

Montana Legislative Services Division
Legal Services Office

TO: State Administration and Veterans' Affairs Interim Committee
FROM: K. Virginia Aldrich
DATE: August 2, 2013
RE: Legislative Administrative Rule Review Report

Pursuant to 5-5-228, MCA, the State Administration and Veterans' Affairs Interim Committee is responsible for reviewing administrative rules within its jurisdiction. Staff for the State Administration and Veterans' Affairs Interim Committee has prepared this report for informational purposes only. This report does not represent any action or opinion of the State Administration and Veterans' Affairs Interim Committee and does not preclude additional action that may be taken by the State Administration and Veterans' Affairs Interim Committee pursuant to its authority under the Montana Administrative Procedure Act (Title 2, chapter 4, MCA).

MAR NOTICE NUMBER: 44-2-181

AGENCY/BOARD: Secretary of State

RULE CLASSIFICATION: (e.g. substantive/interpretative/emergency/temporary): Substantive

SUBJECT: Ballot Forms and Uniformity, Fee Schedule for Statewide Voter Registration Lists and Extracts, Voter Registration Application and Information Requirements, Maintenance of Active and Inactive Voter Registration Lists for Elections, Late Registration Procedures, Procedures for Determining the Sufficiency of Identification and Eligibility to Vote at Polling Places, Various Election Procedures Relating to Voter Registration and Voting.

NOTICE DESCRIPTION: (e.g. proposal notice/adoption notice):
Notice of proposed amendments and new rules

SUMMARY OF RULE(S):

The Secretary of State proposed to adopt, amend, amend and transfer, or transfer 15 rules regarding voter registration and voting.¹ This memo deals specifically with New Rule I which was discussed at the July, 2013 State Administration and Veterans' Affairs Interim Committee meeting.

Through statute, the Legislature directed the Secretary of State to adopt certain rules pertaining to ballot forms. The pertinent portion of the code section reads:

¹ A more comprehensive description of the entire notice is contained in the State Administration and Veterans' Affairs Interim Committee rule memorandum dated July 9, 2013.

13-12-202. Ballot form and uniformity. (1) The secretary of state shall adopt statewide uniform rules that prescribe the ballot form for each type of ballot used in this state. The rules must conform to the provisions of this title unless the voting system used clearly requires otherwise. At a minimum, the rules must address:

- (a) the manner in which each type of ballot may be corrected under 13-12-204;
- (b) what provisions must be made on the ballot for write-in candidates;
- (c) the size and content of stubs on paper ballots, except as provided in 13-19-106(1);
- (d) how unvoted ballots must be handled;
- (e) how the number of individuals voting and the number of ballots cast must be recorded; and
- (f) the order and arrangement of voting system ballots. . . .

In response, the Secretary of State proposed to adopt New Rule I to fulfill the requirements of section 13-12-202, MCA. The Secretary's office had previously adopted this rule, and it had been erroneously repealed in 2011. In its original form, New Rule I stated:

NEW RULE I BALLOT FORM AND UNIFORMITY (1) Guidelines that prescribe the ballot form for each type of ballot used in this state are provided to each election administrator in the prescribed forms and election judge handbook, as applicable.

(2) The guidelines conform to the requirements of 13-12-202, MCA.

If the entire text of a rule does not appear within the rule itself, the Montana Administrative Procedure Act (MAPA) allows an agency to adopt a rule "by reference" subject to certain provisions. Among these provisions, the rule must include a citation to the exact material adopted by reference, a statement of the general subject matter of the omitted rule, and a statement of where the material may be obtained. Section 2-4-307, MCA. This allows the public a chance to comment on the rule provisions being incorporated by reference during the rulemaking process. Proposed New Rule I did not contain the required information under MAPA.

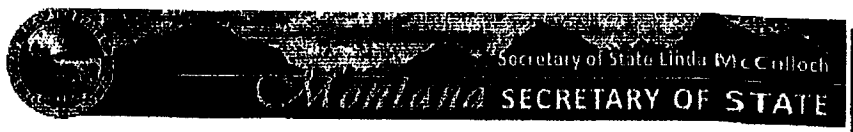
On July 11, 2013, the State Administration and Veterans' Affairs Interim Committee objected to New Rule I in order to place it on the agenda for discussion with the Secretary of State's office at the August 20, 2013, meeting. Pursuant to section 2-4-406, MCA, staff prepared a written objection for delivery to the Secretary of State's office. Under MAPA, the Secretary of State was required to respond in writing to the committee within 14 days of the mailing of the written objection. In the response, the Secretary of State proposed to amend the rule to conform with MAPA requirements.

The new proposed text of New Rule I reads:

NEW RULE I BALLOT FORM AND UNIFORMITY (1) The secretary of state adopts and incorporates by reference the document entitled, "Ballot Form and Uniformity Pursuant to 13-12-202 MCA Layout Instructions and Sample Ballots," which is available on the secretary of state's website at the following link:
<http://sos.mt.gov/Elections/Officials/Forms/index.asp>, updated March 20, 2012.
(2) The document incorporated by reference is provided to each election administrator and contains guidelines that prescribe the ballot form for each type of ballot used in this state, giving guidelines as to font, spacing, and printed instructions, to conform to the requirements of 13-12-202, MCA.

The new version of proposed New Rule I addressed the concerns as outlined at the last meeting, and the proposed rule now appears to be in conformance with MAPA's requirements for materials adopted by reference.

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BEFORE THE SECRETARY OF STATE OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I, amendment of ARM 44.3.1101, 44.3.2004, 44.3.2005, 44.3.2014, 44.3.2015, 44.3.2110, 44.3.2111, 44.3.2114, 44.3.2203, and 44.3.2304, the amendment and transfer of 44.3.1403, 44.3.1716, and 44.3.2016, and the transfer of 44.3.1715 pertaining to elections) NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION, AMENDMENT, AMENDMENT AND TRANSFER, AND TRANSFER

TO: All Concerned Persons

1. On July 11, 2013, at 9:30 a.m., the Secretary of State will hold a public hearing in the Secretary of State's Conference Room, Room 260, State Capitol Building, Helena, Montana, to consider the proposed adoption, amendment, amendment and transfer, and transfer of the above-stated rules.

2. The Secretary of State will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Secretary of State no later than 5:00 p.m. on June 27, 2013, to advise us of the nature of the accommodation that you need. Please contact Jorge Quintana, Secretary of State's Office, P.O. Box 202801, Helena, MT 59620-2801; telephone (406) 461-5173; fax (406) 444-4249; TDD/Montana Relay Service (406) 444-9068; or e-mail jquintana@mt.gov.

3. The rule as proposed to be adopted provides as follows:

NEW RULE I BALLOT FORM AND UNIFORMITY (1) Guidelines that prescribe the ballot form for each type of ballot used in this state are provided to each election administrator in the prescribed forms and election judge handbook, as applicable.

(2) The guidelines conform to the requirements of 13-12-202, MCA.

AUTH: 13-12-202, MCA
IMP: 13-12-202, MCA

REASON: The Secretary of State is adopting this rule as required by 13-12-202, MCA. Detailed guidelines regarding ballot form and uniformity are provided to election administrators in either the prescribed forms or election judge handbook as referenced in the rule and are available on the Secretary of State's web site.

4. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

44.3.1101 SCHEDULE OF FEES FOR STATEWIDE VOTER DATABASE REGISTRATION LISTS AND EXTRACTS (1) Upon written request, the secretary of state



State Administration and Veterans' Affairs Interim Committee

63rd Montana Legislature

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GINGER ALDRICH, Staff Attorney
PAMELA ROSSI, Secretary

July 15, 2013

Linda McCulloch
Secretary of State
State Capitol Building
1301 E. 6th Avenue
Helena, MT 59601

Madam Secretary,

Pursuant to section 2-4-305(9), MCA, on July 11, 2013, the State Administration and Veterans' Affairs Interim Committee objected to New Rule I Ballot Form and Uniformity in the Montana Administrative Register, Rule Notice No. 44-2-181, in order to place it on the Committee's agenda for further discussion on Tuesday, August 20, 2013. The Committee did not object to the other proposals contained in Rule Notice No. 44-2-181.

The Committee's objection stems from concerns over the rule's compliance with the requirement in section 13-12-202, MCA, that the Secretary of State address certain topics through rulemaking. While proposed Rule I attempts to address the requirements of 13-12-202, MCA, it does so by referencing "prescribed forms and [the] election judge handbook". *New Rule I Ballot Form and Uniformity*. This does not appear to fulfill the Montana Administrative Procedure Act requirements under section 2-4-307, MCA, that any omissions from the Administrative Rules of Montana or the Montana Administrative Register necessitate certain criteria within the published rule notice, such as specific citations to the material adopted by reference, a statement of the general subject matter of the omitted material, and where the material may be found. This allows proper public comment on the proposed documents at the time of the proposal notice (since such material must be in existence at the time of the proposal notice). Although the Secretary is allowed to prescribe election materials under section 13-1-202, MCA, section 13-12-202, MCA, specifically governs "ballot form" requirements under rulemaking authority, which is subject to MAPA requirements.

The Committee would like the opportunity to discuss the matter with you or your staff directly to understand the reasoning behind the rule before considering whether to renew its objection.

If you have any questions or concerns, please do not hesitate to contact me.

K. Virginia Aldrich
State Administration and Veterans' Affairs Staff Attorney
cc Sheri Scurr

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MONTANA SECRETARY OF STATE

LINDA McCULLOCH

July 30, 2013

K. Virginia Aldrich, Staff Attorney
State Administration and Veterans' Affairs Interim Committee
P.O. Box 201706
Helena, MT 59620-1706

Dear Ms. Aldrich:

I am in receipt of your letter dated July 15, 2013, objecting to the adoption of New Rule I, Ballot Form and Uniformity, as it is proposed in MAR Notice No. 44-2-181.

The Committee's objection is that the rule "does not appear to fulfill the Montana Administrative Procedure Act requirements under section 2-4-307, MCA, that any omissions from the Administrative Register necessitate certain criteria within the published rule notice, such as specific citations to the material adopted by reference, a statement of the general subject matter of the omitted material, and where the material may be found."

Pursuant to Mont. Code Ann. § 2-4-406(2), the Secretary of State responds by proposing to amend New Rule I as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

New Rule I (44-3- 2407) BALLOT FORM AND UNIFORMITY (1) Guidelines that prescribe the ballot form for each type of ballot used in this state are provided to each election administrator in the prescribed forms and election judge handbook, as applicable. The secretary of state adopts and incorporates by reference the document entitled "Ballot Form and Uniformity Pursuant to 13-12-202 MCA Layout Instructions and Sample Ballots," which is available on the secretary of state's website at the following link: <http://sos.mt.gov/Elections/Officials/Forms/index>, updated March 20, 2012.

(2) The document incorporated by reference is provided to each election administrator and contains guidelines that prescribe the ballot form for each type of ballot used in this state, giving guidelines as to font, spacing, and printed instructions, to conform to the requirements of 13-12-202, MCA.

AUTH: 13-1-202, 13-12-202, MCA
IMP: 13-1-202, 13-12-202, MCA

As you know, the Secretary of State is authorized under Mont. Code Ann. § 13-1-202 to prescribe forms and rules under her authority as the chief election officer for the state. The forms and rules authorized are specifically for use by the county election administrators. A statement of intent that accompanied the rulemaking authority of Mont. Code Ann. § 13-1-202 clarified that the rulemaking authority as it relates to this section was specifically to provide forms, directives, instructions, and advice to local election administrators. Therefore, it can be argued that the ballot form is prepared for use by public officials in carrying out their official duties with regard to elections. The Secretary of State believes that right is reserved to herself and the local election administrators as the subject matter experts on elections.

I hope that this clarifies the Secretary of State's authority with regard to election forms and that the SAVA committee will agree to allow the objected rule to go forward as quickly as possible with the suggested amendment. If, after this response, you are still proposing placing this item on the SAVA committee agenda for August, our agency would respectfully request an opportunity to be present and testify before the committee on this matter.

Sincerely,

*Linda McCulloch by Kathryn Bran
Conf. Deputy*

Linda McCulloch
Secretary of State