

**California Secretary of State
Proposed Regulatory Action
Risk Limiting Audits
Addendum to Initial Statement of Reasons**

On June 18, 2021, the Secretary of State gave notice of a proposal to make permanent emergency regulations related to Risk Limiting Audits. This is known as a Certificate of Compliance action. The Secretary of State proposed to adopt most of the emergency regulations as well as make some additional changes. The initial public comment period for this proposed regulation text ended on August 5, 2021. In response to comments received in response to the originally proposed regulation text, the Secretary of State is now proposing additional changes to the proposed regulation text. This public comment period will be open for 45 days. Only comments that relate to changes to the text noticed on June 18, 2021 (shown in underline or strikethrough in the proposed regulation text) will be considered during this public comment period.

This document is intended to be read alongside the document noticed simultaneously entitled “Proposed Regulation Text: Changes to Proposed Regulation Text Noticed June 18, 2021.” The changes shown in that document are explained here.

PUBLIC HEARING AND COMMENT

Hearing Date: No hearing date is scheduled. A public hearing will be held if any interested person, or his or her duly authorized representative, submits a written request for a public hearing to the contact person listed no later than 15 days prior to the close of the written comment period.

Written Public Comment Period: September 3, 2021, through October 18, 2021 (45-day comment period)

Subject Matter of Proposed Regulations: Risk Limiting Audits

Section(s) Affected: Sections 20111, 20112, 20114, 20115, 20117, 20118, 20119, 20120, 20121, 20122, 20124, and 20125 of Chapter 2 of Division 7 of Title 2 of the California Code of Regulations

PURPOSE AND NECESSITY

The purpose of these additional changes to the proposed regulation text as part of this Certificate of Compliance action are to address comments the Secretary of State received during the initial public comment period. These changes are necessary to address those concerns and to allow for an efficient and effective risk limiting audits pilot program in California.

FACTUAL BASIS / RATIONALE

The factual basis and rationale for each section of the proposed regulations that are changed in this notice period are as follows:

20111. Definitions.

Subdivision (c). The definition of “ballot-level comparison audit” is expanded to explain how this type of audit is performed. The purpose of this change is to expand on the referenced statutory definition (while not changing that definition), to better illustrate to the public and elections officials how this audit functions. This change is necessary to ensure this audit type is performed properly and understood by the public. This audit type compares ballots represented in the cast vote record with the audit trail, and this definition makes that process clear.

Subdivision (d). The definition of “ballot manifest” is modified to change the word “ballots” to “ballot cards” and to add the words “at minimum” to the contents of a ballot manifest. The purpose of changing to the words “ballot cards” is to clarify that individual ballot cards should be noted rather than ballots, and this change is necessary to avoid confusion around multi-page ballots and how multi-page ballots are handled during an audit. The purpose of adding the words “at minimum” is to clarify that a ballot manifest is not limited to the items that must be included in such a manifest and is necessary to allow elections officials’ the flexibility to add additional fields to ballot manifests.

Subdivision (e). The definition of “ballot-polling audit” is expanded to explain how this type of audit is performed. The purpose of this change is to expand on the referenced statutory definition (while not changing that definition), to better illustrate to the public and elections officials how this audit functions. This change is necessary to ensure this audit type is performed properly and understood by the public. The hyphen is also removed from between the words “ballot” and “polling” for consistency throughout these regulations and with the Elections Code section 15366(c).

Subdivision (f). The definition of “batch comparison audit” is revoked and replaced. The new definition is largely similar to the previous definition, but structurally reworded and slightly clarified to avoid confusion and expanded to include the steps involved in conducting this audit. The purpose of this change is to address comments received that felt the original definition was potentially confusing and to better illustrate to the public and elections officials how this audit functions. This change is necessary to ensure this audit type is performed properly and understood by the public. Paragraphs (1) through (4) describe the specific steps involved in this type of audit. These paragraphs describe how ballot cards are organized into batches, how the vote subtotals are prepared, how vote subtotals must not exceed the count of ballot cards, and how the batches are compared to the ballot-level subtotals. Each of these steps is necessary to describe how this audit type works. The step described in paragraph (3) is necessary because if the number of ballot cards exceeds the vote subtotals then the vote subtotals are not prepared accurately, so the audit will not be accurate. It is not necessary for these two numbers to match exactly (in other words, there can be fewer ballot cards than the vote subtotals), because if the audit identifies a missing ballot then that would be an exception that may expand the audit but would not make the results of the audit invalid.

Subdivision (j). The definition of “hybrid audit” is revoked and replaced. Public comment indicated that the initial definition was inaccurate in how it described this audit type. It was

necessary to replace this definition to accurately describe the audit type. The new definition describes the audit type by describing its steps; a simple summary statement like originally proposed was determined to be potentially misleading. The steps are listed in paragraphs (1) through (5). Each of these steps is necessary to accurately describe how the audit works: ballot cards are divided into batches, vote subtotals or cast vote records are prepared, the totals are compared to ensure the audit can proceed (for the same reason as described in the discussion for subdivision (f), paragraph (3) above), and ballot cards are evaluated. Each of these steps is necessary to describe how this audit type works.

Subdivision (k). The definition of public notice is modified to require the use of two rather than one communication channels. The purpose of this change is to ensure notice is given in a way that is most likely to reach interested parties, and was made at the request of public comment. This change is necessary to ensure the public has adequate notice to allow participation in the audit process. Paragraph (1) is added to this subdivision to state a preference for email communication to known interested parties, though not to require this type of communication or the maintenance of a list of known parties. The purpose of this statement is to ensure that those most interested in risk limiting audits are directly contacted for all notice purposes. This provision is necessary to express this preference and to ensure full public participation in the risk limiting audit process.

Subdivision (l). The definition of “random seed” is clarified to note that a random seed itself is randomly generated (not solely a number used to generate other random numbers), and that it is used not just to select ballot cards but to select batches of ballot cards for audit. The addition of “randomly generated” is necessary to clarify that the random seed itself is random, ensuring the randomness of the audit and the purpose of random seed generation. The clarification of how the random seed is used (also for batches of ballot cards) is necessary to clarify that this random seed is used not just for instances when individual ballot cards are drawn but also for selection of batches in applicable audit types.

Subdivision (n). The acronym “SOS” is changed to “Secretary of State” as that acronym had not been defined, and the word “affect” is changed to “effect” to correct a grammatical error. Both changes are non-substantive.

Note and Reference. An additional reference citation is added. The purpose of this is to provide an accurate citation, and this is necessary to comply with the Administrative Procedure Act.

20112. Audit Types.

Subdivision (d). The description of the hybrid audit type is modified to be consistent with the revised definition of this audit type in subdivision 20111(j), for the same purpose and necessity describing the changes in that definition, above.

20114. Contests to be Audited.

Text is added to describe and allow the concept of an opportunistic review of contests not subject to audit. The purpose of this change is to explicitly allow those participating in the risk limiting

audit program to engage in this activity alongside the audit. Opportunistic reviews allow the review of results of contests not subject to audit, and offer additional public confidence in reported results of these contests even though that review is not subject to the risk limit. This type of review is especially poignant given the change in the original emergency regulations, and in recent law changes, to remove cross-jurisdictional contests from the pilot program. This change is necessary to avoid a challenge to this practice in concert with the audit.

20115. Audit Board Selection.

Subdivision (a), paragraph (2). Text is added to express a preference for audit board members to not have been involved in adjudicating voter intent during tabulation. The purpose of this addition is to state such a preference. The reason this is a preference rather than a requirement is based on feedback received from elections officials that there may not be sufficient people available to participate on audit boards who have not been involved in tabulation. However, the use of the term “if feasible” is intended to be stronger than a purely optional provision. This provision is necessary to express this preference.

20117. Ballot Manifest and Ballot Handling.

Subdivision (a). The term “independent of” is changed to “without reliance on.” The purpose of this change is to clarify how the ballot manifest is maintained. This is not intended to be a substantive change, merely clarification. This change is necessary to avoid confusion and allow proper administration of risk limiting audits.

Subdivision (b). The word “and” is added to correct a grammatical error. This is a non-substantive change.

Subdivisions (d) and (e). The word “ballots” is changed to “ballot cards.” The purpose of changing to the words “ballot cards” is to clarify that individual ballot cards should be noted rather than ballots, and this change is necessary to avoid confusion around multi-page ballots and how multi-page ballots are handled during an audit.

20118. Chain of Custody.

Subdivisions (b) and (c). The word “ballots” is changed to “ballot cards.” The purpose of changing to the words “ballot cards” is to clarify that individual ballot cards should be noted rather than ballots, and this change is necessary to avoid confusion around multi-page ballots and how multi-page ballots are handled during an audit.

20119. Data Publication Prior to Audit.

Subdivision (b). This provision is clarified to state what contests must and may be included in cast vote records made available to the public. The purpose of this change is to avoid confusion among elections officials and observers about what data should be made available. Only records used in the audit are mandatory because these are ones that members of the public would use to recreate the audit. This is a primary reason that certain audit data such as the random seed and

the source code of the RLA software tool are made available to observers and the public: so that those groups can do so. Other records are voluntary to give elections officials discretion. This provision is necessary to clarify the intent of this subdivision.

Note and Reference. The word “and” is removed for grammatical purposes. This is a non-substantive change.

20120. Random Seed.

Subdivision (b), paragraph (1). This provision is revised to create two distinct notice periods for the first random seed and for the second random seed. Five days’ notice, as contemplated in the original regulation text, is appropriate both to allow time for potential observers to arrange to attend the audit and—more importantly—to serve as a general announcement that the county will be starting the risk limiting audit. A separate, shorter notice period for the second random seed is necessary due to the practicalities of conducting a risk limiting audit during the compressed election canvass period. Due to election timelines in California, elections officials may only have a few days to conduct a second phase audit – which would not allow for 5-days’ notice before a die roll. The intent here is that anyone interested in observing the audit would have sufficient notice before the first die roll and that they would remain close by before the second die roll, knowing that the audit was not completed after the first phase. One hour would allow observers to return to the audit location if they were away but would not interfere with the ability for the audit to conclude in a compressed time frame. This provision is necessary to clarify notice periods, balancing the interests of observers with the practicalities of the election canvass timeline.

Subdivision (b), paragraph (2). This provision is revised to clarify that the elections official has discretion in designating staff members to roll the die. The purpose of this provision is to confirm that the elections official has the discretion both in selection members of the public or their own staff to role a die. This provision is necessary to avoid confusion.

Subdivision (b), paragraph (3). The word “can” is changed to “may” as a grammatical correction. The purpose of this change is to avoid confusion. This provision is necessary for the same reason.

Subdivision (b), paragraph (4). This paragraph is added at the request of commenters. This provision explicitly allows video recording or photography of the random seed selection process. This is not intended to be a change in audit procedure but rather a clearly defined option for observers. This provision is necessary to ensure observers may exercise this option.

Note and Reference. The word “and” is removed for grammatical purposes. This is a non-substantive change.

20121. Audit Procedures for Single-Phase Audit.

Subdivision (a). The word “ballots” is changed to “ballot cards.” The purpose of changing to the words “ballot cards” is to clarify that individual ballot cards should be noted rather than ballots,

and this change is necessary to avoid confusion around multi-page ballots and how multi-page ballots are handled during an audit.

Subdivision (a), paragraphs (3) and (4). The phrase concerning hybrid audits with a ballot-level comparison audit component are revoked to conform with the revised definition of this audit type in subdivision 20111(j), for the same purpose and necessity describing the changes in that definition, above.

Subdivision (a), paragraph (4). A change here provides that vote totals are extracted from the voting system before being entered into the RLA software tool. The purpose of this change is to ensure that it is clear the vote totals must come from the voting system, and this change is necessary to ensure other vote totals are not used for this purpose. Additionally, the end of this paragraph changes from a period to a semicolon to allow for the addition of a new paragraph (5).

Subdivision (a), paragraph (5). This new section addresses the information that must be entered into the RLA software tool for hybrid audits. The purpose of this addition clarifies what information the RLA software tool will need to conduct this audit type. This is necessary to ensure the correct data is entered into the RLA software tool and that those reading these regulations are aware in advance of starting the audit of what will be required.

Subdivision (b). The words “if possible” are added with respect to resolving inconsistencies. The purpose of this addition is to address situations where an inconsistency that would not necessarily be a reason to stop the audit cannot be resolved, or cannot be resolved in a timely manner, would not prevent the audit from stopping. This addition is necessary to allow audits to continue in this situation. Additionally, a new requirement that inconsistencies be noted in the final audit report is added. The original regulations already intended this type of reporting in Section 20125, subdivision (16) in this version of the text (this relates to reporting anything unusual or problematic), but this addition makes this type of reporting explicitly required. This change is necessary to ensure such information is adequately disclosed.

Subdivision (d). The word “randomly” is removed to accurately reflect how the RLA software tool functions. The purpose of this change is to clarify that the tool does not randomly generate a list of ballot cards or batches of ballot cards, but rather that it systematically generates this list while using a random number. The randomness exists with the random seed, not the RLS software tool itself. To wit: if the same random seed is entered multiple times the result would be the same; only if the random seed changes would the result differ. This structure allows members of the public to recreate the audit using the same random seed and their own audit tools and get the same results, which allows confirmation that the RLA software tool is functioning properly. This provision is necessary to avoid confusion in this area and to confirm how the RLA software tool should function.

20122. Audit Procedures for Two-Phase Audit.

Subdivision (a). A hyphen is added to the term “two phase.” This is a non-substantive change.

Subdivision (b), paragraphs (3) and (4) and subdivision (f), paragraphs (3), (4), and (6). The phrase concerning hybrid audits with a ballot-level comparison audit component are revoked to conform with the revised definition of this audit type in subdivision 20111(j), for the same purpose and necessity describing the changes in that definition, above.

Subdivision (b), paragraph (5). This new section addresses the information that must be entered into the RLA software tool for hybrid audits. The purpose of this addition clarifies what information the RLA software tool will need to conduct this audit type. This is necessary to ensure the correct data is entered into the RLA software tool and that those reading these regulations are aware in advance of starting the audit of what will be required.

Subdivision (c). The words “if possible” are added with respect to resolving inconsistencies. The purpose of this addition is to address situations where an inconsistency that would not necessarily be a reason to stop the audit cannot be resolved, or cannot be resolved in a timely manner, would not prevent the audit from stopping. This addition is necessary to allow audits to continue in this situation. Additionally, a new requirement that inconsistencies be noted in the final audit report is added. The original regulations already intended this type of reporting in Section 20125, subdivision (16) in this version of the text (this relates to reporting anything unusual or problematic), but this addition makes this type of reporting explicitly required. This change is necessary to ensure such information is adequately disclosed.

Subdivisions (d) and (e). The word “first” is re-added after having been removed in the June 18, 2021 proposed text. This word was removed on the mistaken assumption that a two-phase audit may not need to random seeds. The concept of two distinct random seeds for the two phases of a two-phase audit has been restored throughout these regulations. With this correction, the word “first” is once again relevant.

Subdivision (f). The changes here mirror those in subdivision (b), with the same purpose and necessity. What occurs in the first phase of the audit should occur in the second phase of the audit.

Subdivision (g). The changes here mirror those in subdivision (c), with the same purpose and necessity. What occurs in the first phase of the audit should occur in the second phase of the audit.

Subdivision (h). This provision is re-added after having been removed in the June 18, 2021 proposed text. This provision was removed on the mistaken assumption that a two-phase audit may not need to random seeds. The concept of two distinct random seeds for the two phases of a two-phase audit has been restored throughout these regulations. With this correction, the provision is once again relevant.

Subdivision (i). This subdivision is renumbered with the insertion of a new subdivision (h) above. The provision related to entering the second random seed into the RLA software tool is re-added after having been removed in the June 18, 2021 proposed text. This provision was removed on the mistaken assumption that a two-phase audit may not need to random seeds. The concept of two distinct random seeds for the two phases of a two-phase audit has been restored

throughout these regulations. With this correction, the provision is once again relevant. Additionally, the phrase “whether the audit can stop” is removed as it did not add any requirement and could be confusing to elections officials and observers. The concept of an audit “stopping” and whether “further auditing” is not needed are one and the same and so the potentially confusing duplication of these concepts is resolved with this removal.

Subdivision (j). This subdivision is renumbered with the addition of the new subdivision (h) above. This is a non-substantive change.

20124. Public Observation and Verification of Audit.

Subdivision (a). The word “to” is changed to “by.” This is a non-substantive grammatical change.

Subdivision (a), paragraph (2). The word “ballots” is changed to “ballot cards.” The purpose of changing to the words “ballot cards” is to clarify that individual ballot cards should be noted rather than ballots, and this change is necessary to avoid confusion around multi-page ballots and how multi-page ballots are handled during an audit.

Subdivision (a), paragraph (3). The phrase concerning hybrid audits with a ballot-level comparison audit component are revoked to conform with the revised definition of this audit type in subdivision 20111(j), for the same purpose and necessity describing the changes in that definition, above. A new requirement to provide documentation related to hybrid audits is added to conform to information required in such audits, as described in subdivision 20111(j) above. This addition is necessary to ensure observers have access to this information.

Subdivision (b). This provision is changed to allow elections officials to designate a person other than the audit board to answer public questions about the audit. The purpose of this provision is to allow the elections official to exercise this option. The earlier version of these regulations could be read to mean that if the audit board would be interfered with by answering questions than there would be no one designated to answer their questions. This allows (but does not require) the elections official to designate someone to assist with such questions. This provision is necessary to balance the public need to ask questions with the ability of the audit board to engage in audit activities without interference.

20125. Certification of Contest Results and Reporting of Audit Results.

Subdivision (a), paragraph (6). A new requirement that inconsistencies be noted in the final audit report is added. The original regulations already intended this type of reporting in Section 20125, subdivision (16) in this version of the text (this relates to reporting anything unusual or problematic), but this addition makes this type of reporting explicitly required. This change is necessary to ensure such information is adequately disclosed.

Subdivision (a), paragraph (10) of the new regulation text. The phrase concerning hybrid audits with a ballot-level comparison audit component are revoked to conform with the revised definition of this audit type in subdivision 20111(j), for the same purpose and necessity describing the changes in that definition, above.

Subdivision (a), paragraphs (6) through (15) are renumbered to accommodate the addition of new paragraphs. These changes are non-substantive.

Subdivision (a), paragraph (12). With the addition of opportunistic reviews of contests not subject to audit in Section 20114, it is necessary for information about these reviews to be disclosed to ensure full transparency into the audit process and any information identified as a result of such audits and reviews. This provision is necessary to ensure full public disclosure of information discovered during the audit.

ECONOMIC IMPACT STATEMENT

The Economic Impact Statement in the Initial Statement of Reasons noticed on June 18, 2021 is unchanged.