulations.

COMMISSIONER OF FINANCE REVIEW OF CHARGES

As required by Minnesota Statutes, section 14.131, the Department has consulted with the Commissioner of Finance. We sent the copies on October 27, 2009. The documents included: draft rules; and draft SONAR. The Department of Finance replied to our request for review in a memorandum dated October 29, 2009, in which they stated "that the proposed rule revisions will have minimal fiscal impact on local units of government and the Secretary of State has adequately considered local government costs."

In this portion of the SONAR, there usually appears a discussion of the fiscal impact and benefit of the proposed rules on local government, but as the proposed rules directly impact local government and as the impact and benefits are addressed throughout the SONAR both in the Regulatory Analysis preceding this section and in the rule-by-rule analysis, that information is not repeated here.

COST OF COMPLYING FOR SMALL CITY

Agency Determination of Cost

As required by Minnesota Statutes, section 14.127, the Office has considered whether the cost of complying with the proposed rules in the first year after the rules take effect will exceed $25,000 for any small city. The Office has determined that the cost of complying with the proposed rules in the first year after the rules take effect will not exceed $25,000 for any small city.

The Office has made this determination based on the probable costs of complying with the proposed rule, as described in the Regulatory Analysis section of this SONAR on pages seven to nine and the rule-by-rule analysis.

The Office, through the League of Minnesota Cities, also asked Dan Madsen, City Administrator of the city of Madelia, and Lori Jorgenson, City Clerk-Treasurer for the City of Rothsay, (two small cities affected by the proposed rules) to estimate whether the cost to the city of complying with the proposed rules during the first year would exceed $25,000. Both Mr. Madsen and Ms. Jorgenson stated that the cost would not be in excess of $25,000 for the city.

PERFORMANCE-BASED RULES

Minnesota Statutes, sections 14.002 and 14.131, require that the SONAR describe how the office, in developing the rules, considered and implemented performance-based standards that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the office in meeting those goals.

While some of the proposed rules are office responses to recent legislative changes and court rulings including those related to the Coleman / Franken election contest, Secretary Ritchie and his staff have taken the further step of searching for, and finding, many other rules that impede superior achievement and the cost-effective delivery of services. Moreover, the office has worked with local election officials and average voters to identify areas for improvement.

Some of the most valuable additions, revisions, and deletions proposed in this document were drawn from these sorts of discussions about our rules.

For example, many of the changes to the absentee and mail balloting materials were derived from suggestions by local election officials as well as experts in the field of usability (who study how to present information and format materials in the way that it is most easily understood). The instructions for voters using electronic ballot marking devices were developed in consultation with leaders in the blind community, who are frequent users of these devices.

Although the Office's first goal was to assure that our rules are in accord with recent statutory changes and court rulings, staff searched for, and with the aid of others found, improvements that are sure to improve the performance of election administration.

ADDITIONAL NOTICE

Minnesota Statutes, section 14.131, also requires a description of the agency's efforts to provide additional notification under section 14.14, subdivision 1a, to persons or classes of persons who may be affected by the proposed rule or must explain why these efforts were not made.

Here is: 1) a description of our proposed Additional Notice Plan and (2) an explanation of why we believe our Additional Notice Plan complies with Minnesota Statutes, section 14.131, i.e., why our Additional Notice Plan constitutes good faith efforts to seek information by other methods designed to reach persons or classes of persons who might be significantly affected by the proposal.

The Additional Notice Plan is to send a copy of the Proposed Amendments to Rules Governing Petitions, Absentee Balloting, Voting System Testing, Optical Scan Voting Systems, Recounts, Election Judge Training Program, and Ballot Preparation, the Statement of Need and Reasonableness for those Proposed Amendments, the Notice of Hearing, and a transmittal letter to the following persons by electronic mail wherever possible and by United States mail where electronic mail addresses are unavailable:

All members of the following legislative committees with policy oversight in this area of law:

House Governmental Operations, Reform, Technology and Elections Committee
Senate State and Local Government Operations and Oversight Committee
Elections Subcommittee of the Senate State and Local Government Operations and Oversight Committee

Chairs and Ranking Minority Members of the following legislative committees with fiscal oversight in this area:

House State Government Finance Division
House Finance Committee
Senate State Government Budget Division
Senate Finance Committee

House and Senate Leadership from the Majority and Minority Caucuses

Governor Pawlenty

Former Secretaries of State Mary Kiffmeyer, Joan Anderson Growe and Arlen Erdahl

Chairs of the Democratic-Farmer-Labor, Republican, Independence, Green, Libertarian, and Constitution Parties, Minnesota's political parties

The following election attorneys:
- Fritz Knaak
- David Lillehaug
- Tony Trimble
- Alan Weinblatt

Representatives of voting equipment and service vendors:
- Dominion
- Election Systems & Software
- Sequoia
- Synergy Graphics

Representatives of:
- Association of Minnesota Counties
- League of Minnesota Cities
- Minnesota Association of County Officers/Minnesota County Auditors
- Minnesota Association of Townships
- Minnesota School Boards Association

Representatives of the following public-interest groups
- Center of the American Experiment
- Common Cause
- League of Women Voters
- Minnesota Citizens Concerned for Life
- Minnesota Council of Nonprofits
- Minnesota Majority
- Minnesota Taxpayers League
- TakeAction Minnesota

Representatives of the following agencies and organizations of people with disabilities:
- Minnesota Commission Serving Deaf, Deaf-Blind and Hard of Hearing People
- Minnesota Disability Law Center
- Minnesota State Council on Disability
- National Federation of the Blind

Representatives of the following groups representing communities of color in Minnesota
- Council on Asian-Pacific Minnesotans
- Council on Black Minnesotans

Council on the Affairs of Chicano/Latino People
Minnesota Indian Affairs Council
Native Vote Alliance of Minnesota

The Office of the Secretary of State believes that this Additional Notice Plan complies with the statute because the notice materials described above, provides the principal representatives of the affected parties with ample notice and opportunity to provide suggestions, proposals and comments regarding the proposed rule amendments.

The listed persons and organizations receiving the Additional Notice together represent the vast majority of persons interested in these rules. They frequently comment on (or make) public policy. They represent several parties and a number of different positions on the spectrum of political thought, and will adequately represent the views of a diverse group of Minnesota citizens, which is a central purpose of the rulemaking process. They represent:

Policymakers, especially in the Legislature, who have oversight of this subject matter area;
Political parties;
Professional elections administrators;
Former Secretaries of State;
Local governments that actually implement elections;
Lawyers with expertise in elections matters; and
Public-Policy groups representing a spectrum of populations and views held within the general public.

The scope of persons to receive notice and the main points of this Additional Notice Plan include everyone from and some organizations in addition to those included in the Additional Notice Plan for the Request for Comments that was reviewed by the Office of Administrative Hearings and approved by Administrative Law Judge Eric Lipman in a July 15, 2009 letter. The Additional Notice Plan contained in this SONAR was approved by Judge Manuel J. Cervantes in a letter dated November 2, 2009.

Our Notice Plan also includes giving notice required by statute. We will send the rules and Notice of Intent to Adopt to everyone who has registered to be on the Office's rulemaking mailing list under Minnesota Statutes, section 14.14, subdivision 1a. We will also give notice to the Legislature per Minnesota Statutes, section 14.116.

DETERMINATION ABOUT RULES REQUIRING LOCAL IMPLEMENTATION

As required by Minnesota Statutes, section 14.128, subdivision 1, the Office has considered whether these proposed rules will require a local government to adopt or amend any ordinance or other regulation in order to comply with these rules. The Office has determined that they do not because all election laws in Minnesota are State laws and thus no local election law changes are required.

LIST OF WITNESSES

At the public hearing, the Office anticipates having the following witnesses testify in support of the need for and reasonableness of the rules:

Gary Poser, Director of Elections, Office of the Secretary of State

Beth Fraser, Director of Governmental Affairs, Office of the Secretary of State

RULE-BY-RULE ANALYSIS

Chapter 8205

The amendments to parts **8205.1010, 8205.1040, 8205.1050 and 8205.2010** are necessary to ease election administration by providing clarity to those circulating petitions and to election administrators about the requirements that petitions must meet and where petitions must be filed.

The current petition requirements in **8205.1010** have been found to be overly proscriptive. The amendments to this rule, which simplify the requirements by establishing a minimum size for the text of the petition and the signer's oath as opposed to an exact point size as in clause F, are reasonable because they make the requirements easier for petitioners to meet. In contrast, the current requirement that the language of the petition be "as large as possible" is less reasonable because it is completely subjective and therefore does not provide helpful guidance to those crafting petitions.

The proposed changes are also reasonable because they will make petitions easier for potential signers to read and will provide more space for signers to sign, by increasing the point size in paragraph B and decreasing the number of signature lines in paragraph H.

The amendments to **8205.1040** are needed and reasonable because they codify the longstanding interpretation of where a petition has to be filed, thus giving firm guidance on where to file to those wishing to file a petition. The proposed rule is also reasonable because it parallels the statutory definition of "filing officer" as it relates to the office at which a candidate for elected office in the jurisdiction files the affidavit of candidacy, as well as the statutory direction as to where to file recall and removal petitions.

The amendments to **8205.1050** and **8205.2010**, which call for the filing officer to determine whether petitions substantially comply with the type size requirements of the rule, are needed because requiring strict compliance could lead to petitions being rejected for technicalities, and election administrators having to waste time on nonessential minutiae. This is especially a waste of resources, since, although required by the rule, it is likely that rejection on these grounds would not withstand judicial scrutiny.

Because the rule currently requires that the signer's oath be in exactly 12 point type, this office has refrained from posting a sample petition on our website, for fear that the printer might shrink the type, making it invalid. The proposed rule is reasonable because removing the exact specification that the type be exactly 12-point and allowing election officials to determine

substantial compliance with the requirements will allow this office to provide a sample petition on our website and will avoid frivolous litigation that could impose unwarranted costs on both the election administrators and the citizens and petitioners.

8210 Absentee Ballots

The proposed changes to **8210.0100**, which change the language used to refer to the portion of the absentee ballot materials signed by the voter from "affidavit" to "certificate," are needed because the current use of these two words in election rules is confusing and inconsistent with Minnesota Statutes. The proposed changes are reasonable because they bring the rules into alignment with changes made in this word usage in the statute. Making this change will eliminate any confusion that could otherwise arise from the use of two different words. (In chapter 203B, "affidavit" is now only used to refer to certain statements used in agent delivery of absentee ballots pursuant to section 203B.11. See Minnesota Statutes, sections 203B.07, 203B.09, 203B.12, 203B.21, 203B.225, 203B.24 and 203B.25.)

The proposal to change the text from all caps to upper and lower case letters in **8210.0100, subp. 2** is needed because the currently mandated format is difficult to read, is inconsistent with the format used in other election rules, requires information already available to the election officials, and has an overly busy graphic design. The proposed amendments are reasonable because studies have shown that upper and lower case letters are easier for individuals to read; because it is simpler to have two lines for the voter's address, instead of a separate line for the city or town, as this is the uniform way that the address portion of domestic absentee voters' certificates have been and continue to be designed throughout the rules; because having the voter fill in the county is unnecessary, as the local election official will have sent these materials and will know the county in which they are located; and finally because it is better design to move the lines for the voter's phone number and email address up to the top of the certificate, so that all of the spaces that the voter fills out are grouped together at the top, and that only the signature and the date remain at the bottom of the certificate.

The proposed addition to **8210.0300**, which requires that additional instructions be printed on the ballot envelopes, is needed to provide voters with the clearest direction, and is reasonable because it is based upon usability experts' recommendations. They have suggested that additional instructions such as these be printed on all absentee balloting materials to provide redundancy of instructions for those who do not read the instruction sheets provided with the ballots. Making this part effective for envelopes printed after March 1, 2010 is needed and reasonable because it will allow local election officials to use up any supply that they may have on hand and not incur additional expenses from having to discard ballot envelopes that they have in stock.

The proposed changes to **8210.0500, subp. 1** are needed because the statutes upon which the current rules are based have changed, and because there have been changes in election administration.

It is reasonable to replace “enclosed” with “transmitted” and “mailed” with “sent” because these words allow for absentee ballot instructions to be sent electronically to overseas and military voters who request it, in accordance with Minnesota Statutes, section 203B.225.

It is reasonable to specify minimum type sizes for the instructions to ensure that they are as easy for voters to read as possible, and that local election officials or printers do not shrink them down too small. The sample instructions that this office has prepared use type that is slightly larger than the minimum type sizes required here.

It is reasonable to require that local election officials provide voters with both a telephone number and an email address for use if they have questions so that voters can communicate with the officials in the way that is most convenient for them. It is reasonable for this information to appear in the return address section of the envelope in which the materials are transmitted to the voter, because this is a section of the materials that already needs to be customized for every local election jurisdiction that administers absentee voting and thus this is the least intrusive, least expensive alternative. Requiring that this information appear elsewhere would, in some cases, lead to an increase in costs to customize materials that are otherwise printed for use by multiple jurisdictions (i.e., county-wide).

It is reasonable to delete the qualifiers “in election jurisdictions using electronic voting systems,” because electronic voting systems are now required to be used in nearly all elections in Minnesota.

It is reasonable to have a statement printed on the envelope in which absentee balloting materials are transmitted to the voter to encourage them to read the instruction sheet because experience has shown that voters often begin marking and assembling the materials without referencing the instruction sheet, unless prompted to do so.

It is reasonable to delete the requirement to instruct voters on how to fold the ballot, because the ballots mailed to absentee voters have already been folded. The voter simply needs to re-fold the ballot in the same way that they received it in order to fit it into the ballot envelope. In fact, the instructions to absentee voters, found in subparts 2, 3 and 4, have not included instructions on how to fold the ballots for many years.

It is reasonable to add that the instructions must include graphic depictions of how the ballot materials are to be completed, as well as assembled, because they will help voters make fewer mistakes in filling out the ballots and in completing the materials, leading to more accepted absentee ballots.

The proposed changes to **8210.0500, subp. 2** are necessary to make the instructions more succinct and easier for voters to understand and successfully follow. The US Senate recount was a unique examination of Minnesota’s election system. For the first time, there was an analysis of absentee ballots that had been rejected and the reasons for their rejection. Statewide, approximately 12,000 absentee ballots (or 4% of the total number of absentee ballots cast) were rejected. Upon further examination, local election officials determined that about 1,400 of these were improperly rejected – they should have been accepted – and over 10,000 were properly

rejected, because the voter did not fulfill the requirements necessary to vote by absentee ballot, or had already voted on Election Day. This office worked with local election officials to identify ways to reduce the number of improperly rejected ballots and to reduce the number of voter errors that led to their absentee ballots being properly rejected. These analyses led to legislation introduced last legislation session and these proposed changes to the absentee ballot instructions and certificates.

One of the keys to reducing voters' errors is to ensure that the instructions to voters and the certificates that they must successfully complete to have their ballot counted are as easy to understand as possible. As such, this office enlisted the assistance of those with expertise in designing materials so that they are as user friendly as possible. They provided substantial guidance on the redesign of the absentee ballot instructions and certificates. A small, non-scientific usability test was conducted to get some feedback from users who had not been involved in the process as to what they found helpful or confusing. Usability experts made several reasonable general recommendations that have been incorporated into the instructions in this subpart, as well as subparts 3, 4, 6 and the instructions for mail ballots found in 8210.3000. They recommended:

1. Putting a list of the items that a voter will need to vote at the top of the instructions.
2. Using numbers and bold text to signify major steps in the process and bullet points to elaborate upon those steps, instead of the paragraph format found in the current rules.
3. Streamlining the instructions so that instructions that only apply in certain circumstances are removed from the main text and either put on the back of the sheet or on another sheet. For example, most voters will not make mistakes on their ballots and therefore will not need instructions on how to correct a mistake. As such, it is reasonable to put instructions for correcting a mistake on the reverse side of the instruction sheet, with a note on the front side notifying voters that the instructions are there, if needed. Similarly, the instructions for voting in a partisan primary are being removed from the absentee ballot instructions sent out to voters for all elections, and instead are included in the new subpart 7, requiring that a short additional instruction sheet be sent to voters for these elections.
4. Using language that is as simple as possible. For example, the usability test demonstrated that "secrecy" is not a word with which everyone is familiar. As such, it is better to refer to the envelope into which the ballot should be placed simply as the "tan ballot envelope" instead of the "ballot secrecy envelope".
5. Labeling the materials in ways that are intuitive. Since the voter certificate appears on the return envelope and the voter (and witness in some cases) needs to sign this, refer to this envelope as the "white signature envelope", instead of the "return envelope."

In addition, the proposed amendments regarding these instructions incorporate the following reasonable changes as well:

Changing "ballot(s)" to "ballot" throughout the instructions is reasonable because all races are now listed on the same ballot – voters are no longer presented with different ballots for different levels of government.

Specifying that voters should not write their names or identification numbers on the ballot instead of more generally instructing voters not to put identifying marks on the ballot is reasonable because it provides voters with clearer instructions that reflect the standards used by the State Canvassing Board in 2008 when determining when a ballot was invalid because it had been identified by a voter.

Alerting voters that the signature on the voter certificate will be compared to the signature on the absentee ballot application is reasonable because it should lead to fewer ballots being rejected because the voter did not sign the documents in a consistent fashion.

Noting that notaries who are serving as witnesses must affix their stamps is reasonable because this is consistent with the February 13, 2009 Order Following Hearing and the April 13, 2009 order of the Ramsey County District Court three judge panel in *Sheehan and Coleman v. Franken*, [the US Senate Election Contest] (Pages 14 – 15 and Conclusion of Law #136, clause (h), respectively).

Adding more detailed instructions for how voters should indicate changes on their ballots is reasonable, because doing so will lead to more uniformity among absentee voters and provide clearer information to election judges and recount officials when determining voter intent in accordance with Minnesota Statutes, section 204C.22.

Adding special instructions for voters with disabilities is reasonable because it allows the prior instructions to be streamlined and facilitates voters with disabilities and their caregivers in finding these instructions. It is reasonable to add an instruction to explain the options that voters with disabilities have for signing, because this has been an area in which there has been confusion both among voters. Including this information in the absentee ballot instructions should provide the voters, their caregivers and election administrators with the information that they need to administer absentee voting to voters with disabilities accurately and consistently across the state. In addition, adding a note that power of attorney does not apply to voting is reasonable because this is an area of significant confusion. Each election, individuals with power of attorney mistakenly believe that they can vote for the person for whom they have power of attorney outside of their presence. Providing this note will help to correct this misunderstanding. The Office of the Attorney General has assisted in crafting the language in this section to ensure that it accurately reflects statute and case law on the matter.

The instructions for unregistered voters in **8210.0500, subp. 3** reflect the changes found in the instructions to pre-registered voters in subp. 2. In addition, the front side of the instructions specifically mentions use of a Minnesota Driver's License with a current address as proof of residence with a note that a list of other options can be found on the other side. Specifically mentioning a driver's license with a current address is reasonable because more than 70% of election day registrants use either a driver's license or a state identification card as their proof of residence this change allows these individuals to read significantly less text. The list of options for proof of residence have been reorganized so that they are listed in an order that approximates the frequency of their use, again allowing voters to find the information that they need as quickly as possible.

The other addition to subp. 3 is the note close to the top of the page that alerts voters that the voter registration application must be returned with the ballot in order for the ballot to be counted. Adding this note is reasonable because more than 1,000 absentee voters' ballots were rejected in 2008 because they did not return the voter registration application or did not return it with the ballot. Urging voters to return them together will help ensure that their ballots are accepted and counted.

The instructions for military and overseas voters sent ballots by mail, found in **8210.0500, subp. 4**, incorporate many of the changes from the previous two subparts. In addition to those changes, the proposed instructions ask the voter to provide different identification numbers than the previous rule and have removed the witness requirement to bring the rule into conformity with statutory changes made in 2008 to Minnesota Statutes, section 203B.21, subd. 3, clause 6. In addition, it is reasonable to add a warning to these voters that the identification number that they provide must match the number provided on their absentee ballot application, just as it is reasonable to add a warning to other absentee voters that their signatures will be matched. In both cases these warnings alert voters of requirements to having their ballots accepted.

Adding **8210.0500, subp. 5** which stipulates the language that must be used in a cover letter with absentee balloting materials sent to military and overseas voters electronically is necessary and reasonable because the voter should be provided with an explanation along with ballot and accompanying materials, which is not now provided for in current rules. It would not make sense to attach these documents to a blank email without additional information for the voter. It is reasonable to put the text of the cover letter in the rule to ensure that all military and overseas voters receive the same notice, rather than the possibility that counties may create their own notice. This office provided a uniform notice for all counties to use for this purpose in 2008. The proposed subpart would require its use.

It is reasonable for the letter to inform the voter as to how the ballot may be returned and to provide the deadline for doing so because the voter is likely to read the cover letter and needs to know this information. It is reasonable to state clearly that a paper ballot must be returned, because this was a frequent question asked by voters who received their ballots electronically in 2008. It is reasonable for the letter to state the documents that the voter should find attached so that the voter will know if there is an attachment missing. It is reasonable to provide a check list of the steps that the voter should take so that it is easily accessible to the voter.

It is necessary and reasonable to add separate instructions for ballots sent to military and overseas voters electronically, found in **8210.0500, subp. 6**, because the steps used by these voters are necessarily different. It does not make sense to send these voters incomplete instructions or to send all voters instructions that only apply to ballots that have been emailed.

The instructions in subp. 6 differ from the instructions for mailed ballots in that they instruct the voter:

- to print the materials
- to either provide his or her own envelopes or to create envelopes using the materials provided
- to print off a new ballot, if the voter makes a mistake

- to attach the Certificate of Eligibility to the Ballot Secrecy envelope

Each of these elements of the instructions are reasonable because they address the unique requirements of casting a ballot that was sent electronically.

Please note that election officials will only accept one ballot for each absentee ballot application, so even if the voter printed and returned multiple ballots, by law, only the last ballot validly received, would be counted.

The addition of additional instructions for use in a partisan primary, found in **8210.0500, subp. 7**, is necessary and reasonable because these instructions, which do not apply in most elections, take up valuable white space on the current instruction sheet and may cause unnecessary confusion. In 2008, all 300,000 absentee voters in the general election received these instructions for voting in a primary, even though they did not apply to the ballot on which they were voting; only the 21,000 voters voted by absentee ballot in the primary were in need of these instructions.

The changes to **8210.0600** are necessary to make the instructions for the voter's and witness's certificates easier to understand and for voters and witnesses to complete successfully. It is especially important to make the certificates as intuitive as possible since nearly 9,000 absentee ballots were properly rejected because the voter or witness failed to properly complete the certificate or because the voter's signature failed to match the signature on the absentee ballot application. Working with local election officials and usability experts, we have found ways to improve the design and instructions provided to voters and codify court rulings, while protecting the integrity of the election process.

8210.0600, Subpart 1a lays out the certificate for pre-registered voters and their witnesses. It is reasonable to put the words "Signature Envelope" at the top of the voter's certificate, so that it is as easy as possible for voters to identify the materials that need to be assembled. The envelope is entitled 'Signature Envelope' instead of 'Return Envelope' because depending upon whether the jurisdiction is using a third envelope or a flap on this envelope, this envelope may not be the actual external 'Return Envelope' discussed in parts 8210.0720 and 8210.0730. In addition, usability experts recommended referring to the envelopes in a way that is intuitive to voters. "Signature Envelope" makes sense because this is the envelope voters need to sign.

It is reasonable to change the text on the certificate from all caps to upper and lower case letters because studies have shown that this is easier to read. It is reasonable to add a large "X" to the lines on which the voter and the witness need to sign because this is the standard visual cue for document signatures in our society and the "X" will draw their attention to these spaces and make the need to sign more clear.

It is reasonable to rearrange the witness's portion of the certificate so that, similar to the voter's section, the witness provides the required information above the oath and only the signature is required below the oath. It is reasonable to condense the number of lines on the certificate and combine the line for the witness's Minnesota address or title, if an official, because a witness

need only provide one or the other. Combining the instruction and the space for providing it will make this clearer and save space.

As an additional safeguard to protect election integrity, the proposed rule reasonably requires witnesses to certify that they are or have been registered to vote in Minnesota, are a notary, or are authorized to give oaths. This addition is reasonable because it will help ensure that only those who are eligible to do so serve as witnesses. Please note that any rule proposed by this office cannot conflict with applicable law and that in the court order dated March 31, 2009, the Ramsey County District Court three judge panel in *Sheehan and Coleman v. Franken* [the US Senate 2008 election contest] held that "a person may serve as a 'registered voter witness' under 203B.07 if he or she has ever registered to vote in Minnesota" (Order Granting Petitioners' Second Renewed Motion for Summary Judgment and Amending Order Granting in Part and Denying in Part Petitioners' Renewed Motion for Summary Judgment Dated March 11, 2009, page 6).

The space for the witness to date their signature has been deleted, as the witness, in signing is attesting that the voter completed the ballot and the envelope, which includes in the voter's certificate the date on which these acts occurred. Furthermore, in their order dated February 23, the Ramsey County District Court three judge panel in *Sheehan and Coleman v. Franken* [the US Senate 2008 election contest] held that a ballot could not be rejected because the date written by the voter was different than the date listed by the witness (Order Granting in Part and Denying in Part Contestee's Conditional Motions for Partial Summary Judgment Dated February 23, 2009, page 10 – 11). It is reasonable to remove the space for the witness to date their signature, because leaving space for both the voter and the witness to date their signatures may lead election judges to erroneously conclude that a ballot can be rejected because the witness failed to fill in this space or because of a date mismatch. Removing the space for the witness to date their signature will prevent this possibility from occurring.

Noting that notaries who are serving as witnesses must affix their stamps is reasonable because this is consistent with the February 13, 2009 Order Following Hearing and the April 13, 2009 order of the Ramsey County District Court three judge panel in *Sheehan and Coleman v. Franken*, [the US Senate Election Contest] (Pages 14-15 and Conclusion of Law #136, clause (h), respectively).

The changes described above are also made in the certificate for unregistered voters, which is laid out in **8210.0600, subpart 1b**. It is reasonable to make the changes to both certificates so that voters are presented with information that is as similar as possible.

In addition to these common changes, it is reasonable to change the heading from "PROOF OF RESIDENCE USED BY VOTER" to "Voter must provide proof of residence," because this makes it clearer that this is a requirement for unregistered voters. As elsewhere, it is reasonable to use upper and lowercase letters because studies have shown that this is easier to read. In addition, since there has never been room on the witness certificate to provide complete descriptions of the options for the eligible proofs of residence, it is reasonable to note that the witness should see the instructions, where complete descriptions can be found.

In their April 13, 2009 order, the *Sheehan and Coleman v. Franken* panel ruled that the witness's indication that they had seen the proof of residence was sufficient, even if the witness had not made note of an identification number on the witness certificate. (Conclusion of Law #136, clause (i)). As such, it is reasonable to remove the spaces for noting identification numbers which needlessly takes up space on this already crowded form. Leaving the space for the numbers to be filled in has caused and could continue to cause confusion among election judges as to whether it is a required field, and may lead them to mistakenly reject absentee ballots that should be accepted.

A voucher form is already printed on the back of voter registration applications prepared under M.R. 8200.1100, Subp. 2. As such, it is reasonable to remove the spaces for a voucher's information from the envelope because having different spaces for the witness and the voucher on the same envelope often confuses voters and their witnesses, leading them to call local election officials. Election judges are already required to open the signature envelope to ensure that the voter registration application is complete before they can accept an absentee ballot, so having vouchers use the form on the back of the voter registration application does not create an additional step or burden for election judges accepting and rejecting absentee ballots. If the witness's certificate indicates that a voucher provided the proof of residence, election judges will simply need to turn over the voter registration application to ensure that the voucher form has been completed. Including voter registration applications with the voucher form on the back has the added benefit that they are not self mailers and do not have a return address on the reverse side, making it less likely that voters will return them separately.

In **8210.0600, subp. 2** it is reasonable to add specifications as to a label's placement to ensure that it does not mask important instructions to the voter, an issue which came to light during the recount.

In **subp. 3** it is reasonable to give minimum type sizes for the text on the voter's and witness's certificates to ensure that they are as easy to read as possible, and that headings get the emphasis that they need. The samples generated by this office meet these type size requirements. It is reasonable to provide minimum measurements for the space for the voter's name and address to be sure that it is large enough to accommodate the use of labels. It is reasonable to provide a minimum size for the width of the voter's certificate to ensure that local election officials use the space on the envelope as well as possible.

Three new subparts, **8210.0710, 8210.0720**, and **8210.0730**, lay out the requirements for return envelopes used for all absentee voters and replace the current requirements found in 8210.0700 and 8210.0800, subparts 1 and 2, which are being repealed. It is necessary to restructure the requirements for return envelopes in this way because the current rule parts are very confusing. In some ways they are duplicative, repeating requirements for domestic absentee ballot envelopes that also apply to the envelopes used for military and overseas voters. In other places, they are unclear because they use the term "return envelope," but may be referring to the envelope with the voter certificate or to the third envelope if the county uses one. In some cases the rules specifically give different directions depending upon whether the county uses a flap or a third envelope. All of this only becomes more complicated and confusing as we incorporate the

usability expert's advice by adding more instructions and checklists to the envelopes for the voters.

As such, the proposed new rule parts restructure how the rules are laid out, focusing instead on the type of envelope, not the voter it is for. In the proposed rule parts, all of the instructions for return envelopes, regardless of which kind, are grouped together in **8210.0710**. There is a different rule part, **8210.0720,** for the mailing requirements, which either applies to the signature envelope or to the 3rd envelope. Finally, there is a separate rule part with requirements that apply only in cases in which a 3rd envelope is used, **8210.0730**. The headings of the subparts make it easy for local election officials to find the requirements for which they are looking. It is reasonable to restructure the rules in this way, because it will make them easier for local election officials to use.

In addition to restructuring these requirements, the proposed rule parts require that additional instructions and checklists be printed on the envelopes. These additions are necessary to ease election administration by providing voters with clearer instructions as to how to assemble their absentee ballot materials in a way that will allow for their ballot to be accepted and counted.

Many sections of the proposed new rule parts simply reflect the current requirements found in the rule parts that are being repealed.

8210.0710, subpart 1, which requires the secretary of state to provide sample envelopes, is a requirement currently found in rule parts 8210.0700, subp. 10 and 8210.0800, subp. 4.

8210.0710, subp. 2, **clause A**, which states the minimum size for the envelope, is currently found in 8210.0700, subp. 2, clause A for envelopes used for domestic voters. It replaces the requirements currently found in 8210.0800, subp. 2, clauses A and B, which currently allow greater variation in the size of envelopes used for military and overseas voters. It is reasonable to standardize the minimum size used for envelopes for all absentee voters because this is already the counties' standard practice. In addition, since optical scan ballots are now required to be used in nearly all elections in the state, it is not possible to fit a ballot in a smaller envelope.

Clause B, which states the required envelope and ink colors, reflects the requirements of 8210.0700, subp. 2, clause D and 8210.0800, subp. 2, clause F.

Clause C, which requires that there be space for local election officials to indicate whether the ballot was accepted or rejected, reflects the requirement of 8210.0700, subp. 2, clause E. This is not currently a requirement for envelopes used for military and overseas voters, but it is reasonable to make it one, since it is already counties' current practice. This clause adds to the requirement that this text be printed at the bottom of the envelope, which is reasonable, because this will ensure that it is not placed in the middle of text to which the voter needs to pay attention.

Clause D, which requires that spaces for the election, ward and precinct be printed on the envelope, reflects 8210.0700, subp. 2, clause B. It is reasonable to extend this requirement to envelopes used for military and overseas voters, because it is already standard practice to include

this on those envelopes. It is reasonable to add a requirement to note that these spaces are "For office use only:" because it makes it clear to voters that this is not information that they need to provide. It is reasonable to qualify the requirement to print any of these spaces on the envelope, so that local election officials are not required to include these spaces if the official is using labels that contain this information, because more and more jurisdictions are affixing this information to the envelopes using the labels, making the requirement to print these spaces on the envelope unnecessary in those situations.

8210.0710, **subpart 3**, which requires that the envelopes be labeled, is reasonable because this will help election officials to distinguish between the different versions.

8210.0710, **subparts 4 and 5**, which require that instructions be printed above the voter's certificate to tell voters what to enclose in the envelope, is reasonable because this will be helpful for voters who may not always read the instruction sheet. It is reasonable to allow these instructions to appear on the reverse side of the envelope if a third envelope is used, because in these cases, counties may use an envelope that seals on the side, not the top, and therefore there may not be room at the top for this additional text.

8210.0710, **subparts 6**, **7 and 8**, which require that a checklist for the voter printed on the envelope, is reasonable, because this will help voters ensure that they have completed the tasks necessary to have their ballots accepted. The items on the checklist are tailored to the different requirements for different categories of voters. In subpart 6, it is reasonable to print the checklist below the witness's certificate on the envelopes for preregistered voters, because there is room to do so, and there is nowhere else to print it without adding additional pieces to the mailing that would add costs to local election officials. In subparts 7 and 8, it is reasonable to require that the checklists include steps for sealing the envelopes with the flap, because voters often find this confusing. It is also reasonable to require that the checklists be printed on the inside of the flaps, because there is not room to print them on the part of the envelope that contains the voter's certificate in these cases and there space on the inside of the flap that can be used for this purpose.

8210.0720 lays out the requirements for the mailing information on either the return envelope or a third envelope.

Subpart 1, which requires the secretary of state to provide sample envelopes, is a requirement currently found in rule parts 8210.0700, subp. 10 and 8210.0800, subp. 4.

Subpart 2 is reasonable, because it simply says that the envelope on which the mailing information appears must be printed according to the specifications of this part.

Subpart 3, which lays out the requirements for the mailing address, is a requirement currently found in 8210.0700, subp. 3 and 8210.0800, subp. 2, clause G.

Subpart 4, which requires that marks approved by the Postal Service to be printed on the envelopes, reflects 8210.0700, subp. 9 and 8210.0800, subp. 2, clause I. It is reasonable to make

this a requirement, because including these marks on the envelope will help ensure that they are identifiable, delivered in a timely manner, and conform to Postal Service policies.

Subpart 5, which requires that the envelope be labeled as Official Absentee Balloting Material, reflects 8210.0800, subp. 2, clause E. It is reasonable to extend this requirement to domestic absentee ballot envelopes, because this label already appears on the sample that this office prepares and is common practice.

Subpart 6, which allows local election officials to include a return address, reflects 8210.0700, subp. 8. This is not specifically mentioned as an option for envelopes used for military and overseas voters, but it is reasonable to make it one, since it is already counties' common practice.

Subpart 7, which lays out additional requirements for envelopes for military and overseas voters, reflects *current* rule parts 8210.0800, subp. 2, clauses C, D, E, and H.

8210.0730 lays out the requirements for a third envelope, in cases in which a county uses one.

Subpart 1 is reasonable because it simply explains that the requirements in this part are in addition to those in the previous part.

Subpart 2, which requires that the envelope be labeled, reflects the requirement of *current* 8210.0700, subpart 2, clause C and is reasonable because it requires that the third envelope be labeled in a way that makes it easy for voters to identify it. (The instructions for voters in rule parts 8210.0600 refer to the third envelope as the "return envelope".)

Subpart 3, which requires that checklists for voters be printed on the outside of the third envelope, because this will help voters ensure that they have completed the tasks necessary to have their ballots accepted. It is reasonable that the checklist be printed on the outside of the third envelope, because there is not a flap on which to print it and there is room to print it on the third envelope.

8210.0800, subp. 3 and 3a, changing "affidavit" to "certificate" is necessary and reasonable because this brings the rules into alignment with changes made in this word usage in the corresponding statute. Making this change will eliminate any confusion that could otherwise arise from the use of two different words. (In chapter 203B, "affidavit" is now only used to refer to certain statements used in agent delivery of absentee ballots pursuant to section 203B.11. See Minnesota Statutes, sections 203B.07, 203B.09, 203B.12, 203B.21, 203B.225, 203B.24 and 203B.25.)

Adding a sentence to **subp. 3** clarifying that county auditors must send the certificate of eligibility as an electronic document to voters who have requested to receive their ballots electronically is necessary and reasonable because, unlike other voters, these voters are not provided envelopes with the certificates pre-printed on them.

The proposal to change the text from all caps to upper and lower case letters in **subp. 3a** is necessary and reasonable because studies have shown that upper and lower case letters are easier for individuals to read. Changing the instruction from "VOTER'S PRESENT OR LAST ADDRESS IN MINNESOTA" to "MN address (present or last)" is necessary and reasonable because it makes it clearer to voters that they are required to provide an address in Minnesota. Some voters misinterpreted the current instruction and provided their current address – wherever it might be in the world. It is necessary and reasonable to simply have two lines for the voter's address, instead of a separate line for the city or town, because this is the uniform way that the address portion of voters' certificates have been and continue to be designed for domestic absentee voters throughout the rules.

In addition, it is necessary and reasonable to eliminate the need for the voter to fill in the county, since the local election official will have sent these materials and will know the county in which they are located. Furthermore, moving the line for the voter's email address up above telephone number and removing the notation that it is optional is necessary and reasonable because Minnesota Statutes, section 203B.21, subd. 3, clause (2) now requires that military and overseas voters provide an email address, if the voter has one.

It is necessary and reasonable to move the space for the voter's identification number up from the bottom to the top of the certificate so that it is more prominent and so that all of the spaces that the voter fills out are grouped together at the top, and that only the signature and the date remain at the bottom of the certificate. It is necessary and reasonable to change the types of identification numbers requested because this reflects the changed requirements of Minnesota Statutes, section 203B.21, subd. 3, clause (6).

It is necessary and reasonable to reformat the voter's certificate using bullets because this makes it easier for the voter to read and understand.

It is necessary and reasonable to remove the section of the form to be completed by a witness because the statute no longer requires a witness, see Minnesota Statutes, section 203B.21, subd. 3, clause (6).

Rule part **8210.2000**, which requires that local election officials fill in the voters' name, address, ward and precinct prior to sending the ballots to a voter, largely reflects rule part 8210.0700, subp. 7. The proposed rule deviates from the current rule in two ways: 1. It is only required if the official is not otherwise affixing this information on a label and 2. It adds that the official has to fill in the name and address of the voter. These changes are reasonable because they reflect the fact that election officials using the Statewide Voter Registration System can easily print labels for absentee voters that include all of this information and these jurisdictions already affix this information to voters' envelopes. Having the election official fill in the voter's name and address, which they have from the absentee ballot application, means that there is one less step for the voter to take and one less reason for a voter's ballot to be rejected. We had considered requiring that local election officials fill in this information for all absentee voters, but were convinced by local election officials that it could be a burden for them to fill in this information for voters who are voting absentee in person in their offices, if they are not using the Statewide

Voter Registration System. As such, this rule only applies to ballots being mailed or delivered to voters by an agent.

The addition of "or initialed" to **8210.2400** is necessary and reasonable because it brings the rule into conformance with Minnesota Statutes, section 203B.08, subd. 3, which was amended in 2008 by Laws 2008,chapter 244, article 2, section 14, to require that the returned absentee ballot be either stamped or initialed.

The addition of **8210.2600**, which provides procedures for issuing replacement ballots, is necessary because there are no procedures for issuing replacements for absentee ballots in the statute or the rules, and providing them will provide guidance to local election officials and help ensure that voters around the state are treated as similarly as possible.

Subp. 1, states that local election officials must provide replacement ballots to voters who request them, and is needed because this is a requirement of Minnesota Statutes, sections 203B.06, subd. 3a, clause (b) and 203B.22. Furthermore, this change is needed as it reflects the court's reasonable decision in *Erlandson v. Kiffmeyer* (2003 MN 565, C7-02-1879) to provide a replacement ballot upon request. In *Erlandson*, the Minnesota Supreme Court ordered election officials to provide replacement ballots to any absentee and mail ballot voter who requested one, in whatever manner that request came (Order dated 10/31/02, paragraph 9 and Opinion dated 4/17/03, at footnote 9). In order to properly implement this provision, it is reasonable to require the election official to record the date of the voter's request, the date that the replacement ballot was issued, and the reason that the voter requested a replacement ballot, because having this information on the voter's absentee ballot application will provide an added safeguard to alert election judges accepting and rejecting absentee ballots that this voter may have submitted more than one ballot. It is reasonable to require that any spoiled ballots returned to the election official be placed in the spoiled ballot envelope, so that they are not loose and will not get mixed in with other election materials or accidently counted.

Subp. 2, which requires election officials that have rejected ballots more than five days before an election to issue replacement ballots along with an explanation of why the first ballot was rejected, is needed and reasonable because this implements Minnesota Statutes, section 203B.13, subd. 2. Providing an explanation to the voter will alert the voter not to make the same mistake again. Requiring the secretary of state to provide election officials with sample notices to voters is reasonable, because this will both ease the burden on local election officials to provide this notice and ensure that voters around the state are treated equally. As in subp. 1, it is reasonable to note on the voter's absentee ballot application the date that the first ballot was rejected, the date that the replacement ballot was issued and the reason that the first ballot was rejected because these records will allow for oversight as to whether replacement ballots are being sent to voters in a timely fashion, and provide clearer information to election officials, candidates and judges during an election contest. It is reasonable to keep rejected absentee ballots in a separate sealed container so that they are not loose and will not get mixed in with other election materials or accidently counted. Please note that these ballots are still in their envelopes, unlike the ballots in subpart 1. Since a rejected ballot is actually a different category and is bulkier with the envelopes, it is reasonable to keep them separate from the spoiled ballots.

The addition of **8210.2700**, which addresses Federal Write-in Absentee Ballots (FWAB), is necessary because there currently is no direction in the rules for local election officials as to how to process these ballots, which could lead to voters being treated differently across the state.

Subp. 1, which provides that the ballot should go through the normal accepting and rejecting process when a Federal Post Card Application (FPCA) has been received from the voter, is reasonable because, with both the application and the ballot in hand, it is possible to use the normal procedure. It is reasonable to have this direction in the Rules so that county auditors will know that the procedures contained in subpart 2 only apply in cases in which an FPCA has not been received from the voter.

Subp. 2, which provides procedures when the county auditor receives an FWAB, but has not received an FPCA from the voter, is both needed and reasonable because it codifies the decision of the Ramsey County District Court three judge panel in *Sheehan and Coleman v. Franken* (Order dated 4/13/09, paragraphs 38, 39, 40, and 136 (b)) which opined that a voter's attestation that they submitted an FPCA is sufficient to accept an FWAB even if the local election official never received the FPCA. Usually the process for accepting or rejecting an absentee ballot involves comparing information on the application to information on the voter certification. However, in this case there is no application to which to compare the certification. As such, it is reasonable to codify the court's order and require acceptance of the ballot, unless the voter fails to meet the other requirements (e.g., unless the voter did not properly complete the certification or already cast another ballot).

Since the FPCA serves as both a voter registration form (for UOCAVA voters who are eligible to be registered) and as an ongoing absentee ballot request, and the court has opined the voter's attestation that they submitted an FPCA is sufficient to accept a Federal Write-in Absentee Ballot, it is reasonable that an FWAB would have the same effect that the FPCA would have had, had it been received, and serve as both the voter's registration and ongoing absentee ballot request. It is reasonable for county auditors to record that a voter prefers to receive ballots by email, if the voter has provided an email address, because this is the most timely way to provide future ballots to voters. It is reasonable to prohibit county auditors from sending a ballot to voters submitting a FWAB for this election because this prohibition will ensure that similarly situated voters across the state are treated similarly. We considered requiring county auditors to send a ballot to voters submitting a FWAB for this election, but rejected this idea because we believed that receiving a ballot for an election in which they have already voted by FWAB would confuse voters and because most FWABs are received within the last week before the election, meaning that there is usually insufficient time for a voter to receive a ballot and return it prior to election day.

Changing **8210.3000**, **subpart 1** to include a reference to new rule part 8210.2700 is needed and reasonable because it ensures that all of the rules related to absentee ballots apply to mail balloting.

Changing **subp. 2** to extend the deadline for local jurisdictions to adopt resolutions authorizing mail balloting is necessary and reasonable because the proposed 90 day deadline ensures that this choice is made before candidates have filed for office. The current 45 day deadline could allow a local governing body to change the voting method after members of that body are certain of the candidates who will be running in the election.

The change to **subp. 4** related to the timing for sending mail ballots is necessary and reasonable because it reflects changes made to Minnesota Statutes, section 204B.45, but not to 204B.46, as to when ballots may be sent. Requiring that the instructions include a telephone number or email address for voters to use if they have questions, as opposed to having this be optional, is necessary and reasonable because voters need to know where to direct their questions.

The changes to **subp. 4a** are necessary and reasonable because they mirror the changes made to the absentee ballot instructions in 8210.0500 and all voters, whether absentee or mail, should be provided with instructions that are as easy to follow and as similar as possible.

The changes to **subp. 4b** are necessary and reasonable because they mirror the changes made to the voter's certificate for absentee voters in 8210.0600 and all voters, whether absentee or mail. should be provided with a certificate that is as easy to follow and as similar as possible.

It is necessary and reasonable to change the cross-references in **subp. 5** because the instructions to absentee voters and voters certificates were re-ordered when the rules were amended in 2007, making the current cross-references inaccurate.

It is necessary and reasonable to strike nearly all of **subp. 6** and repeal subpart 6a, related to replacement ballots, because procedures for replacing absentee ballots are being codified in proposed rule part 8210.2600 and the procedures for absentee ballots apply to mail ballots as well (see rule part 8210.3000, subpart 1). The only part of the current rule that is still needed requires election officials to keep a record of the replacement ballots issued. This sentence is needed and reasonable, because unlike absentee ballots, there is not an application on which to keep the record, but it still should be kept.

The change to **subp. 7**, replacing the word "challenged" with "treated as provided by Minnesota Statutes, section 201.12" is necessary and reasonable because it brings the rule into line with that statute, as amended, which now provides different treatment for voters, depending upon whether the returned mailing contains a forwarding address. As a result of the statutory changes, it is necessary and reasonable to delete the requirement to send a voter registration card and the accompanying explanation to voters in mail ballot precincts for whom there is a new address, and reasonable to send voters a regular mail ballot return envelope instead of an absentee ballot return envelope for unregistered voters, because Minnesota Statutes, section 201.12 now requires that these voters' registrations be automatically updated, so these voters no longer need the registration materials. It is necessary and reasonable to remove the requirement to provide a list of these voters to the election judges processing the ballots if the address update is done in time for the voter to appear on the roster at their new address, because there is then no difference between the steps for processing these ballots and the steps for processing any other mail ballots.

The list of voters issued second ballots will still be needed in cases in which the address was updated after the roster was printed.

The changes to **subp. 10**, requiring that records of replacement ballots be provided to election judges instead of the affidavits for replacement ballots, are necessary and reasonable, because they mirror the changes made in the previous subparts.

It is necessary and reasonable to require that the election judges receiving and counting the ballots be of two different major political parties, unless the election is exempt from this requirement, because this is the same standard used with absentee ballots.

It is necessary and reasonable to codify provisions for election judges accepting and rejecting mail ballots during the 30 days before the election, because authorization to do so was added to Minnesota Statutes, 204B.45 in 2008.

It is necessary and reasonable to allow election judges to remove ballots from envelopes that have been marked "accepted" and place these ballots in a locked ballot box prior to 8:00 p.m. on Election Day, to conform mail ballot practice to absentee ballot practice. Election judges are already allowed under other Minnesota law to open absentee ballot envelopes prior to 8:00 p.m. It is confusing and unreasonable to have a different standard for opening mail ballots. The current rule already allows election judges to separate ballot envelopes from the accepted return envelopes prior to 8:00 p.m. Once the ballot envelope is separated from the voter's information on the return envelope, there is no way to know which ballot envelope goes with which return envelope. As such, there is no reason to delay removing the ballots from the ballot envelopes and placing the ballots in the ballot box until after the polls have closed. Please note that in the proposed rule, mail ballots, like absentee ballots, still may not be counted until after 8:00 p.m.

The current rule authorizes election judges to try to ascertain if a witness is a registered voter, in the case that the witness failed to provide their address. It is necessary and reasonable to remove this authorization to ensure that absentee and mail voters are treated similarly in jurisdictions across the state. Since this rule is permissive, it means that election judges have the choice of whether to reject the ballot or to look for additional information, which means that mail voters in different precincts could be treated differently. Moreover, there is not authorization for election judges to take this step if a witness's address is missing from the certification on an absentee ballot envelope, and mail ballots and absentee ballots should be treated as similarly as possible.

8220 CERTIFICATION AND TESTING OF VOTING SYSTEMS

The changes to **8220.0325**, which distinguish between certification of an entire new voting system and recertification of hardware or software upgrades are necessary and reasonable because there are substantial differences in the time involved in both the certification process and any subsequent purchasing process. Certifying, and subsequently purchasing a new voting system is much more complicated and time-consuming, whereas recertification of a simple hardware or software upgrade can be accomplished much more quickly and is often included in the maintenance agreements on voting equipment. It is reasonable to change the deadline for a manufacturer to submit a new voting system to the secretary of state for certification from

September of an odd year to December of an odd year, because this provides manufacturers more time and may provide local election officials with more options, while still allowing adequate time for a new system to be certified and purchased before the next general election.

While each ballot counter and accessible ballot marker is and will be continue to be tested prior to use in each election in accordance to Minnesota Statutes, sections 206.83 and with this chapter of the rules, it is necessary and reasonable in **8220.0700** to replace the requirement that voting equipment be recertified every four years with a requirement that it be recertified when the secretary of state determines that changes in Minnesota election law require reexamination, because having testing authorities reexamine and retest equipment that has not changed to standards that have not changed is time consuming and costly – there is no need to do so if there have not been substantial changes to the state's requirements or the equipment's specifications.

It is necessary and reasonable to differentiate between changes that an independent testing authority has deemed as 'de minimis' and those they have not to bring the rule into line with clarified federal guidelines. The proposed rule reflects the Election Assistance Commission's September 18, 2009 Notice of Clarification 09-003 regarding De Minimis change determinations which holds that re-certification is not required if an independent testing authority has determined that a change is 'de minimis'. Local election officials are particularly supportive of this proposed rule change, because they are finding it more and more difficult to obtain replacement parts for their aging equipment.

It is necessary and reasonable in **8220.1050** and **8220.1350** to add the words "mark or" to the description of functions to be tested using the test deck because the addition of this language better reflects the statutory definition of "voting system" found in Minnesota Statutes, section 206.56, which includes ballot marking devices, as well as ballot counters.

It is necessary and reasonable to add the requirement in **8220.1150** to have the test deck include ballots marked by the electronic ballot marker because this reflects the statutory requirement in Minnesota Statutes, section 206.83.

The instructions for ballot marking devices included in the new rule **8220.2860** are necessary and reasonable to ensure that voters using these devices in polling places across the state are presented with uniform instructions that are as easy to follow as possible. These instructions are reasonable because the standard instructions recommended by the vendor were modified in consultation with representatives from the blind community, one of the populations most likely to use these devices.

8230 PROCEDURES FOR OPTICAL SCAN VOTING SYSTEMS

It is necessary and reasonable to delete the stricken text in **8230.0560** as this language is being moved to the proposed 8250.1800 in an effort to consolidate all of the requirements for optical scan ballots into one rule part.

The change to **8230.1450**, to prohibit stickers from being affixed to any ballot that will be placed in a ballot box or ballot counter, is necessary and reasonable because the use of stickers often voids the warranty on voting equipment, which is costly to repair and replace. We had considered limiting the use of stickers to those approved by the vendor, but rejected this proposal after consultation with several legislators, including Senator Chris Gerlach, who pointed out that this proposal might allow a write-in candidate to use stickers in some precincts, but not others, depending upon the voting equipment being used. As such, we modified our proposal to prohibit the use of all stickers, which will ensure equal treatment across the state. Please note that Minnesota Rule part 8220.0350, item J will continue to require voting equipment vendors to notify the secretary of which stickers may be used with their equipment. If there comes a time when vendors notify this office that a particular sticker may be used in all of the equipment certified for use in the state, this office would have the option of modifying this rule to allow the use of that sticker at that time.

The change to **8230.4365**, which allows ballot boxes to be opened by election judges of different major political parties in precincts with fewer than 1,500 registered voters and at times other than between 1:00 and 3:00 p.m. on election day, is necessary and reasonable because local election officials have found the current limitations overly-restrictive. Election judges need to be allowed to open the box when it is becoming overfull or when the ballots are bunching up in a way that makes ballots jam in the unit or cause the write-in diverter to malfunction – this may happen in precincts with fewer than 1,500 registered voters (especially if the ballots are long), may happen before 1:00 p.m. if turnout is high in the morning and may happen again after 3:00 p.m. As long as these procedures are followed and the two election judges are from different major political parties, it should not matter at what time they open the ballot box. Similarly, the ballots may not need to be removed from the box, they may simply need to be straightened out to lie flat. As such, it is reasonable to remove the requirement that if election judges open the box that they must remove the ballots.

8235 RECOUNTS

Changing the term “administrative” to “discretionary” in **8235.0200** is necessary and reasonable because it brings the rule into line with Minnesota Statutes, sections 204C.35, subd. 2 and 204C.36, subd. 2 which have been amended to use the term “discretionary” to describe recounts done at the request of a candidate.

It is necessary and reasonable to allow a recount official to delegate the duty to conduct a recount to a county auditor or municipal clerk, upon mutual consent, because there may be circumstances under which the recount official may not be able to conduct the recount (such as health or family emergency reasons). The current rule does not allow for the duties to be delegated, even if the need arose.

It is necessary and reasonable to expand the prohibition from serving as a recount official to situations when an immediate family member is a candidate in the race because doing so could prevent a situation that would be legal, but might harm the perception of the impartiality of the recount official and public acceptance of the outcome of the recount. It is reasonable in this case to have the canvassing board choose the election official to conduct the recount so that there is no question about the partiality of the new recount official, which could occur if that person were chosen by the relative of one of the candidates.

The following several paragraphs deal with the issue of original and duplicate ballots.

It is necessary and reasonable to clarify that ballots in the envelope labeled "Original ballots from which duplicate are to be or were made" are not within the scope of the recount and to prohibit this envelope from being opened during the recount because allowing this envelope to be opened has the potential to introduce issues that are beyond the scope of an administrative recount and should be investigated or determined within the context of an election contest.

Some background: Some absentee ballots cannot be read by optical scan voter tabulators either because they are mutilated and cannot be inserted into the machine or because they were transmitted to a voter electronically and have been returned on paper that is not the right size or weight to be inserted into the machine. These ballots need to be duplicated so that they can be counted by machine. Minnesota Rules, part 8230.3850, requires that two election judges of different political parties make an exact replica of these ballots and to label the duplicate and the original. The duplicates are fed into the optical scanner and the originals are sealed into this envelope.

In the case of the US Senate recount, both candidates argued that the duplicates should be removed from the stacks of voted ballots and that the originals should be counted instead, based upon the theory that this would better allow the voter's intent to be determined. Although this office had some concerns about doing so, this procedure was agreed to by the candidates and incorporated into the recount procedures adopted by the canvassing board. This provision was a major issue in the contest litigation that followed, and it is now clear that this is not a procedure that should be used in future recounts, for reasons discussed below.

This office believes it is necessary and reasonable to prohibit this procedure from being repeated and to prohibit the envelope from being opened in future recounts. According to M.R. part 8235.0200, "the scope of an automatic or administrative recount is limited to the recount of the ballots cast and the declaration of the person nominated or elected." While reviewing the original ballots in the U.S. Senate recount was permissible as the court upheld, because the intent was to review the ballots that would best allow the voter's intent to be determined, this step is not necessary, as a number of election law cases (see *Chumney v. Craig (Texas)*, 805 S.W. 2d at 865, *Cobb v. Thurman (Fla.)* 957 So. 2d at 642-643 and *Hoffer v. School District U-46 (Illinois)* 652, N.E.2d at 364) have upheld the presumption that that election officials carried out their duties accurately, absent any proof to the contrary. Original ballots therefore do not need to be reviewed to determine voter intent because it should be presumed that the two election judges of different political parties who transcribed the votes did so accurately. Moreover, in the recount

and the election contest, there were no allegations that there were mistakes in transcribing the votes from originals to duplicates.

The issues that were raised related to the original and duplicate ballots had to do with whether the number of ballots labeled "original" matched the number of ballots labeled "duplicate." This is an issue that goes beyond a recount of the ballots cast and a determination of who received the most votes. Just like any issue related to whether an individual voter was improperly excluded from voting or whether an ineligible person voted, this issue should be reserved for an election contest, where each candidate can provide evidence and testimony, the judges can consider the issue, and the judicial panel can make findings of fact. In this context, a candidate could provide evidence that the ballots were not duplicated properly, that the election judges failed to carry out their duties accurately, and that it is necessary to review the original ballots.

Some will argue that candidates need to be able to review the originals in the context of a recount to know whether or not there is an issue to raise in an election contest. This office disagrees. While statewide recounts are extremely rare, recounts for other offices are a regular occurrence, with multiple recounts every year. Recounts for local offices are usually conducted prior to recounts for state and federal offices. If this rule is not adopted, it is likely that there will be recounts for local offices and questions in 2010 during which local canvassing boards will decide to review the original ballots. We believe that candidates for state or federal office facing a recount would be uncomfortable to learn that a school district or city canvassing board had already opened the original ballot envelope without them present. The only way to preserve the evidence is to prohibit the envelope from being opened prior to an election contest.

Even without opening the envelope, a candidate can determine in the course of recounting the ballots, whether there are ballots marked “duplicate” and discern how many there are. A candidate could see whether there is an envelope of original ballots for the precinct and has the option of asking election judges from that precinct whether ballots were duplicated and whether the proper procedures were followed. This information would give the candidate the ability to make a decision about whether there is likely to be an issue with the duplicate and original ballots that could make a difference in their race.

Finally, a recount is an administrative procedure fully paid for at the public’s expense. While there are costs of an election contest that are borne by the public, a judicial panel has the option of assessing the candidates for costs – and the public deserves to have at least the option of having the candidates pay for their own fact-finding costs related to duplicates and original ballots, not automatically having the public pick up the tab, as is the case if this is done during a recount.

It is necessary and reasonable to strike the words “and making available to the recount” in **8235.0400** for two reasons. First, this language is redundant, as rule part 8235.0700 already requires the custodian of the ballots to make available any requested election materials available to the recount official. Second, it is not related to the part title or the rest of the rule part.

It is necessary and reasonable to strike the last sentence of **8235.0600** because this rule part relates to the use of electronic voting equipment and Minnesota Statutes, section 204C.35 and 204C.36 now require that recounts be conducted manually. As such, there is no longer a need to provide access to the counting program or technical assistance.

The change to **8235.0700** changing sealed envelopes to sealed containers is necessary and reasonable because it more accurately reflects current practice. Many local election officials no longer use envelopes to store their voted ballots. Adding that the containers of voted ballots must be sealed and unsealed within public view is necessary and reasonable to promote greater public confidence in the integrity of the recount. This change was suggested jointly by Common Cause and Citizens for Election Integrity Minnesota. It is already common practice during a recount to seal and unseal the ballot containers within public view, but this office strongly supports adding this to the rule to ensure that it is always used as a standard procedure.

The changes to **8235.0700 and 8235.0800**, which place limits on candidates' representatives and provide detailed instructions for the counting process, are necessary to make it as easy as possible for recount officials to maintain control of the procedure, while allowing the candidates adequate representation.

Limiting the number of candidate representatives allowed in the counting (non-public) section of the room in **8235.0700** is reasonable because a candidate who has provided adequate training to his or her representatives should not need more than one person to observe and issue challenges per precinct being recounted. It is reasonable to allow each candidate one additional representative to observe the stacks of ballots being counted, because this allows the candidate to observe both their own and their opponent's stacks being counted and for them to be counted simultaneously. Local election officials have strongly urged the adoption of this rule because of issues related to limited space around the tables and because having additional candidate representatives in the recount area can lead to "ganging up" on the recount official. It is reasonable to specifically state that candidates may have additional representatives in the public viewing area of the room to ensure that this is clear to recount officials and candidates alike.

In **8235.0800, subp. 1**, it is reasonable to add details to the process for sorting the ballots, in accordance with the standard practice, to inform candidates, their representatives, and the public of how recounts are conducted. It is reasonable to clarify that candidate representatives should make any and all challenges during the sorting process because that is the stage in the process during which the recount official is determining for whom the voter voted. If the candidate representative believes that the voter's intent is not clear, this is the time to say so. This will allow the recount official (and the candidate representatives) to focus on one task at a time. Once the ballots have been sorted, it is reasonable for the recount official to just focus on counting them accurately, instead of having to address interruptions to the counting process from challenges as to the voter's intent, especially because a challenger may be tempted to raise frivolous challenges at that point when the vote totals are becoming clear.

It is reasonable to replace words about whether ballots should be counted with "whether there are identifying marks on" the ballot because the proposed phrase adds clarity for the candidate

representative and the public about the only circumstance under which a ballot would not be counted in a recount for the candidate marked.

Current rule part 8235.0800, subp. 1 prohibits frivolous challenges, but does not define the term "frivolous", making the rule less helpful than it could be. It is necessary to define this term to ease election administration. The candidates in the 2008 U.S. Senate recount abused the ability to make challenges based upon "identifying marks" by challenging thousands of ballots that had stray pen marks. These challenges were used to manipulate the running totals reported by the media while the ballots were being recounted. Each challenge added costs to the public, in that they slowed down the process, that photocopies were made of each challenged ballot, that the challenged ballots and the copies had to be sent to this office, and that this office scanned an image of each challenged ballot. While candidates have a right to challenge ballots where there is a real question of for whom the voter voted or whether the voter identified their ballot, they do not have a right to use the challenge procedure to manipulate the process, at the public's expense.

It is reasonable to codify the determination of the State Canvassing Board in the 2008 U.S. Senate recount with respect to certain challenges involving identifying marks as "frivolous". The Canvassing Board only upheld challenges based upon identifying marks if the voter had signed the ballot, written a name on the ballot completely outside the space allotted for writing-in the name of a candidate, or written an identification number on the ballot. All of the other challenges based upon identifying marks were dismissed by the board or withdrawn by the candidates. It should be noted that this language is not intended to exclude other challenges from being determined to be frivolous.

In the 2008 U.S. Senate recount, challengers were allowed to request that a pile be recounted in its entirety. There were occasions when challengers abused this power and insisted that the entire precinct be recounted just because the recount plan adopted by the Canvassing Board allowed them to do so. Since the ballots are counted in piles of 25, and since the candidate representatives are counting along with the recount official, it is reasonable in **subp. 2** to require that any question about the totals be raised immediately, and be limited to the pile of 25 in front of them. If the question is about whether there are 24 or 25 ballots in the pile or 15 or 17 ballots in the final pile, that's the pile that should be recounted, not the entire stack of 1,000, 3,000 or 6,000.

It is reasonable to allow the recount official to review any challenges with the candidate representatives after the votes have been counted as in **subp. 3**, because it gives the recount official and the candidate representatives the opportunity to look at each of the challenges in the context of all of the challenged ballots from that precinct. When reviewing the challenged ballots in this context, challengers are often willing to withdraw challenges – either because some no longer seem as valid or because the other candidate is willing to withdraw an equal number of similar challenges. Limiting the number of challenged ballots that need to be processed and reviewed by the canvassing board is reasonable, because it can save local and state governments' time and money.

In addition to noting the reason for the challenge and the precinct name, it is reasonable to allow either the name of the candidate the individual is representing or the individual making the

challenges, as well as a sequential number, to be noted on the ballot because this allows the ballots to be more clearly labeled and distinguished, in a way that worked well in the US Senate recount.

It is reasonable to specifically state that the recount official is permitted, but not required, to make photocopies of the challenged ballots, because making copies can allow the candidates to review the challenges made by their volunteers to prepare for the canvassing board meeting and gives the public access to images of the challenged ballots, while still keeping the original challenged ballot secure and safe from tampering, damage or loss. It is reasonable to make this permissive, not required, because there may be cases in which the candidates do not feel a need to receive copies and the public is not as interested in the race. It is reasonable to add "during that day of counting" to the instruction to seal the challenged ballot envelope, because it is common practice to put all challenged ballots from one day's counting into one envelope, and not use separate envelopes for challenged ballots for each precinct.

8240 TRAINING PROGRAMS

It is necessary and reasonable to change **8240.1655** to remove the requirement that a trainee election judge has already taken or is taking a class on government because local election officials have found that this requirement unnecessarily reduces the pool of the students who are eligible to serve as trainee election judges and that students who have not yet taken this course can still provide a valuable service and have a meaningful experience. In addition, students may have a keen interest in elections, even if they are not due to take a course on government until later in their high school careers. It is necessary and reasonable to specifically state the qualifications for home-schooled students to serve as election judge trainees to ensure that local election officials and home schooled students are aware that this is an option and that it requires a certification from the student's parent.

8250 BALLOT PREPARATION

The current rules in chapter 8250 reflect the way that ballots were used prior to the widespread use of optical scan or any type of electronic ballot counter. Throughout the rules there are references to different colored ballots, used when, for example, federal and state offices were on a white ballot, county offices were on a canary ballot, municipal offices were on a green ballot and municipal questions were on a blue ballot. When electronic ballot counters were introduced, the statute and rules were changed to state that ballots and procedures should proceed following the requirements for various colored ballots to the extent practicable, and also laid out a few special conditions or procedures necessary for the new ballots. As a result, the requirements for preparing ballots are spread throughout many rule parts, and local election officials have to constantly be determining which ones apply and which ones are obsolete.

Proposed rule part 8250.1810 is necessary and reasonable because it consolidates all of the ballot requirements for optical scan ballots into one section, so that local election officials will be able to find all of the direction that they need in one place. If the legislature ever decides to repeal the statutes related to colored ballots, this office will be in a position to repeal most of the rules

related to the different colored ballots, without having to worry that we are losing any on-going requirements in the process.

The one exception is that small townships are exempt from the requirement to use optical scan ballots. As such, it is necessary to continue to amend the rule parts related to township ballots as needed.

It is necessary and reasonable to change the wording for municipal ballot questions in **8250.0390** because the current wording which states that the voter is to "put an X in the square next to the word 'NO' for that question" causes confusion, since the word "for," which often indicates support, seems contradictory next to the word "NO", indicating opposition.

It is necessary and reasonable to strike the language in **8250.1600** stating that parts 8250.0100 to 8250.1400 apply to electronic voting systems, because this proposal consolidates all of the requirements for optical scan ballots into 8250.1810. The language is also amended to include the new rule part 8250.1810 as applicable to electronic voting systems.

It is necessary and reasonable to repeal **8250.1800,** which contains the current requirements for optical scan ballots, because these requirements are being incorporated into the new rule part 8250.1810.

8210.1810, subpart 1 includes a variety of existing requirements for the form of optical scan ballots. It requires that ballots be prepared at least 30 days before the election and be shrink wrapped in quantities of 25, 50 or 100. These requirements are currently contained in rule parts 8230.0560; 8250.0200; 8250.0370 Subp 1; 8250.0385 Subp 1; 8250.0390 Subp. 1; 8250.0395 Subp 1; 8250.0397 Subp 1; and 8250.0398 Subp 1.

Subpart 1 also requires that the ballot be printed with black ink on white paper. This requirement is currently contained in 8250.0300 and is reasonable because it is common practice to print ballots on white paper. The requirements to ensure that the ballots be easily legible and with dividing lines are current contained in rule parts 8250.0300; 8250.0370 Subp 1; 8250.0385 Subp 1; 8250.0390 Subp. 1; 8250.0395 Subp 1; 8250.0397 Subp 1; and 8250.0398 Subp 1.

The requirements in subp. 1 that the ballot have a precinct name, precinct identifier or ballot style indicator come from rule part 8230.0560. The requirement that each ballot style must include both the precinct name and applicable school district number, if the precinct is split by school districts is new. It is necessary and reasonable because it will make it easier for election officials and election judges to differentiate between the ballots and help ensure that election judges provide voters with the correct ballot, thus avoiding spoiled or miscast ballots.

Subpart 2 lays out the requirements for primary ballots. **Clause A** sets the requirements for political party headings. The requirement that the party names be in upper case in at least 14 point type is reasonable because it is consistent with the current requirement for the formatting and type size for office titles, found in 8250.1800, subpart 3, clause A, and because this codifies common practice. The requirement that the party names be shaded with a 30% screen is

currently found in rule part 8250.1800, subp. 2a, clause A. The requirement that the party column remains, even if a party does not have candidates in a given district is new. It is necessary and reasonable because it is needed to comply with an addition to Minnesota Statutes, section 206.84 Subd. 3.

Clause B, which requires a special heading if there is also a nonpartisan section of the ballot, is currently contained in rule part 8250.1800 Subp. 2a, clause C.

Clause C is necessary and reasonable because it simply provides in the rules document instructions from Minnesota Statutes, section 206.90, subd. 6, as to which instructions do not need to be printed on optical scan ballots.

Clause D, which requires the use of a bold line between sections if there is a nonpartisan section of the same side of the ballot as a partisan race, is currently found in rule part 8250.1800 subp. 2a, clause E.

Clause E, which clarifies when certain instructions should not be printed, is from current rule part 8250.1800 subp. 2a, clause F.

Clause F contains ballot instructions that must be printed on the ballot in different circumstances, which are required by Minnesota Statutes, section 206.90 Subd. 6. It is necessary and reasonable to include these instructions in this rule part so that local election officials are able to find all of the requirements for preparing ballots in this one rule part

Subpart 3 lays out the requirements for the ballot headings. The headings that must be used are currently contained in Minnesota Statues, sections 204D.08 Subd. 4; 204D.08 Subd. 6; and 204D.11 Subd. 5; and rule parts 8250.0500; 8250.0370 Subp. 1; 8250.0385 Subp 1; 8250.0390 Subp. 1; 8250.0395 Subp. 1; 8250.0397 Subp 1; and 8250.0398 Subp 1.

The requirement that the jurisdiction name and the date be printed as part of the heading is currently found in rule parts 8250.0500; 8250.0385 Subp. 1; 8250.0390 Subp. 1; 8250.0390 Subp. 2; 8250.0395 Subp. 1; 8250.0395 Subp. 2; 8250.0397 Subp. 1; 8250.0397 Subp. 2; 8250.0398 Subp 1; and 8250.0398 Subp 2.

The requirement that the heading be in at least 18 point type is currently contained in rule parts 8250.1200; 8250.0370 Subp 1; 8250.0385 Subp 1; 8250.0390 Subp. 1; 8250.0395 Subp 1; 8250.0397 Subp 1; and 8250.0398 Subp 1.

The requirement that ballots have the words “Official Ballot” printed in uppercase in 10 point bold type is currently contained in Minnesota Statutes, 204B.37; and rule parts 8250.1200; 8250.0370 Subp 1; 8250.0385 Subp 1; 8250.0390 Subp. 1; 8250.0395 Subp 1; 8250.0397 Subp 1; and 8250.0398 Subp 1.

The requirement that the word “Judge” be printed on the ballot in 10 point type is currently contained in Minnesota Statutes, section 204B.37; and rule parts 8250.1200; 8250.0370 Subp 1;

8250.0385 Subp 1; 8250.0390 Subp. 1; 8250.0395 Subp 1; 8250.0397 Subp 1; and 8250.0398 Subp 1.

Subpart 4 contains specifications for instructions to voters. The requirement that the words "instructions to voters" be printed on the ballot is currently contained in rule part 8250.0350. The instructions for filling out the ballot are currently contained in rule part 8250.1200. The instructions for how many candidates to vote for is contained in rule part 8250.1800 Subp. 3, clause B.

Subpart 5 lists the headings for the types of government offices and the order in which they must appear on the ballot. This requirement is currently found in rules part 8250.1800 subp. 2. The requirement that the offices be printed in uppercase 14 point bold type is from rules part 8250.1800 subp. 3, clause A. The final sentence of this subpart about the number being listed is from rule part 8250.1800 subp. 2.

Subpart 6 lists the names of offices to appear on the ballot and their order. The requirements related to type size are currently contained in rule part 8250.1800 subp. 3, clause B and the shading requirement is from current rule part 8250.1800 Subp. 3, clause B. The requirements for office names and their order are currently contained in Minnesota Statutes, sections 204B.36 Subd. 4; and 206.90 Subd. 6; and rules parts 8250.0600; 8250.0370 Subp 2; 8250.0385 Subp 2; 8250.0390 Subp 2; 8250.0395 Subp 2; 8250.0397 Subp 2; 8250.0398 Subp 3; and 8250.0398 Subp 4. The abbreviations that may be used are currently contained in rule part 8250.0600. The "at-large" designation is currently contained in rule parts 8250.0385 Subp. 2; 8250.0395 Subp. 2; and 8250.0398 Subp 3. The requirements related to the order of offices when they are designated by number are contained in rule parts 8250.0370 Subp. 2; 8250.0385 Subp 2; 8250.0395 Subp 2; and 8250.0398 Subp 3; as well as Minnesota Statutes, section 204D.14 Subd. 2. The requirements for placement on the ballot when offices are combined are currently found in rule parts 8250.0600 ; 8250.0370 Subp. 2; and 8250.0385 Subp 2. The placement of any other county offices is currently found in rule part 8250.0370 Subp. 2.

Subpart 7 specifies the requirements for the order and form of candidate names. The requirement that the name be as it appeared on the affidavit of candidacy is from Minnesota Statutes, section 204B.06. The requirement that candidate names be printed at a right angle to the length of the ballot is currently found in rule part 8250.0800. The type requirements for candidate names are currently in rule part 8250.1800 Subp. 3, clause C. The requirement that the candidates' names appear as close to the vote targets possible is currently contained in rule part 8250.1800 Subp. 3, clause C. Requirements related to the candidates' party names or principles are currently contained in Minnesota Statutes, sections 204B.36, Subd. 2; 204D.13 Subd. 3; and 204B.07 Subd. 1; and rule part 8250.0900. The type size requirement for candidates' political parties or principals are contained in rule part 8250.1800 Subp. 3, clause C.

Subpart 8 relates to requirements for write-in spaces on the ballot. Most of these requirements are currently found in rule part 8250.0800. The requirements related to the type size of the text and its alignment are currently contained in rule part 8250.1800 Subp. 3, clause E.

Subpart 9 sets the requirements for the order of candidates in partisan races on the general election ballot. These requirements are being moved to this part from current rule part 8250.1000. The one addition to these requirements is the sentence related to the drawing of lots if more than one candidate files for office by petition using the same political party or principle. This addition is necessary and reasonable because there are currently not procedures in place that address what to do in this situation, which is more and more likely to occur as some of the minor political parties in the state run more candidates for office.

Subpart 10 contains requirements for the order and form of ballot questions. The requirement that ballot questions follow the offices for that jurisdiction is currently contained in rule part 8250.0370 for county questions and is common practice for printing questions for all levels of government on optical scan ballots. The instructions for voting on a question are currently contained in rule parts 8250.0370 Subp 1; 8250.0390 Subp. 2; 8250.0397 Subp. 2; and 8250.0398 Subp. 4. The rules do not currently contain type size requirement for voting instructions for ballot questions. However, it is necessary and reasonable to require that these instructions be printed in at least 8 point type, because this is the minimum size required for voting instructions for offices (see rule part 8250.1200) and it is common practice to use this as the minimum type size for ballot question instructions as well. Numbering the ballot questions is currently required in rule parts 8250.0370 Subp. 2; 8250.0390 Subp. 2; 8250.0397 Subp. 2; and 8250.0398 Subp. 4. The positioning of the name and/or number of the jurisdiction is a new requirement which is needed and reasonable because it is important to identify to which jurisdiction the question applies. The requirement that the heading be screened or printed white on black is currently contained in rule part 8250.1800 Subp. 3, clause D. The requirements for the questions' titles are currently contained in rule parts 8250.0370 Subp. 2; 8250.0390 Subp. 2; 8250.0397 Subp. 2; and 8250.0398 Subp. 4. The type size requirements for the title, the body of the question, for "Yes" and "No" and their alignment are all currently contained in rule part 8250.1800 Subp. 3, clause D.

Subpart 11 sets the requirements related to the printing of constitutional amendments on the ballot. The requirement that there be a heading is currently found in rule part 8250.1800 Subp 2. Most of the remaining requirements are taken from 8250.0365, subp. 2. The requirements related to the shading, the type size and style and the alignment of the choices are currently found in rule part 8250.1800 Subp. 3, clause D.

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Subpart 12, which lays out the requirements for the vote targets, is taken from rule part 8250.1800 Subp. 4.

Subpart 13, which specifies the instructions when there is printing on both sides of the ballot, is from rule part 8250.1800 Subp. 5.

Subpart 14, which sets the requirements for federal ballots is taken from Minnesota Statutes, section 204D.11 Subd. 4. It is necessary and reasonable to include these requirements in this rule so that local election officials can look to one source for the ballot requirements.

Subpart 15, which sets the requirements for presidential ballots is taken from 42USCS 1973aa-1 and is consistent with Minnesota Statutes, section 204D.11 Subd. 4. It is necessary and

reasonable to include these requirements in this rule so that local election officials can look to one source for the ballot requirements.

Subpart 16 spells out the order and form for a special election ballot. The requirements for the headings are currently contained in rule part 8250.0370, subp. 2, as well as Minnesota Statutes, sections 205.17 Subd. 5; and 205A.08 Subd. 3. The requirements for placement on the ballot are currently contained in rule parts 8250.0370 Subp. 2; 8250.0385 Subp. 2; 8250.0395 Subp. 2; and 8250.0398 Subp. 3.

Subpart 17, which relates to extraneous marks, is taken from current rule part 8250.1800 subp. 6.

Subpart 18, which relates to example ballots, is from current rule part 8250.1800 subp. 7.

REPEALER

The proposed repeal of **8210.0200, subp. 3**, which allowed for the use of postcard absentee ballot applications, is necessary to ease election administration. It is reasonable to repeal this subpart for several reasons. First, the postcard applications posed challenges for local election administrators in that they are not of a standard size, which makes data entry and filing more difficult. Secondly, there were postcard forms distributed by organizations in the 2008 and previous elections that did not include space for the statutorily required information, requiring local election administrators to contact voters and have them resubmit applications containing all of the required fields. This is a poor use of local governments' resources during an already hectic time in the election cycle. The fact that some organizations distributed forms without all of the required fields may have been due to the small size required to get the best rates from the US Postal Service. Finally, in 2008 there were a significant number of complaints from voters about the postcard forms that they received from candidates and political parties. The postcard absentee ballot applications were often included as tear-off sections of literature pieces for a candidate. Since the absentee ballot application was often pre-filled in for the voter, many voters complained that this practice crossed a line and came too close to the candidate or political party signing the voter up to vote for the candidate. Repealing this subpart is reasonable because it will save local governments money for all of these reasons.

8210.0700 and 8210.0800, subparts 1 and 2 are being repealed because those provisions are being amended and reorganized into proposed rule parts 8210.0710, 8210.0720 and 8210.0730.

It is necessary and reasonable to repeal rule part **8210.3000, subpart 6a**, which specifies the requirements for an affidavit to receive a replacement mail ballot, because procedures for replacing absentee ballots are being codified in proposed rule part 8210.2600 and the procedures for absentee ballots apply to mail ballots as well (see rule part 8210.3000, subpart 1). Therefore, this subpart must be removed as it is inconsistent with absentee ballot procedures.

It is reasonable to allow voters to request a replacement ballot without submitting an affidavit, because a rule cannot conflict with applicable law and this was the case law established in

Erlandson v. Kiffmeyer. In this case, the Minnesota Supreme Court ordered election officials to provide replacement ballots to absentee and mail voters alike, to any voter who requested one, *in whatever manner that request came* (Order, 10/31/02, paragraph 9 and Opinion, 4/17/03, at footnote 9, emphasis added). It would be contrary to *Erlandson* and Minnesota Statutes, section 204B.45, subd. 3, as well as unreasonable, to have a higher standard for requesting a replacement ballot in a mail ballot precinct than for an absentee ballot. As long as there is a record that a replacement ballot has been issued, the election judges will take extra care to ensure that only one ballot is accepted per voter.

It is necessary and reasonable to repeal rule part **8220.0950** related to edit listings because it is obsolete. Edit listings are only used with punch card voting systems, which have not been used or certified for use in Minnesota elections for many years.

It is necessary and reasonable to repeal rule parts **8235.0500** and **8235.1000**, which relate to the use of electronic voting equipment during a recount, because they are obsolete. Minnesota Statutes, sections 204C.35 and 204C.36 now require that recounts be conducted manually. As such, there is no longer a need to place additional restrictions on access to the ballot tabulators and ballot markers or for local election officials to test electronic equipment to be used in a recount.

It is necessary and reasonable to repeal rule part **8250.1800** because the language relating to optical scan ballot formats is being reorganized and recodified in the new proposed rule 8250.1810.

LIST OF EXHIBITS

In support of the need for and reasonableness of the proposed rules, the Office anticipates that it will enter the following exhibits into the hearing record:

Several different kinds of absentee balloting materials, both existing and proposed.

CONCLUSION

Based on the foregoing, the proposed rules are both needed and reasonable.

November 16, 2009

MARK RITCHIE
Secretary of State