



RULE-MAKING ORDER

CR-103P (May 2009)
(Implements RCW 34.05.360)

Agency: Office of the Secretary of State, Elections Division.

Permanent Rule Only

Effective date of rule:

Permanent Rules

31 days after filing.

Other (specify) _____ (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

Yes No If Yes, explain:

Purpose:

The rule changes update WACs to reflect changes passed by the 2013 Legislature, and provide other updates.

Citation of existing rules affected by this order:

Repealed: 434-209-020, 434-215-150, 434-230-047, 434-230-095, 434-335-430, 434-335-440, 434-335-445, and 434-335-450.

Amended: 434-12A-110, 434-208-060, 434-208-130, 434-208-140, 434-215-021, 434-215-025, 434-215-130, 434-230-015, 434-230-025, 434-230-055, 434-230-100, 434-230-110, 434-230-130, 434-230-045, 434-235-020, 434-235-040, 434-235-030, 434-250-100, 434-250-105, 434-250-110, 434-250-120, 434-250-320, 434-250-095, 434-261-086, 434-261-100, 434-262-020, 434-262-031, 434-262-070, 434-324-026, 434-324-045, 434-324-076, 434-324-111, 434-324-115, 434-324-118, 434-335-270, 434-335-280, 434-335-300, 434-335-310, 434-335-320, 434-335-330, 434-379-009, 434-379-010, 434-381-120, 434-840-005, and 434-840-100.

Suspended:

Statutory authority for adoption: RCW 29A.04.611

Other authority :

PERMANENT RULE (Including Expedited Rule Making)

Adopted under notice filed as WSR 13-24-064 on November 26, 2013 (date).

Describe any changes other than editing from proposed to adopted version:

There are no substantive changes from the proposed version.

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name:

phone () _____

Address:

fax () _____

e-mail _____

Date adopted: February 26, 2014

CODE REVISER USE ONLY

NAME (TYPE OR PRINT)

Ken Raske

SIGNATURE

TITLE

Assistant Secretary of State

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: February 26, 2014

TIME: 8:21 AM

WSR 14-06-040

(COMPLETE REVERSE SIDE)

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	_____	Amended	<u>1</u>	Repealed	_____
Federal rules or standards:	New	<u>1</u>	Amended	<u>1</u>	Repealed	_____
Recently enacted state statutes:	New	_____	Amended	<u>13</u>	Repealed	<u>3</u>

The number of sections adopted at the request of a nongovernmental entity:

New	<u>1</u>	Amended	_____	Repealed	_____
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The number of sections adopted in the agency's own initiative:

New	<u>7</u>	Amended	<u>45</u>	Repealed	<u>8</u>
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	<u>6</u>	Amended	<u>31</u>	Repealed	<u>5</u>
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The number of sections adopted using:

Negotiated rule making:	New	<u>8</u>	Amended	<u>45</u>	Repealed	<u>8</u>
Pilot rule making:	New	_____	Amended	_____	Repealed	_____
Other alternative rule making:	New	_____	Amended	_____	Repealed	_____

Concise Explanatory Statement (RCW 34.05.325(6)(a))
Elections Rulemaking, WSR 14-06-040

(i) Agency's Reason for Adopting the Rule:

The rule changes update WACs to reflect changes passed by the 2013 Legislature, and allow the WACs to be consistent with federal law.

(ii) Changes in Text:

- (1) WAC 434-230-130(1) was edited to clarify that all mail-in ballots must be accompanied by a security envelope or sleeve.
- (2) WAC 434-261-108 was changed to clarify that each batch of optical scan ballots must be tabulated on a different scanner if more than one scanner is used in the election.
- (3) WAC 434-335-323(1) was changed to move language from paragraph (a) to paragraph (d)(iv).

(iii) Summary of Comments:

(1) Envelopes and sleeves, WAC 434-230-130. Please add a reference to ballot sleeves, in addition to ballot envelopes, in paragraph (1).

Agency Response: The WAC was changed to add a reference to sleeves since some counties use a sleeve rather than an envelope since the passage of HB 1031 in 2011 (Chapter 182, Laws of 2011).

(2) Optical Scan Scanners, WAC 434-261-108. Please clarify the WAC to address counties that use only one optical scan scanner.

Agency Response: The WAC was changed to clarify that different scanners must be used if more than one scanner is used in the election.

(3) Logic & Accuracy Test Matrix, WAC 434-335-323. The phrasing of paragraph (1) is not correct because a *matrix* does not include the ballots, rather, the *test deck* includes the ballots.

Agency Response: The WAC was changed to move wording from paragraph (a) to paragraph (d)(iv).

(4) Postage Information Requirements, WAC 434-230-130 and WAC 434-250-200. The two WACs seem contradictory.

Agency Response: WAC 434-230-130 lists the minimum information about postage required to be printed on return envelopes, and WAC 434-250-200 lists additional information about postage that is required by new U.S.P.S. regulations.

(5) Voter Registration Updates, WAC 434-324-076. "Household member" is not defined.

Agency Response: Because RCW 29A.08.410 allows a voter registration address to be updated by phone, email and other methods, many voters want to update not only their own voter registration address but also the address for family members and other members of their household who move with them. County Auditor's Offices have been unsure whether they had authority to process address updates submitted on behalf of a family or household member. The WAC amendment does not create new address updates; it simply facilitates updates that are already being submitted to county offices.

(6) The Logic & Accuracy Test Deck, WAC 434-335-323. The WAC is unclear whether additional ballots must be added to the test deck if there are state measures on the ballot.

Agency Response: The WAC requires that additional ballots be added to the test deck when “more than one measure appears on a ballot within the same jurisdiction and each has the same response position names.” Yes, state ballot measures could be one of the measures when “more than one measure appears on the ballot within the same jurisdiction.”

(7) Ballot Deposit Sites, WAC 434-250-100. The proposed rule removes the requirement that election workers notate the time a ballot was received at a ballot deposit site if the ballot was received after 8:00 p.m. on election day.

Agency Response: RCW 29A.40.160 requires that all ballot drop boxes be secured at 8:00 p.m. on election day. Additionally, RCW 29A.60.050 requires elections staff to bring all questionable ballots to the canvassing board for their rejection; a ballot is not considered rejected until the canvassing board has rejected it, either individually or in a batch of ballots. At 8:00 p.m. on election day, each ballot box is either emptied, locked closed, or removed from its location. The previous phrasing of the WAC assumes that elections staff are at the ballot box to note the time that the ballot is submitted late; but this is usually not the case. If the box was emptied at 8:00 p.m. and staff have already left when the late ballot is placed in the box, the time that the late ballot was received is unknown. If staff are still at the box when a voter arrives to submit a late ballot, the ballot is placed into a separate container specifically for late ballots.

(8) Ballots returned by fax or email, WAC 434-250-120. The proposed scheme in WAC 434-250-120 for non service or overseas voters to return ballots via e-mail or fax is not permitted under RCW 29A.40.091(4).

Agency Response: RCW 29A.40.091(4) states, “A voted ballot and signed declaration returned by fax or e-mail must be received by 8:00 p.m. on the day of the election or primary.” Additionally, RCW 29A.40.110(4) states, “Any overseas voter or service voter may return the signed declaration and voted ballot by fax or e-mail by 8:00 p.m. on the day of the primary or election, and the county auditor must use established procedures to maintain the secrecy of the ballot.” Regular voters (voters who are not military or overseas) return ballots by fax and email. The faxed and emailed ballots are received by the county elections offices. In the weeks prior to the 2012 General Election, political parties, campaigns and county elections offices raised questions on how ballots returned electronically should be handled. In October 2012, the Secretary of State’s Office issued Clearinghouse #12-08, available [here](#). The WAC changes codify the instructions in the Clearinghouse, and move language relating to protecting the secrecy of the ballot from WAC 434-235-040 to WAC 434-250-120. This topic has also been previously addressed in WAC 434-208-060(1)(d).

(9) Pattern of Similar Marks, WAC 434-261-086. The proposed rule on patterns of similar marks raises questions on how the rule will be implemented in various scenarios. Because the rule does not eliminate ambiguity, it should be considered for revision in any future rulemaking.

Agency Response: Decisions on how to interpret voters’ marks on ballots are especially challenging. Since 2007, when the voter intent rules and manual were created, the WAC has required the voter to use the same mark throughout the whole ballot in order for the votes to be considered valid. County election officials voiced concern that this was causing many votes to be rejected because voters often use one type of marking on one side of the ballot and another type of marking on the other side of the ballot, or one type of marking with candidate races and another type of marking with ballot measures. Implementation of this rule will be monitored over the next year. The Secretary of State’s Office agrees that any revisions that become warranted should be addressed. It is the practice of the Secretary of

State's Office to revise the voter intent rules as the public's voting habits and practices shift. This is reflected in the fact that this is the fourth version of the voter intent rules, since their inception in 2007.

(10) Random Sampling Procedure, WAC 434-379-010. This amendatory section of the proposed rule does not appear to make any changes to the current WAC.

Agency Response: Paragraph (5) of the WAC corrects a citation to Article II of the State Constitution by changing "Section 1A" to "Section 1." Article II, Section 1 of the State Constitution establishes the right of initiative and referendum. Paragraph 1(a) addresses initiatives. The authority to check signatures using a random sample procedure applies to both initiatives and referenda so the WAC should reference all of Section 1, not just 1(a).

(11) Electronically Returned Ballots, Ballot Declarations, WAC 434-250-120. By what authority OSOS by agency rule create an exemption to disclosure of the public records named in proposed addition to WAC 434-250-120?

Agency Response: The amended language in WAC 434-250-120(4)(a) states, "For ballots returned by fax or e-mail, the county auditor must apply procedures to protect the secrecy of the ballot. If returned by e-mail, the county auditor must print the e-mail and attachments; the printed e-mail and signed declaration page must be processed and retained like other ballot declarations, and the printed ballot must be processed and retained like other ballots. The electronic versions of the e-mail, ballot declaration, and ballot are exempt from public disclosure in order to maintain secrecy of the ballot." This language was previously in WAC 434-235-040. The WAC clarifies that ballots returned electronically shall be processed and retained like other returned ballots. The WAC preserves the voter's right to a secret ballot. The Washington State Constitution, Article VI, Section 6, establishes the right to a secret ballot for every voter. The email and ballot declaration contain the voter's name and other identifying information. Because a ballot and ballot declaration returned by email are attachments to the email, production of the electronic email, ballot and ballot declaration would violate secrecy of the ballot.

(12) Outsourcing Assembly. Which counties outsource assembly of outgoing ballot packets?

Agency Response: The Secretary of State's Office does not have a list of which counties outsource assembly of outgoing ballot packets.

(13) Ballots Printed with Sequential Numbers, WAC 434-230-015. What is the enforcement mechanism for the proposed "shuffling" of ballots or envelopes when assembly of outgoing ballots is outsourced?

Agency Response: WAC 434-230-015(10) states, "If ballots are printed with sequential numbers or other sequential identifiers, the county auditor must take steps to prevent ballots from being issued sequentially, in order to protect secrecy of the ballot." The county elections department is responsible for complying with all applicable WACs. If the county elections department prints ballots with sequential numbers or other sequential identifiers, then the county must take steps to prevent the ballots from being issued sequentially. Responsibility to comply with the WAC continues, regardless of whether the county performs the work with county employees and equipment, or contracts with a vendor.

(14) Ballots Printed with Sequential Numbers, WAC 434-230-015. Shuffling doesn't prevent vendor ballot packet assemblers from recording the ballot ID bar code and the voter ID bar code at insertion.

Agency Response: The Washington State Constitution, Article VI, Section 6, establishes the right to a secret ballot for every voter. The county elections department is responsible for preserving the voter's right to a secret ballot, regardless of whether the county performs the work with county employees and equipment, or contracts with a vendor.

(15) Ballots Returned Electronically. Which auditors other than Cowlitz County Auditor Kristina Swanson have been encouraging or accepting or counting ballots cast by email by “snowbirds” and other nonUOCAVA voters?

Agency Response: Voters are encouraged to return their ballot via the postal system or a county ballot drop box. If a voter expresses concern that he or she will be unable to use one of those options, then the voter is notified of the option of returning the ballot by fax or email by 8:00 p.m. on election day, and following up with the hard copies by mail.

(16) Ballots Returned Electronically. How many such email-return ballots have been voted and counted to date?

Agency Response: The Secretary of State’s Office does not have statistics on how many ballots from non-UOCAVA voters were returned by fax or email. The county elections departments generally track how many ballots were returned by fax or email, but may or may not track how many were returned by UOCAVA voters and how many were returned by non-UOCAVA voters.