

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

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: June 18, 2021, through August 2, 2021 (45-day comment period)

Subject Matter of Proposed Regulations: Risk Limiting Audits

Section(s) Affected: Sections 20110, 20111, 20112, 20114, 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 regulations is to make permanent the emergency regulations (OAL File No. 2020-0902-01) the Secretary of State (SOS) adopted on September 10, 2020, related to Risk Limiting Audit (RLA). The emergency regulations were adopted to conform to urgency legislation Assembly Bill 2400 passed by the California Legislature that went into effect on August 27, 2020. Without the emergency regulation, California counties would not have been able to conduct risk-limiting audits compliant with regulation for the statewide general election held on November 3, 2020.

The emergency regulations made changes to procedures for conducting a two-phased audit. These changes were necessary to conform to audit software that the SOS procured for use in risk-limiting audits in California. In the process of procuring audit software, the SOS learned that the procedures in the current regulations were overly restrictive and would make them incompatible with available audit software. These changes were necessary to ensure audit software is available for county elections officials to use.

In addition, we are proposing to add two more audit types in the regulations: “Batch comparison audit” and “Hybrid audit.” This is being done on the demand of some counties and in consultation with the RLA experts. Batch comparison and Hybrid audit can be efficient for some counties depending upon the use of the type of voting system and method of ballot storage. Pursuant to section 15367 (a)(4), a county elections official cannot use any other method other than a ballot-level comparison audit, or ballot polling audit without the approval of the Secretary of State. Therefore, it is necessary for the Secretary of State to include these additional methods of the RLAs in order for counties to use them.

FACTUAL BASIS / RATIONALE

The factual basis and rationale for each section of the proposed regulations are as follows:

20110. General Provisions. These changes were made through the emergency regulations (OAL File No. 2020-0902-01) which the SOS adopted on September 10, 2020. We have not made any additional change in this section. The following factual basis and rationale for amending this section are the same as they were described in the Finding of Emergency.

Subdivision (b). We have changed the elections to which these regulations apply from those occurring on or after March 3, 2020 to those occurring on or after November 3, 2020. These changes are necessary to conform to modified legislative language updating these dates. We have also struck language stating that risk-limiting audits could be conducted in place of the one percent manual tally, as described, and replaced that language with new language in new subdivision (c) that conforms to revised legislative language. This change was necessary to conform to modified legislative language.

Subdivision (c). This is a new subdivision that restates legislative language stating that county elections officials that conduct risk-limiting audits may exclude certain contests from the one percent manual tally, as described. This language restates legislative language and so is non-substantive. This language is included to provide full context for these regulations to participating county elections officials and to the general public.

20111. Definitions. In addition to the changes made through the emergency regulations, we have also added subdivision (f) – definition of “Batch comparison audit” and subdivision (j) – “Hybrid audit” to this section.

Subdivision (f) “Batch comparison audit.” We have the definition of batch comparison audit. It means a type of risk-limiting audit in which elections officials examine voter markings on randomly selected batches of ballots seeking strong evidence that the reported tabulation outcome is correct. We are proposing to add batch comparison audit as one of the types of RLAs. Elections Code section 15367 (a)(4) provides, “An elections official is in compliance with this section if the elections official conducts a ballot-level comparison audit, or ballot polling audit, with a five percent risk limit or a risk-limiting audit with a five percent risk limit using another method for conducting risk-limiting audits as approved by the Secretary of State. Counties cannot use any other method of RLA unless that is approved by the SOS. The SOS after consulting with counties, the RLA experts and the RLA software tool vendor has determined that batch comparison audit is one of the suitable types of RLA that can be added to the types of audit authorized under section 20112 of this chapter. Since, we are proposing to add batch comparison audit to the types of RLA, therefore, it is necessary to provide its definition to ensure that both the county elections official and the public understand what is batch comparison audit.

Subdivision (g). This subdivision is struck because cross-jurisdictional contests have been eliminated from the statute providing for the risk-limiting audit pilot program. This change is necessary to conform these regulations to current statutory language.

Subdivision (j). This subdivision is struck because partial risk-limiting audits have been eliminated from the statute providing for the risk-limiting audit pilot program. This change is necessary to conform these regulations to current statutory language. This subdivision is being replaced with the definition of the phrase “Hybrid audit.” It means a combination of multiple audit types. We are proposing to add hybrid audit as one of the types of RLAs. Elections Code section 15367 (a)(4) provides, “An elections official is in compliance with this section if the elections official conducts a ballot-level comparison audit, or ballot polling audit, with a five percent risk limit or a risk-limiting audit with a five percent risk limit using another method for conducting risk-limiting audits as approved by the Secretary of State. Counties cannot use any other method of RLA unless that is approved by the SOS. The SOS after consulting with counties, the RLA experts and the RLA software tool vendor has determined that hybrid audit is one of the suitable types of RLA that can be added to the types of audit authorized under section 20112 of this chapter. Since, we are proposing to add hybrid audit to the types of RLA, therefore, it is necessary to provide its definition to ensure that both the county elections official and the public understand what is hybrid audit.

Subdivisions (g) (h), (i), (k), (l), (m), (n), and (o). These subdivisions are renumbered to reflect the addition of subdivision (f) and removal of subdivision (g). These are non-substantive changes.

20112. Audit Types.

We have added subdivisions (c) and (d) to this section. These subdivisions will add two new types of RLAs – “Batch comparison audit” and “Hybrid audit.” Factual basis and reasons for adding these two types of RLAs are provided in the subdivisions (f) and (j) above in section 20112 of this chapter.

20114. Contests to be Audited.

This subdivision is struck and replaced with new language that conforms with modified statutory language. AB 2400 replaced the requirement that county elections officials audit all contests in their jurisdiction, including cross-jurisdictional contests, with a requirement to audit one or more contests fully contained within a county’s borders. This change is necessary to conform these regulations to current statutory language.

20121. Audit Procedures for Single-Phase Audit.

We have made changes in subdivision (a) to Paragraphs (2), (3) and (4). We have removed the “and” in paragraph (2) to make it grammatically correct. This change is non-substantive. In paragraph (3) and (4) we have added reference to hybrid audit and batch comparison audit. This change is necessary to correspond to the new types of audit we are proposing to add. In a single-phase audit procedure both hybrid and batch comparison audit require that along with ballot manifest and result of all ballot cards, they also require cast vote records for all ballot card(s) tabulated as well as the vote totals from each contest being audited for each batch to be entered into the RLA software tool. These changes are also necessary to ensure that county elections official follow proper procedures while conducting batch comparison and hybrid audit.

20122. Audit Procedures for Two-Phase Audit.

Subdivision (a). We have made changes to Paragraphs (3) and (4). In paragraph (3) and (4) we have added reference to hybrid audit and batch comparison audit. This change is necessary to correspond to the new types of audit we are proposing to add. In a two-phase audit procedure both hybrid and batch comparison audit require that along with the initial ballot manifest for all ballot card(s) and the results for all ballot card(s) tabulated that were included in the initial ballot manifest, they also require cast vote records for all ballot card(s) tabulated as well as the vote totals from each contest being audited for each batch to be entered into the RLA software tool. These changes are also necessary to ensure that county elections official follow proper procedures while conducting batch comparison and hybrid audit. Paragraph (5) is being renumbered. This is a non-substantive change.

Subdivision (d) and (e). We are removing the words “first” from both of these subdivisions. This is to conform to section 20120 of this chapter. There is no such reference to either first or second random seed in section 20120. It appears that this word was inserted into these subdivisions due to an oversight. These are non-substantive changes.

Subdivision (h). This language is struck to remove the requirement that county elections officials conducting a two-phase audit generate a second random seed for the second audit phase. The purpose of this change is to reflect how audit software functions when conducting two-phase audits. In the process of procuring audit software, the SOS learned that it may be possible to conduct two-phase audits, while preserving the randomness of the ballots selected for audit, without requiring two audit seeds. Eliminating this requirement from regulation gives flexibility to software vendors designing audit software and gives the SOS the ability to procure existing audit software without making custom changes. This change is necessary to provide flexibility in how the SOS procures and how county elections officials use audit software

Subdivision (i). Language concerning a second random seed is struck. The purpose of this change is to reflect modified procedures for using audit software. This change is necessary to reflect the elimination of subdivision (h) that removes the requirement for a second random seed.

Subdivisions (i) and (j). These subdivisions are renumbered to reflect the removal of subdivision (h). These are non-substantive changes.

20124. Public Observation and Verification of Audit.

We have made changes to subdivision (a)(3)(B) of this section. These changes reflect the additional information that would be required to be disclosed for both batch comparison and hybrid audit to ensure that the audit process is observable and verifiable to the public. In addition to the ballot manifest and cast vote record for a batch comparison audits or hybrid audits with a batch comparison audit component, the county elections official must also disclose vote totals from each contest being audited for each batch. In addition, we are reformatting subdivision (a)(3)(B) to make it clear and easy to understand. This change is non-substantive.

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

We have made changes to subdivision (a), paragraphs (1) and (9). We have also added paragraph (10) to this subdivision. In paragraph (1), we are adding the reference to batch comparison and hybrid audit. This change conforms to the addition we have made in section 20112 where we are adding two more audit types. Therefore, this change is necessary to reflect the addition in section 20112 of this chapter. In paragraph (9), we have included a reference to the hybrid audit with a ballot-level comparison audit component. Since, the hybrid audit can be a combination of any of the audit types, therefore, a hybrid audit with a ballot-level comparison audit component would require the same information to be included in the report. Similarly. We have added paragraph (10) to this this subdivision because for a batch comparison audits or a hybrid audit with a batch comparison audit component, discrepancies between batches and batch totals should be reflected on the report. Therefore, this change is necessary to reflect the addition of two audit types in section 20112 of this chapter.

ECONOMIC IMPACT STATEMENT

The proposed regulations conform to the legislative changes enacted in AB 2400 (2020). Apart from implementing the will of the legislature, these changes to the current regulations do not significantly impact the existing programs or procedures used by the county elections officials to conduct the RLAs.

Creation or Elimination of Jobs within the State of California

It is not anticipated that these regulations will create or eliminate jobs within the State of California. These regulations conform to the legislative changes enacted in AB 2400 (2020). Apart from implementing the will of the legislature, these changes to the current regulations do not significantly impact the existing programs or procedures used by the county elections officials to conduct the RLAs.

Creation of New or Elimination of Existing Businesses within the State of California

These regulations are anticipated to affect the Secretary of State and county elections official. These regulations conform to the legislative changes enacted in AB 2400 (2020). Apart from implementing the will of the legislature, these changes to the current regulations do not significantly impact the existing programs or procedures used by the county elections officials to conduct the RLAs. Therefore, we do not anticipate the expansion of or elimination of existing businesses.

Expansion of Businesses or Elimination of Existing Businesses within the State of California

These regulations are anticipated to affect the Secretary of State and county elections official. These regulations conform to the legislative changes enacted in AB 2400 (2020). Apart from implementing the will of the legislature, these changes to the current regulations do not significantly impact the existing programs or procedures used by the county elections officials to conduct the RLAs. Therefore, we do not anticipate the expansion of or elimination of existing businesses.

Benefits of the Regulations

These regulations benefit California residents as they provide transparency and confidence to the public that the election result is correct and verified. These regulations do not have any significant impact on the environment or the working conditions of California businesses and their employees.