

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE OFFICE OF THE SECRETARY OF STATE

In the Matter of Proposed Amendments  
to Rules Governing Elections,  
Minnesota Rules, Chapters 8205, 8210,  
8220, 8230, 8235, 8240, and 8250.

**REPORT OF THE  
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge (ALJ) Manuel J. Cervantes conducted a hearing concerning the above-entitled rules proposed by the Minnesota Office of the Secretary of State (OSS or Secretary of State) on December 18, 2009, in the Ladyslipper Room of the Minnesota Centennial Office Building, Saint Paul, Minnesota. The hearing continued until everyone present had an opportunity to state his or her views on the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.<sup>1</sup> The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency made after the proposed rules were initially published do not result in the rules being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing when a sufficient number of persons request one. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

The members of the Secretary of State's hearing panel were Beth Fraser, Director of Governmental Affairs and Gary Poser, Director of Elections. Twenty members of the public signed the hearing register.

The Secretary of State and the Administrative Law Judge received written comments on the proposed rules prior to the hearing. At the hearing, the initial deadline for filing written comment was set at twenty calendar days (January 7, 2010), to allow interested persons and the OSS an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five business days (January 14, 2010), to allow interested persons and the OSS the opportunity to file a written response to the comments received during the initial period. Several

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<sup>1</sup> Minn. Stat. §§ 14.131 through 14.20. (Unless otherwise specified, all references to Minnesota Statutes are to the 2008 edition, and all references to Minnesota Rules are to the 2009 edition.)

comments were received during the rulemaking process. The hearing record closed for all purposes on January 14, 2010.

## NOTICE

The Secretary of State must make this Report available for review by anyone who wishes to review it for at least five working days before the OSS takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the OSS makes changes in the rules other than those recommended in this Report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Secretary of State must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Elections Division of the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the OSS, and the OSS will notify those persons who requested to be informed of their filing.

Based on the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

### I. Background and Nature of the Proposed Rules

1. The proposed rules address several chapters of the Minnesota Rules and are designed to help eliminate mistakes by election judges and to provide additional direction to local election officials to ensure that absentee ballots are processed consistently across the state.<sup>2</sup>

2. The proposed changes to Chapter 8205 (Petitions) establish a minimum size for petition text rather than an exact point size. The proposed amendments also clarify who is a filing officer for petitions.<sup>3</sup>

3. The Secretary of State also proposes to amend parts of Chapter 8210 (Absentee Ballots) to add instructions to the mail balloting return envelopes and clarify instructions to voters regarding absentee balloting, particularly with regard to uniformed and overseas citizens; regulate the placement of labels on envelopes by election officials; create a replacement process for lost, spoiled, or never-received ballots; address the processing of Federal Write-in Absentee Ballots (FWAB); and extend the mailing period from 20 days to 30 days before the election.<sup>4</sup>

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<sup>2</sup> Transcript ("T.") at 13-14.

<sup>3</sup> T. at 15. See *also*, Statement of Need and Reasonableness ("SONAR") at 14-15.

<sup>4</sup> T. at 15-18. See *also*, SONAR at 15-30.

4. The proposed changes to Chapter 8220 (Voting System Testing) clarify when reexamination and recertification of voting system hardware and software is required and give text and audio instructions for ballot marking devices.<sup>5</sup>

5. The Secretary of State proposes to amend Chapter 8230 (Optical Scan Voting Systems) to prohibit the placement of stickers on ballots; allow election judges of two different parties to open the ballot boxes for the purpose of preventing jams or other malfunctions at times other than between 1:00 and 3:00 p.m.; and move some of the rule parts to Chapter 8250.<sup>6</sup>

6. The proposed amendments to Chapter 8235 (Recounts) allow a recount official to delegate the duty to conduct a recount to another election official by mutual consent; dictate who may observe the counting; and amend the process for sorting, counting, reviewing, and labeling challenged ballots.<sup>7</sup>

7. The proposed changes to Chapter 8240 (Election Judge Training Program) amend the qualifications for trainee election judges by eliminating the requirement that trainees complete or enroll in a course on government at the time of service. The amendments also allow eligible home-schooled students to be trainees with a parent certification.<sup>8</sup>

8. The Secretary of State proposes to amend Chapter 8250 (Ballot Preparation) to consolidate all of the ballot requirements for optical scan ballots into one section. In addition, the proposed amendments modify the form of the blue ballots for City or Town questions so that voters vote yes or no “on” a question instead of yes or no “for” a question.<sup>9</sup>

9. Finally, the Secretary of State proposes to repeal several rule parts in Chapters 8210, 8220, 8235, and 8250 to reflect movement of language between rule chapters throughout the proposed rules.<sup>10</sup>

## **II. Compliance with Procedural Rulemaking Requirements**

10. On July 14, 2009, the Secretary of State filed a proposed additional notice plan for its Request for Comments with the Office of Administrative Hearings and requested that the plan be approved pursuant to Minn. R. 1400.2060. By letter of July 15, 2009, Administrative Law Judge Eric L. Lipman approved the additional notice plan.

11. On July 20, 2009, the OSS published in the *State Register* its Request for Comments on the Secretary of State’s intention to amend its rules governing petitions, absentee balloting, voting system testing, optical scan voting systems, recounts,

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<sup>5</sup> T. at 18. See also, SONAR at 30-31.

<sup>6</sup> T. at 19. See also, SONAR at 31-32.

<sup>7</sup> T. at 19-20. See also, SONAR at 32-37.

<sup>8</sup> T. at 20-21. See also, SONAR at 37.

<sup>9</sup> T. at 21. See also, SONAR at 37-42.

<sup>10</sup> T. at 21-22. See also, SONAR at 42-43.

election judge training program, ballot preparation and redistricting. The notice indicated that the OSS had not yet prepared a draft of the possible rules and requested comments on its proposal.<sup>11</sup>

12. As required by Minn. Stat. § 14.131, the OSS asked the Commissioner of Finance to evaluate the fiscal impact and benefit of the proposed rules on local units of government. The Department of Finance provided comments in a memorandum dated October 29, 2009, concluding that the proposed rules will have “minimal fiscal impact on local units of government.”<sup>12</sup>

13. On October 27, 2009, the OSS filed copies of the proposed Notice of Hearing, proposed rules, and draft Statement of Need and Reasonableness (SONAR) with the Office of Administrative Hearings. The filings complied with Minn. R. 1400.2080, subp. 5. On the same date, the OSS also filed a proposed additional notice plan for its Notice of Hearing and requested that the plan be approved pursuant to Minn. R. 1400.2060. By letter of November 2, 2009, the Administrative Law Judge approved the additional notice plan.

14. On November 13, 2009, the Secretary of State mailed the Notice of Hearing to all persons and associations who had registered their names with the OSS for the purpose of receiving such notice.<sup>13</sup> The Notice contained the elements required by Minn. R. 1400.2080, subp. 2. The Notice identified the date and location of the hearing in this matter. The Notice also announced that the hearing would continue until all interested persons had been heard.

15. At the hearing on December 18, 2009, the OSS filed copies of the following documents, as required by Minn. R. 1400.2220:

- A. the Request for Comments as published in the *State Register* on July 20, 2009 (34 S.R. 94);<sup>14</sup>
- B. the proposed rules dated October 27, 2009, including the Revisor’s approval;<sup>15</sup>
- C. the Statement of Need and Reasonableness (SONAR);<sup>16</sup>
- D. the certification that the OSS mailed a copy of the SONAR to the Legislative Reference Library on November 13, 2009;<sup>17</sup>

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<sup>11</sup> 34 State Register 94 (July 20, 2009); Ex. 1.

<sup>12</sup> SONAR at 10.

<sup>13</sup> Ex. 6.

<sup>14</sup> Ex. 1.

<sup>15</sup> Ex. 2.

<sup>16</sup> Ex. 3.

<sup>17</sup> Ex. 4.

- E. the Notice of Hearing as published in the *State Register* on November 16, 2009 (34 S.R. 686) and the Notice of Hearing as mailed;<sup>18</sup>
- F. the Certificate of Mailing the Notice of Hearing to the Rulemaking Mailing List on November 13, 2009, and the Certificate of Accuracy of the Mailing List;<sup>19</sup>
- G. the Certificate of Additional Notice under the Additional Notice Plan on November 13, 2009;<sup>20</sup>
- H. comments received to date;<sup>21</sup>
- I. copy of transmittal letter showing the OSS sent notice to Legislators per Minn. Stat. § 14.116, on November 13, 2009;<sup>22</sup>
- J. copy of transmittal letter and response showing the OSS consulted with the Department of Finance per Minn. Stat. § 14.131, dated October 29, 2009;<sup>23</sup> and
- K. Absentee Balloting materials.<sup>24</sup>

16. The Administrative Law Judge finds that the Secretary of State has met all of the procedural requirements under applicable statutes and rules.

### III. Statutory Authority

17. In its SONAR, the Secretary of State documents its statutory authority to adopt the proposed rules in Chapters 8205, 8210, 8220, 8230, 8235, 8240, and 8250. As to Petitions, the Secretary of State asserts that its statutory authority to adopt rules is set forth in Minn. Stat. §§ 204B.071, 211C.03, 211C.04, and 211C.06. These statutes require the Secretary of State to adopt rules: governing “the manner in which petitions required for any election in this state are circulated, signed, filed, and inspected;” prescribing the form required for a recall petition; prescribing the form and manner for submitting petitions to the Secretary of State; and requiring the Secretary of State to verify the number and eligibility of petition signers.<sup>25</sup>

18. As to absentee and mail balloting, the OSS states that its statutory authority to adopt rules is set forth in Minn. Stat. §§ 203B.08, 203B.09, 203B.125, and 204B.45.

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<sup>18</sup> Ex. 5.

<sup>19</sup> Ex. 6.

<sup>20</sup> Ex. 7.

<sup>21</sup> Ex. 8.

<sup>22</sup> Ex. 9.

<sup>23</sup> Ex. 9.

<sup>24</sup> Ex. 10.

<sup>25</sup> SONAR at 1-3.

The statutes relating to absentee voting require the OSS to adopt rules: “establishing procedures to be followed by county auditors and municipal clerks to assure accurate and timely return of absentee ballots;” establishing the form, content, and type size and style for absentee ballots and other associated materials; and establishing methods and procedures for issuing ballot card and related absentee forms. As to mail balloting, the OSS must “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.”<sup>26</sup>

19. The statutory authority for rules regarding voting system testing and optical scan voting systems is found at Minn. Stat. §§ 206.57, subd. 1; 206.82, subd. 3; and 206.84, subd. 3. These statutes require the Secretary of State to adopt rules relating to the examination and use of, testing procedures for, and standard ballot formats for electronic voting systems.<sup>27</sup>

20. The statutory authority for rules regarding recounts is found at Minn. Stat. § 204C.361, and requires the OSS to adopt rules establishing uniform recount procedures.<sup>28</sup>

21. Subdivision 2 of Minn. Stat. § 204B.25, requires the Secretary of State to adopt rules “establishing programs for the training of county auditors, local election officials, and election judges by county auditors as required by this section.”<sup>29</sup>

22. Finally, the statutory authority for rules regarding ballot preparation is found at Minn. Stat. §§ 204D.08, 204D.11, 205.17, 205A.08, 206.84, and 447.32. These statutes require the Secretary of State to adopt rules for the format and preparation of the ballots for state primaries, municipal elections, and school district elections.<sup>30</sup>

23. The Administrative Law Judge finds that the Secretary of State has general and specific statutory authority to adopt the proposed rules.

#### **IV. Additional Notice Requirements**

24. Minn. Stat. §§ 14.131 and 14.23 require that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule or explain why these efforts were not made. As discussed above, the Secretary of State submitted two additional notice plans to the Office of Administrative Hearings, which were reviewed and approved by letters dated July 15, 2009, and November 2, 2009. During the rulemaking hearing, the

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<sup>26</sup> SONAR at 3-4.

<sup>27</sup> SONAR at 4.

<sup>28</sup> SONAR at 4.

<sup>29</sup> SONAR at 4-5.

<sup>30</sup> SONAR at 5-6.

OSS introduced evidence that certified provision of notice to those on the rulemaking mailing list maintained by the OSS and in accordance with its additional notice plan.<sup>31</sup>

25. The OSS took action to inform and involve the following interested and affected parties in this rulemaking:

- A. Legislators who have policy and fiscal oversight of this subject matter;
- B. House and Senate leadership from the majority and minority caucuses;
- C. Governor Pawlenty;
- D. Political parties;
- E. Professional election administrators;
- F. Former Secretaries of State;
- G. Local and municipal governments that actually implement elections;
- H. Lawyers with expertise in elections matters; and
- I. Public policy groups representing a spectrum of views held within the general public.<sup>32</sup>

26. A copy of the proposed rules, the Notice of Hearing, and the SONAR were all available on the Secretary of State's website.

27. The OSS has widely disseminated the proposed rules to affected parties. Therefore, the Administrative Law Judge finds that the OSS has satisfied the notice requirements.

## **V. Impact on Farming Operations**

28. Minn. Stat. § 14.111 imposes an additional requirement calling for notification to be provided to the Commissioner of Agriculture when rules are proposed that affect farming operations. In addition, where proposed rules affect farming operations, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

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<sup>31</sup> Exs. 6 and 7.

<sup>32</sup> SONAR at 11-13.

29. The proposed rules do not affect farming operations, and the Administrative Law Judge concludes that the OSS did not, and was not required to, notify the Commissioner of Agriculture.

## **VI. Compliance with Other Statutory Requirements**

### **A. Cost and Alternative Assessments**

30. Minn. Stat. § 14.131 requires an agency adopting rules to include in its SONAR:

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

31. With respect to the first factor, in its SONAR the Secretary of State recognized two groups; those who will benefit from the proposed rule changes and those who will be affected by the proposed changes. The groups that stand to benefit are the Secretary of State's Office, election officials and local governments, eligible voters, and candidates involved in recounts. The Secretary of State and elections officials and the local governments for whom they work will bear the costs of the proposed rules, which should be minimal.<sup>33</sup>

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<sup>33</sup> SONAR at 7.

32. With respect to the second requirement, the OSS will need to incorporate the new rules for the training of election officials into the current training program but does not anticipate that the new rules will increase the cost or length of the current training seminar. The OSS projects that the proposed rules will not cause any other state agency to incur costs, and further believes that there will be no impact on state or local revenues.<sup>34</sup>

33. With respect to the third element, the OSS must determine if there are less costly or less intrusive methods to achieve the purposes of the proposed rules. The OSS addresses this element in its rule-by-rule analysis in the SONAR. In the rule-by-rule analysis of the SONAR, the Secretary of State asserts that the proposed changes are the least intrusive and most clear means of amending the rules.<sup>35</sup>

34. With respect to the fourth requirement, the OSS must describe any alternate methods the OSS considered and the reasons they were rejected. In its SONAR the Secretary of State asserts that this requirement is addressed in its rule-by-rule analysis.<sup>36</sup> It does not appear that the Secretary of State seriously considered any other alternatives to the rulemaking process.

35. With respect to the fifth factor, the Secretary of State must note the probable cost of complying with the proposed rules. The OSS acknowledges that there will be some limited cost increases to county election officials from the addition of the proposed rules that require that a Federal Write-in Absentee Ballot serve as a voter registration and absentee ballot request in lieu of a Federal Postcard Application. Conversely, the Secretary of State asserts that the proposed rules will actually lead to cost savings for local election officials that will more than offset any cost increases. Among other things, the proposed rules will streamline the absentee ballot instructions to reduce errors as well as reduce frivolous challenges in recounts.<sup>37</sup>

36. With respect to the sixth factor, the OSS contends that the failure to adopt these proposed rules will result in continued errors in the absentee balloting process by voters and election officials. The OSS believes that not adopting these rules will almost certainly lead to lawsuits about differential treatment of similarly situated voters.<sup>38</sup>

37. With respect to the seventh factor, the Secretary of State asserts there is nothing in the proposed rules that conflicts with federal regulations.<sup>39</sup>

38. The Administrative Law Judge concludes that the OSS has fulfilled its obligation under Minn. Stat. § 14.131 to discuss costs and alternative assessments in the SONAR.

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<sup>34</sup> SONAR at 8.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 8-9.

<sup>38</sup> *Id.* at 9.

<sup>39</sup> *Id.*

## **B. Performance-Based Regulation**

39. Minn. Stat. § 14.131 also requires that an agency include in its SONAR a description of how it “considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002.” Section 14.002 states, in relevant part, that “whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.”

40. The Secretary of State explained in the SONAR that many of the proposed rules are its responses to recent legislative changes and court rulings, including those related to the 2008 U.S. Senate election contest. However, the OSS has taken the further step of searching for other rules that impede superior achievement and the cost-effective delivery of services. The OSS has worked with local election officials and average voters to identify areas for improvement and has proposed changes to the rules in light of these discussions. Taken as a whole, the Secretary of State believes these changes will improve the overall performance of election administration.<sup>40</sup>

41. The Administrative Law Judge finds that the OSS has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

## **C. Consultation with the Commissioner of Finance**

42. Under Minn. Stat. § 14.131, the agency is also required to “consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.”

43. The Secretary of State sent its proposed rule and draft SONAR to the Commissioner of Finance on October 27, 2009.<sup>41</sup> On behalf of the Commissioner of Finance, Executive Budget Officer Katharine Barondeau replied on October 29, 2009. This response affirms the OSS’s assertion that the proposed rules will have some financial impact upon local governments, but that this impact should be offset by process improvements and cost-saving opportunities afforded by the rule.<sup>42</sup>

44. The Administrative Law Judge finds that the Secretary of State has met the requirements set forth in Minn. Stat. § 14.131 for consulting with the Commissioner of Finance.

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<sup>40</sup> SONAR at 10-11.

<sup>41</sup> *Id.* at 10.

<sup>42</sup> *Id.* See also, Ex. 9

#### **D. Cost to Small Businesses and Cities under Minn. Stat. § 14.127**

45. Under Minn. Stat. § 14.127, the OSS must “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.”<sup>43</sup> The Secretary of State must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.<sup>44</sup>

46. In the SONAR, the OSS stated that the proposed rules are not anticipated to increase costs by more than \$25,000 for any small business or small city.<sup>45</sup> The Secretary of State received support for this proposition from the Commissioner of Finance and the small cities of Madelia and Rothsay.<sup>46</sup>

47. The Administrative Law Judge finds that the Secretary of State has made the determination required by Minn. Stat. § 14.127 and approves that determination.

#### **E. Adoption or Amendment of Local Ordinances under Minn. Stat. § 14.128**

48. Effective August 1, 2009, the OSS must:

[D]etermine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. An agency must make this determination before the close of the hearing record . . . . The administrative law judge must review and approve or disapprove the agency’s determination.<sup>47</sup>

49. The Secretary of State determined that no local governments would be required to adopt or amend an ordinance to comply with the proposed rules because all election laws in Minnesota are state laws.<sup>48</sup> The Administrative Law Judge approves that determination.

### **VII. Rulemaking Legal Standards**

50. Under Minnesota law,<sup>49</sup> one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and

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<sup>43</sup> Minn. Stat. § 14.127, subd. 1.

<sup>44</sup> Minn. Stat. § 14.127, subd. 2.

<sup>45</sup> SONAR at 10.

<sup>46</sup> *Id.* See also, Ex. 9.

<sup>47</sup> Minn. Stat. § 14.128, subd. 1. A determination that the proposed rules do in fact require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subsd. 2 and 3.

<sup>48</sup> SONAR at 13.

<sup>49</sup> Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.

reasonableness of the proposed rules by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.<sup>50</sup> The Secretary of State prepared a Statement of Need and Reasonableness (SONAR) in support of its proposed rules. At the hearing, the OSS relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by OSS staff at the public hearing and by the OSS written post-hearing comments and reply.

51. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.<sup>51</sup> Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.<sup>52</sup> A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.<sup>53</sup> The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."<sup>54</sup>

52. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.<sup>55</sup>

53. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the Secretary of State complied with the rule adoption procedure, whether the rule grants undue discretion, whether the OSS has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.<sup>56</sup>

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<sup>50</sup> *Mammenga v. Dept. of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

<sup>51</sup> *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

<sup>52</sup> *Greenhill v. Bailey*, 519 F.2d 5, 19 (8<sup>th</sup> Cir. 1975).

<sup>53</sup> *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

<sup>54</sup> *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d at 244.

<sup>55</sup> *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

<sup>56</sup> Minn. R. 1400.2100.

54. Because the Secretary of State suggested changes to the proposed rules after original publication of the rule language in the *State Register*, it is also necessary for the Administrative Law Judge to determine if the new language is substantially different from that which was originally proposed. The standards to determine whether changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

“the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice;”

the differences “are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice;” and

the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.”

55. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider:

whether “persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests;”

whether the “subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing;” and

whether “the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.”

### **VIII. Analysis of the Proposed Rules**

56. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined, and it will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion, including those made prior to the hearing, has been carefully read and considered. Moreover, because sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary.

57. The Administrative Law Judge finds that the Secretary of State has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all rule provisions not specifically discussed in this Report. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

58. At the hearing, the OSS proposed numerous changes to the rules as published in the *State Register* on November 16, 2009. Nearly all of these proposed changes were in response to public comments received prior to the hearing. The changes are listed below:

8210.0500, Subp. 2, Page 8, line 2, delete “preregistered” insert “registered”

8210.0500, Subp. 2, Page 8, line 4, bold the words “You will need:”

8210.0500, Subp. 2, Page 8, line 11, italicize “including your spouse or relative”

8210.0500, Subp. 2, page 8, lines 17 and 18, underline the word “not”

8210.0500, Subp. 2, page 9 , line 1, after “official” insert “or notary”

8210.0500, Subp. 2, Page 9, line 4, underline the words “by election day to the address on the signature envelope”

8210.0500, Subp. 2, Page 9, line 10, italicize “This person cannot deliver more than 3 ballots”

8210.0500, Subp. 2, Page 9, line 15, after the comma, insert “(do not initial your corrections)”

8210.0500, Subp. 3, Page 13, line 1, bold the words “You will need:”

8210.0500, Subp. 3, Page 13, line 12, italicize “including your spouse or relative”

8210.0500, Subp. 3, Page 13, line 15, underline “with”

8210.0500, Subp. 3, Page 13, lines 24 and 25, underline the word “not”

8210.0500, Subp. 3, Page 14, line 10, after “official” insert “or notary”

8210.0500, Subp. 3, Page 14, line 13, underline the words “by election day to the address on the signature envelope”

8210.0500, Subp. 3, Page 14, line 19, italicize the words “This person cannot deliver more than 3 ballots”

8210.0500, Subp. 3, Page 14, line 24, underline the words “along with”

8210.0500, Subp. 3, Page 15, line 30, after the comma, insert “(do not initial your corrections)”

8210.0500, Subp. 3, Page 16, line 18, delete “should” and insert “must”

8210.0500, Subp. 4, Page 18, line 17, bold the words “You will need:”

8210.0500, Subp. 4, Page 19, lines 1 and 2, underline the word “not”

8210.0500, Subp. 4, Page 19, line 15, italicize the words “If you do not have access to any of these documents, leave this space blank.”

8210.0500, Subp. 4, page 19, line 18, underline the words “by election day to the address on the signature envelope”

8210.0500, Subp. 4, page 19, line 24, the text on this line should be left justified.

8210.0500, Subp. 4, Page 20, line 5, after the comma, insert “(do not initial your corrections)”

8210.0500, Subp. 6, Page 22, line 10, bold the words “You will need:”

8210.0500, Subp. 6, Page 23, lines 4 and 5, underline the word “not”

8210.0500, Subp. 6, Page 24, line 4, after the word “ballot” insert the bolded and underlined words “by election day” and underline the words “to the address above”

8210.0500, Subp.6, Page 24, line 15, after the comma, insert “(do not initial your corrections)”

8210.0600, Subp. 1a, Page 25, line 15, bold the words “Voter completes this section”

8210.0600, Subp. 1a, Page 25, line 16, a place for the voter to list their name, should be placed on line 15, immediately to the right of the words “Voter’s name”

8210,0600, Subp. 1a, Page 25, line 24, a place for the voter to sign their name, should be placed on line 23, immediately to the right of the words “Voter’s signature” and the words “Voter’s signature” should be bolded

8210.0600, Subp. 1a, Page 26, line 1, bold the words “Witness completes this section”

8210.0600, Subp. 1a, Page 26, line 5, after the word “official” delete the blank underlined line

8210.0600, Subp. 1a, Page 26, after line 5, insert “or notary”

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8210.0600, Subp. 1a, Page 26, line 20, a place for the witness's signature, should be placed on line 19, immediately to the right of the words "Witness signature" and the words "Witness signature" should be bolded

8210.0600, Subp. 1a, Page 26, line 22, after the word "notary" insert a comma

8210.0600, Subp. 1b, Page 27, line 1, bold the words "Voter completes this section"

8210.0600, Subp. 1b, Page 27, line 4, a place for the voter's name, should be placed on line 3, immediately to the right of the words "Voter's name"<sup>57</sup>

8210.0600, Subp. 1b, Page 27, line 11, a place for the voter's signature, should be placed on line 10, immediately to the right of the words "Voter's signature" and the words "Voter's signature" should be bolded

8210.0600, Subp. 1b, Page 27, line 14, bold the words "Witness completes this section"

8210.0600, Subp. 1b, Page 27, line 18, after the word "official" delete the blank underlined line"

8210.0600, Subp. 1a, Page 27, after line 18, insert "or notary"  
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8210.0600, Subp. 1b, Page 28, line 22, a place for the witness's signature, should be placed on line 21, immediately to the right of the words "Witness signature" and the words "Witness signature" should be bolded

8210.0710, Subp. 2, clause C, Page 30, line 20, delete "office" and insert "Official" and also delete everything after the word "Only"

8210.0710, Subp. 2, clause C, Page 30, after line 20, insert "( ) Accepted ( ) Rejected (reason:) \_\_\_\_\_"

8210.0800, Subp. 3a, Page 36, line 5, the words "please print clearly" should be in the same position on the right of line 36.6

8210.0800, Subp. 3a, Page 36, line 6, the words "Voter completes this section" should be in bold

8210.0800, Subp. 3a, Page 36, line 8, a place for the voter's name, should be placed on line 7, immediately to the right of the words "Voter's name"<sup>58</sup>

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<sup>57</sup> The OSS corrected an error in this proposed change in its comments dated January 7, 2010, at 12.

8210.0800, Subp. 3a, Page 36, line 17, open parenthesis at start of line and add a comma after “#”

8210.0800, Subp. 3a, Page 36, line 18, delete “Minnesota” and insert “MN” and add a comma after “#”

8210.0800, Subp. 3a, Page 36, line 20, close parenthesis at end of line

8210.0800, Subp. 3a, Page 36, line 21, a place for the voter’s social security number, should be placed on line 20, immediately to the right of the initials “SSN”

8210.0800, Subp. 3a, Page 37, line 23, a place for the voter’s signature, should be placed on line 22, immediately to the right of the words “Voter’s signature” and the words “Voter’s signature” should be bolded

8210.3000, Subp. 4a, Page 43, line 1, bold the words “You will need:”

8210.3000, Subp. 4a, Page 43, line 8, italicize “including your spouse or relative”

8210.3000, Subp. 4a, Page 43, lines 14 and 15, underline the word “not”

8210.3000, Subp. 4a, Page 43, line 25, after “official” insert “or notary”

8210.3000, Subp. 4a, Page 43, line 28, underline the words “by election day to the address on the signature envelope”

8210.3000, Subp. 4a, Page 44, line 14, after the comma, insert “(do not initial your corrections)”

8210.3000, Subp. 4b, Page 45, line 3, bold the words “Voter completes this section”

8210.3000, Subp. 4b, Page 45, line 5, a place for the voter’s name, should be placed on line 4, immediately to the right of the words “Voter’s name”<sup>59</sup>

8210.3000, Subp. 4b, Page 45, line 11, a place for the voter’s signature, should be placed on line 10, immediately to the right of the words “Voter’s signature” and the words “Voter’s signature” should be bolded and consolidated on one line

8210.3000, Subp. 4b, Page 45, line 14, bold the words “Witness completes this section”

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<sup>58</sup> The OSS corrected an error in this proposed change in its comments dated January 7, 2010, at 12.

<sup>59</sup> The OSS corrected an error in this proposed change in its comments dated January 7, 2010, at 12.

8210.3000, Subp. 4b, Page 45, line 18, after “official” delete the blank underlined line

8210.3000, Subp. 4b, Page 45, after line 18, insert “or notary”  
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8210.3000, Subp. 4b, Page 46, line 5, a place for the witness’s signature, should be placed on line 4, immediately to the right of the words “Witness signature” and the words “Witness signature” should be bolded and consolidated on one line

8220.0325, Page 49, line 3, delete “and”

8235.0800, Subp. 1, Page 62, line 22, delete the second “voter” and insert “vote”<sup>60</sup>

59. The Administrative Law Judge commends the Secretary of State for proactively responding to public comments prior to the rule hearing. The ALJ has reviewed all of the public comments and each of the proposed changes, which are needed and reasonable and do not make the rules substantially different from those published in the *State Register*.

## **IX. Broad Issues Relating to the Proposed Rules**

### **Public Support for the Proposed Rules**

60. Overall, there was general support for the proposed rules expressed by organizations such as the Native Vote Alliance of Minnesota; Take Action Minnesota; the Minnesota Disability Law Center; Service Employees International Union (SEIU); the elections committees of the Minnesota Association of County Officers, the League of Minnesota Cities, and the Association of Metro Counties; Common Cause Minnesota; Citizens for Election Integrity Minnesota (CEIMN); League of Women Voters Minnesota; Minnesota Unitarian Universalist Social Justice Alliance; the City Clerk of Lakeville; and Minnesota Council of Nonprofits. These groups supported the proposed rules and commended the Secretary of State for attempting to make the electoral process more accessible to voters and election officials. Many of these groups expressed support for the redesign and clarification of absentee ballots, instructions, and envelopes, as well as for the streamlining of the recount process.

## **X. Rule-by-Rule Analysis**

### **Part 8210.0500**

61. Part 8210.0500 has six subparts that address the required instructions for absent voters. The changes to this part are largely a reorganization of the current rules.

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<sup>60</sup> Additional modifications and corrections to the proposed rules were submitted by the OSS at the hearing, dated December 18, 2009. All page and line number references here and throughout this Report, are to the Revisor’s draft dated October 27, 2009.

Much of the current language is carried over into the proposed rules and refashioned in a more logical way.<sup>61</sup> Based on public comments and upon further review by the agency, the Secretary of State has proposed changes to subparts 2, 3, 4, and 6 in addition to those published in the *State Register* and presented at the public hearing. These changes are as follows:

8210.0500, Subp. 3, Page 14, line 24, strike “does” and insert “has your current address”

8210.0500, Subp. 3, Page 15, line 1, strike “or” and insert “Minnesota” before the word “ID”

8210.0500, Subp. 3, Page 15, line 9, insert “Minnesota” before the word “ID”

8210.0500, Subp. 4, Page 18, line 23, strike “or” and insert “number, Minnesota” before the word “ID”

8210.0500, Subp. 4, Page 19, line 11, strike “or” and insert “number, Minnesota” before the word “ID”

8210.0500, Subp. 4, Page 19, line 14, delete everything after the first period

8210.0500, Subp. 4, Page 20, after line 25, insert:

**"Confidentiality Notice:** A privacy notice for the data you are being asked to provide on the signature envelope is posted at [www.sos.state.mn.us/home/index.aspx?page=889](http://www.sos.state.mn.us/home/index.aspx?page=889)

8210.0500, Subp. 6, Page 22, line 21, strike “or” and insert “number, Minnesota” before the word “ID”

8210.0500, Subp. 6, Page 23, line 15, strike “or” and insert “number, Minnesota” before the word “ID”

8210.0500, Subp. 6, Page 23, line 18, delete everything after the first period

8210.0500, Subp. 6, Page 25, after line 2, insert:

**"Confidentiality Notice:** A privacy notice for the data you are being asked to provide on the certificate of eligibility is posted at [www.sos.state.mn.us/home/index.aspx?page=889](http://www.sos.state.mn.us/home/index.aspx?page=889)<sup>62</sup>

62. The ALJ has reviewed all of the public comments and each of the proposed changes. The commentators are individuals with a great deal of experience in the area

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<sup>61</sup> SONAR at 21.

<sup>62</sup> Comments of the Secretary of State, dated January 7, 2010, at 11-12.

of elections. The proposed changes listed in the previous paragraph make the rules clearer and more user-friendly and the ALJ finds that they are needed and reasonable and do not make the rules substantially different from those published in the *State Register*.

63. The OSS is not proposing to adopt all of the suggested revisions it received from the public relating to part 8210.0500.

64. David Lillehaug, a local election law attorney, suggested that some of the language of subpart 3 should be clarified. The OSS proposes to add the following language to the instructions for unregistered voters who wish to vote absentee: **“Important: You must submit the voter registration application with your ballot (in the signature envelope) for your vote to be counted.”** The OSS proposed this language based on its experience in the 2008 U.S. Senate recount. According to the OSS, more than 1000 absentee voters’ ballots were rejected in 2008 because they did not return the voter registration application. The OSS believes this instruction will prompt voters to better comply with the rules so that their votes are counted.<sup>63</sup>

65. Mr. Lillehaug is concerned that the OSS will reject ballots if the voter registration application is sealed in the secrecy envelope instead of the signature envelope.<sup>64</sup> He stated that Minnesota law allows election officials to open a secrecy envelope to look for a voter registration application and then reseal the envelope.<sup>65</sup> Furthermore, Mr. Lillehaug points to the proposed rules at part 8210.3000, subpart 10, which allows an election judge to open a return envelope to review a voter registration application, and then requires the envelope to be resealed. Mr. Lillehaug suggested that the OSS delete the proposed language “for your vote to be counted.” He also asked that the OSS consider proposing a rule that requires an election official to open a secrecy envelope to check for a voter registration application before an absentee ballot can be rejected on that basis.<sup>66</sup>

66. In response, the OSS clarifies that the instruction does not say that the ballot will be rejected if a voter registration application is returned in the secrecy envelope. The OSS simply wishes to make voters more aware that they need to return their voter registration applications with their ballots. The OSS shares Mr. Lillehaug’s concern and seeks to enfranchise more voters by including the proposed instruction.<sup>67</sup>

67. The Administrative Law Judge agrees that the proposed instruction will not automatically exclude absentee ballots based on the failure to include a voter registration application in the signature envelope. The proposed instruction is needed and reasonable and has a rational basis in the record.

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<sup>63</sup> SONAR at 19.

<sup>64</sup> Comment of David L. Lillehaug, dated December 18, 2009, at 2. Transcript (“T.”) at 27-28.

<sup>65</sup> See, *In re Contest of School Dist.*, 431 N.W.2d 911 (Minn. Ct. App. 1988).

<sup>66</sup> Comment of David L. Lillehaug, dated December 18, 2009, at 2. Transcript (“T.”) at 28.

<sup>67</sup> Comments of the Secretary of State, dated January 7, 2010, at 9.

## Part 8210.0600

68. This part relates to the form that must be completed by a voter, registered or unregistered, who wishes to vote by absentee ballot. The proposed changes are necessary to make the instructions for the voter and witness certificates easier to understand. The Secretary of State worked with local election officials and usability experts to improve the design and instructions, while protecting the integrity of the election process.<sup>68</sup>

69. Based on a comment from Citizens for Election Integrity Minnesota (CEIMN), the OSS wishes to make the following modification at Page 27, line 22: “Utility bill, rent statement, or student fee statement plus photo ID.” This modification is consistent with the proposed rules and helps to enfranchise voters. This change is needed and reasonable and does not make the rules substantially different from those published in the *State Register* on November 16, 2009.

70. In subpart 1b, an unregistered voter is required to provide proof of residence by producing one of a number of listed documents. The witness then checks the box next to the applicable document on the signature envelope. Currently, voters who choose to use a driver’s license, state ID, or passport must provide the number of the document on the form. The proposed rule no longer requires the voter to provide the identification number on the signature envelope. The Secretary of State proposed to remove this number requirement based on an Order of the Ramsey County District Court three judge panel during the 2008 U.S. Senate election contest. The Panel’s April 13, 2009 Order stated that the witness’s indication that they had seen proof of residence was sufficient, without making note of the identification number. The Secretary of State believes that removal of the space for noting identification numbers on the signature envelope would save space on an already crowded form, and would lead to less confusion among election judges as to whether it is a required field on the form. Such confusion can lead election officials to mistakenly reject absentee ballots.<sup>69</sup>

71. State Senator Chris Gerlach and State Representative Tom Emmer objected to the removal of the space on the signature envelope for noting the identification number. They believe that the ID number helps to authenticate an absentee voter’s identity or resolve issues dealing with a potential challenge to a ballot.<sup>70</sup>

72. In response, the Secretary of State referred again to the discussion in the SONAR, emphasizing that removal of this space will help reduce confusion among election officials and ultimately lead to fewer improperly rejected absentee ballots. The Secretary of State also pointed out that Minn. Stat. § 201.061 requires voters to provide their Minnesota driver’s license or Minnesota ID number on their voter registration

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<sup>68</sup> SONAR at 20.

<sup>69</sup> SONAR at 21-22.

<sup>70</sup> Comments of Senator Chris Gerlach and Representative Tom Emmer, dated December 16, 2009.

application, thereby making redundant the requirement to note the number on the signature envelope.<sup>71</sup>

73. Part 8210.0600, subps. 1a and 1b require a voter to certify that on election day he or she meets all the legal requirements to vote by absentee ballot. This language is in the current rule and is not being proposed for change.

74. Senator Gerlach and Representative Emmer proposed adding language after this statement listing an abbreviated form of each of the criteria found in Minn. Stat. § 203B.02 that make a voter eligible to vote absentee; or, in the alternative, include a reference in the rule to Minn. Stat. § 203B.02.<sup>72</sup> The Center of the American Experiment, a public policy organization, also objected to this omission from the rule, claiming that it encourages voters to claim ignorance of the law or to flout the law.<sup>73</sup>

75. The Secretary of State declined to incorporate the suggestion of Senator Gerlach and Representative Emmer because voters are already required to indicate on the absentee ballot application their reason for voting by absentee ballot. Only voters who have provided a valid reason to vote in this manner are issued an absentee ballot. The Secretary of State believes it is redundant to provide this information again.<sup>74</sup>

76. The Administrative Law Judge finds that the Secretary of State has put forth a rational basis for the reorganization of the absentee ballot forms. The comments in opposition to the proposed language are insightful but do not show that the Secretary of State has run afoul of the rulemaking process.

### **Part 8210.0800, subpart 3a**

77. Based on a comment from CEIMN, the OSS wishes to make the following modification at Page 36, line 26: “I swear or affirm, under penalty of perjury, that I am (check one).” This additional modification is consistent with Minnesota law and clarifies the instruction to voters. This change is needed and reasonable and does not make the rules substantially different from those published in the *State Register* on November 16, 2009.

### **Part 8210.2450 (proposed subsequent to hearing)**

78. The Republican Party of Minnesota (RPM) expressed concern in comments before and after the hearing on December 18, 2009, about the manner by which election officials accept or reject absentee ballots.<sup>75</sup> The RPM points to the June 30, 2009 Order of the Minnesota Supreme Court, in which the Court noted that the 2008 U.S. Senate recount brought to light instances where the statutory grounds for rejecting absentee ballots were applied differently across Minnesota jurisdictions. The Court

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<sup>71</sup> Comments of the Secretary of State, dated January 7, 2010, at 8.

<sup>72</sup> Comments of Senator Chris Gerlach and Representative Tom Emmer, dated December 16, 2009.

<sup>73</sup> Comments of Kent Kaiser, dated December 18, 2009. T. at 39-41.

<sup>74</sup> Comments of the Secretary of State, dated January 7, 2010, at 8.

<sup>75</sup> Comments of Trimble & Associates, dated December 4, 2009, at 1-2 and January 4, 2010, at 3-4.

suggested that efforts should be made to reduce these types of inconsistencies.<sup>76</sup> During the rejected absentee ballot review process of the U.S. Senate recount, the OSS sent information to local election officials to help them interpret the statutory criteria for accepting and rejecting absentee ballots. The RPM argued that this interpretive guidance should be added to the proposed rules to address the concerns of the Minnesota Supreme Court and to aid in future election contests. The RPM also believes that increased election judge training is necessary to address these problems.<sup>77</sup> The Center of the American Experiment shared some of the same concerns of the RPM.<sup>78</sup>

79. The OSS agrees with the RPM's comments and has modified the RPM's proposed language into a new Part 8210.2450, as follows:

**8210.2450 DUTIES OF ELECTION JUDGES WHEN EXAMINING RETURN ENVELOPES UNDER 203B.12**

**Subpart 1. Review.** Two or more election judges from different political parties must review the absentee ballots returned for the precinct under Minnesota Statutes, section 203B.12.

**Subpart 2. Name, Address and Signature Review.** The voter's name and address on the absentee application must match the voter's name and address on the return envelope. Use of, or lack of, full names, nicknames, abbreviations or initials on either document are not a reason for rejection.

Election judges must determine that the return envelope contains the genuine signature of the individual who made the application for the ballot by comparing the signature on the envelope to the signature on the absentee ballot application. Use of, or lack of, full names, nicknames, abbreviations or initials within either signature are not a reason for rejection. A signature is considered genuine even if a voter uses a signature mark on either or both documents, or if a voter has another individual or different individuals sign the voter's name in their presence on either or both the application and the return envelope in accordance with Minnesota Statutes, section 645.44, Subd. 14.

**Subpart 3. Voter's Registration Status.** (a) Election judges must determine the voter is registered under the name and at the address on the return envelope by using the statewide voter registration system, or a master list or polling place roster produced from the statewide voter registration system. A voter who is not registered, whose registration is inactive, or whose registration is challenged, must include a properly completed voter registration application within the

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<sup>76</sup> *In the Matter of the Contest of General Election held on November 4, 2008, for the purpose of electing a United States Senator from the State of Minnesota*, A09-697, at fn. 15 (Minn. June 30, 2009).

<sup>77</sup> Comments of Trimble & Associates, dated January 4, 2010, at 3-4 and Ex. C.

<sup>78</sup> Comments of Kent Kaiser, Ph.D., dated November 23, 2009 and December 18, 2009. Transcript (T.) at 38.

absentee return envelope pursuant to Minnesota Statutes, section 203B.04 Sub. 4, or the ballot must be rejected. If the voter was sent non-registered absentee materials and the voter is not registered to vote and a voter registration application is not found in the return envelope, the election judges shall open the ballot envelope and, without examining or removing the ballot, remove any voter registration application from the ballot envelope. The election judges must immediately reseal the ballot envelope with the ballot enclosed, initialing across the seal and noting on the ballot envelope the purpose for which it was opened.

(b) A voter registration application returned separately from an absentee return envelope after the voter registration deadline in Minnesota Statutes, section 201.061, subd. 1, is a late registration and may not be used as a registration for the current election pursuant to Minnesota Statutes, section 201.054, subd. 1 (3).

**Subpart 4. Witness Eligibility.** An absentee ballot may not be rejected for lack of an eligible witness, if a witness has signed the statement required from a witness by Minnesota Rules, part 8210.0600, subparts 1a or 1b, and:

(a) has provided a Minnesota address as part of the witness's certification on the return envelope; or

(b) has provided the title indicating that they are eligible to administer oaths;  
or

(c) has affixed a notarial stamp.

**Subpart 5. Ballot already cast.** Election judges must use available polling place rosters to determine whether the voter has already voted in the precinct on election day. If the voter has already voted, the return envelope must be marked "rejected."<sup>79</sup>

80. The OSS's response to the RPM's concerns is needed and reasonable. The Minnesota Supreme Court has expressed a need for interpretive guidance to reduce the jurisdictional inconsistencies in the review of absentee ballots. This proposed rule part is a step in that direction. This new language is within the scope of the issues put forth in the Notice of Hearing, is in response to public comment, and does not make the proposed rules substantially different.

#### **Part 8220.2860**

81. This proposed part is all new language regarding instructions for ballot marking devices. The Secretary of State proposed this part to ensure uniform instructions across the State in polling places using electronic ballot marking systems. The Secretary of State modified the standard instructions recommended by the vendor of these systems in consultation with representatives from the blind community, one of the populations most likely to use these systems.<sup>80</sup>

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<sup>79</sup> Comments of the Secretary of State, dated January 14, 2010, at Ex. 2.

<sup>80</sup> SONAR at 31.

82. A representative of Hart InterCivic, a vendor of electronic voting systems not currently in use in Minnesota, expressed concern that the proposed language of part 8220.2860 is so specific to the equipment currently certified for use in Minnesota as to preclude the OSS from certifying any other equipment.<sup>81</sup>

83. In response to this comment, the Secretary of State wishes to make two changes to the proposed rules. First, the Secretary of State proposes to modify the title of this part as follows: **INSTRUCTIONS FOR BALLOT MARKING DEVICES CERTIFIED BEFORE JANUARY 1, 2010.**<sup>82</sup>

84. Second, the Secretary of State proposes adding a new part 8220.2865 as follows:

**INSTRUCTIONS FOR BALLOT MARKING DEVICES ORIGINALLY CERTIFIED ON OR AFTER JANUARY 1, 2010.** Each ballot marking device originally certified by the secretary of state on or after January 1, 2010, must deliver substantially the same text and audio instructions as required in part 8220.2860. At the time of any certification after January 1, 2010, the secretary of state must approve any alternate text and audio instructions conforming with part 8220.2860 to the extent practicable, which are necessary to accommodate the navigational method and presentation of the ballot to the voter which are unique to the device being certified. Alternate instructions approved during the certification process must be used for all following elections at which the device is used.<sup>83</sup>

85. The Administrative Law Judge finds that the Secretary of State has shown that the proposed Part 8220.2860 is needed and reasonable. Furthermore, the Administrative Law Judge finds that the modification to the title of Part 8220.2860 and the addition of Part 8220.2865 is not a substantial change from the rules as originally proposed. This response to public comment is necessary and reasonable.

86. Finally, the Administrative Law Judge makes a recommendation for one technical correction to part 8220.2860 at page 57, line 24: “You are only allowed to voter vote for the candidates of one political party for partisan offices in a primary election.” This change merely corrects a typographical error and does not make the rules substantially different.

### **Part 8235.0200**

87. This part deals with automatic and discretionary recounts. Among other changes, the OSS proposes to add a sentence to the end of part 8235.0200 as follows: “The ballots in the envelope labeled ‘Original ballots from which duplicates are to be or were made’ are not within the scope of the recount and this envelope must not be

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<sup>81</sup> Comment of Travis Harrell, dated December 18, 2009.

<sup>82</sup> Comments of the Secretary of State, dated January 7, 2010, at 7.

<sup>83</sup> *Id.*

opened during the recount.” The OSS proposed this addition to the rule in response to the 2008 U.S. Senate recount where original ballots were counted instead of duplicate ballots based on the agreement of the parties. Ultimately, the counting of original ballots lead to confusion and was a major issue in the litigation of the recount.<sup>84</sup>

88. The OSS believes this proposal is needed and reasonable because the process by which duplicate ballots are created is regulated by part 8230.3850, which requires two election judges of different political parties to make an exact replica of the ballot, label the duplicate and the original, and feed the duplicate into the scanner. The original ballot is then sealed into the envelope referenced in the proposed rule language. The OSS believes this process is sound. Furthermore, the recount litigation did not allege that there were mistakes made in transcribing the votes from original ballots to duplicate ballots, but rather that the number of ballots labeled “original” did not match the number labeled “duplicate.”<sup>85</sup>

89. David Lillehaug argued that in a recount the original ballots should be counted instead of the duplicates. He suggested that the original ballot best reflects the intent of the voter.<sup>86</sup> More importantly, Mr. Lillehaug opined that the Minnesota Supreme Court’s decision in the U.S. Senate recount called for the counting of original ballots over duplicate ballots in that case.<sup>87</sup> He also suggested that counting original ballots during a recount enfranchises voters whose duplicate ballots may have been lost or not run through the voting scanner.

90. In response, the OSS disagreed that the original ballots should be counted during a recount. The OSS stated that the issue of matching original ballots to their duplicates goes beyond a recount of the ballots cast. According to the OSS, this issue should be decided in an election contest, which is financed by the parties and not the public, where candidates can provide evidence and testimony to a panel of judges, who can then make findings of fact. Finally, the OSS asserts that opening original ballots could spoil the ballots as evidence in an election contest.<sup>88</sup>

91. The Republican Party of Minnesota (RPM) wrote in support of the Secretary of State’s proposed addition to part 8235.0200. The RPM cited Minn. Stat. § 204C.35, subd. 3, as support for the proposed language, which states that the purpose of a recount is to determine the “number of votes validly cast.” According to part 8230.3850, it is the duplicate ballot, not the original, which is counted by the voting machine. The RPM referred to the 2008 U.S. Senate recount as proof for the need and reasonableness of this proposed language.<sup>89</sup> Finally, the RPM clarified the comments of Mr. Lillehaug regarding the Minnesota Supreme Court’s recount decision by providing the following quote from the ruling:

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<sup>84</sup> See, *Coleman v. Minnesota State Canvassing Board*, A08-2206 (Minn. Dec. 24, 2008).

<sup>85</sup> SONAR at 33-34.

<sup>86</sup> Comment of David L. Lillehaug, dated December 18, 2009, at 2. Transcript (“T.”) at 29-32.

<sup>87</sup> See, *Coleman v. Minnesota State Canvassing Board*, A08-2206 (Minn. Dec. 24, 2008).

<sup>88</sup> SONAR at 34. Comments of the Secretary of State, dated January 7, 2010, at 9.

<sup>89</sup> Comment of Trimble & Associates, dated January 4, 2010, at 1-2.

There can be no dispute that unmatched original damaged ballots are valid ballots and the votes marked on those ballots should be counted in the election. There also can be no dispute that the same vote should not be counted twice. The dispute is whether counting the votes on the unmatched original damaged ballots in the recount will result in double-counting because those votes have already been counted based on an unmarked duplicate ballot. We do not and cannot decide that question based on the record presented in this abbreviated proceeding.<sup>90</sup>

92. The Center of the American Experiment also supported the proposed addition to part 8235.0200 regarding duplicate ballots.<sup>91</sup>

93. The OSS has demonstrated a rational basis for the proposed changes to part 8235.0200. The comments in opposition to the proposed language are insightful but do not show that the OSS has exceeded its statutory authority or is invoking a policy contrary to Minnesota caselaw. Part 8235.0200 is needed and reasonable.

### **Part 8235.0700**

94. Part 8235.0700 sets the general procedures for recounts. The proposed changes to this rule part require the containers of voted ballots to be unsealed and resealed within public view. The changes also allow candidates to have one representative observe the sorting of ballots in each precinct. Candidates may have one additional representative observe the counting of the ballots pursuant to part 8235.0800, subp. 2. The number of candidate representatives in the public viewing area of the room is not restricted.

95. It is currently standard procedure for election officials to unseal and reseal the container of ballots in public view. The OSS wishes to see this procedure memorialized in rule. The OSS states that it is reasonable to limit the number of candidate representatives observing the recount with the candidate in the non-public area of the room to aid the election officials in maintaining control of the procedure while also allowing the candidate adequate representation.<sup>92</sup>

96. Mr. Lillehaug suggested that each candidate should be allowed to have more than one representative present at the sorting of the ballots. He stated that the U.S. Senate recount procedures allowed each candidate to have two representatives present during the process, and that candidates found this very helpful.<sup>93</sup> The OSS rejected that suggestion so as to maintain order and efficiency in the recount process.

97. The RPM proposed extensive thoughtful additions to this rule part, including a reconciliation process for recount procedures. In addition, the RPM suggested that

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<sup>90</sup> *Coleman v. Minnesota State Canvassing Board*, A08-2206 (Minn. Dec. 24, 2008), at 4.

<sup>91</sup> Comments of Kent Kaiser, Ph.D., dated December 18, 2009. Transcript (T.) at 38-39.

<sup>92</sup> SONAR at 35.

<sup>93</sup> Comment of David L. Lillehaug, dated December 18, 2009, at 3. Transcript ("T.") at 32.

the rules agreed to by the two parties in the U.S. Senate recount be added to the proposed rules. The RPM believes that a reconciliation process would minimize disputes over missing and extra ballots.<sup>94</sup>

98. The Secretary of State appreciated the RPM's thoughtful comments, but declined to adopt much of the RPM's proposed language. According to the Secretary of State, many of the procedures used in the U.S. Senate recount are too specific to those circumstances to be used in all recount processes. As to the reconciliation process, the Secretary of State asserts that the RPM's proposal requires election officials to consider documents outside the scope of Minn. Stat. § 204C.35, subd. 3, in determining the number of ballots cast.<sup>95</sup> Subdivision 3 requires that only the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process."

99. The Secretary of State was, however, responsive to some of the RPM's comments and has proposed the following modifications to proposed part 8235.0700:

The custodian of the ballots shall make available to the recount official the precinct summary statements, the precinct boxes or . . . the sealed . . . containers of voted ballots, and any other election materials requested by the recount official. If the recount official needs to leave the room for any reason, he or she must designate a Deputy Recount Official to preside during his or her absence. A recount official must be in the room at all times. The containers of voted ballots must be unsealed and resealed within public view. No ballots or election materials may be handled by candidates, their representatives, or members of the public. There must be an area of the room from which the public may observe the recount. Cell phones and video cameras may be used in this public viewing area, as long as their use is not disruptive.<sup>96</sup>

100. The Administrative Law Judge finds that the Secretary of State has adequately addressed each of the concerns regarding part 8235.0700. The OSS has demonstrated that its proposed rule language is needed and reasonable to protect, enhance, and enforce the recount process.

### **Part 8235.0800, subpart 1**

101. Part 8235.0800 addresses the counting and challenging of ballots, and subpart 1 deals with the sorting of those ballots. The OSS proposes to add language requiring the recount official to review and sort the ballots into piles based upon the official's determination of the vote cast. The proposed language also allows a candidate or the candidate's representative to challenge the recount official's determination during

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<sup>94</sup> Comment of Trimble & Associates, dated January 4, 2010, at 2-3 and Ex. B.

<sup>95</sup> Comments of the Secretary of State, dated January 14, 2010, at 1-2.

<sup>96</sup> *Id.* at Ex. 1. To avoid confusion, the changes as published in the *State Register* on November 16, 2009, are not shown here. Only the OSS's changes proposed subsequent to publication are noted.

the sorting. Finally, the OSS proposes the following sentence at the end of subpart 1: A challenge is frivolous if it is based upon an alleged identifying mark other than a signature or an identification number written anywhere on the ballot or a name written on the ballot completely outside of the space for the name of a write-in candidate.

102. The OSS believes it is reasonable to add these details to the sorting process. Making challenges during the sorting process is preferable to having a recount official take challenges during the counting process. The SONAR states that candidates should make “any and all challenges” during the sorting process because this is when the recount official is determining voter intent.<sup>97</sup>

103. The current rule prohibits frivolous challenges but does not define “frivolous.” The OSS proposes to characterize a frivolous challenge in the above-manner largely due to experience with the U.S. Senate recount, during which the candidates challenged many ballots based only on stray pen marks. The OSS’s proposed characterization of a frivolous challenge is based in part on the determination made by the State Canvassing Board during the U.S. Senate recount. The 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.<sup>98</sup>

104. Mr. Lillehaug objected to the OSS’s proposed language regarding frivolous challenges as being overly restrictive. He argued that there are highly distinctive marks other than the three identified by the OSS that may be identifying marks appropriate for a challenge. Mr. Lillehaug cautioned the OSS against proposing rules based solely on what the OSS perceived to be an unnecessary number of challenges during the U.S. Senate recount. Mr. Lillehaug did acknowledge that the proposed language requiring recount officials to sort ballots into piles prior to counting the ballots would likely reduce frivolous challenges at the counting stage.<sup>99</sup>

105. The OSS reiterated its position from the SONAR and declined to make any further changes to the proposed language based on Mr. Lillehaug’s comments.<sup>100</sup>

106. Many of the RPM’s suggestions for part 8235.0700 are applicable in this part as well. As discussed above, the OSS appreciates the detailed comments provided by the RPM, but declines to adopt most of the RPM’s proposed language. The OSS did propose, however, a few changes to the proposed part 8235.0800 based on the RPM’s comments. The OSS proposes a new subpart 1 and a renumbering of the subsequent subparts, as follows:

Recount officials may not take a break for a meal or for the day prior to the completion of the sorting, counting, review and labeling of challenges, and

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<sup>97</sup> SONAR at 35.

<sup>98</sup> SONAR at 36.

<sup>99</sup> Comment of David L. Lillehaug, dated December 18, 2009, at 3. Transcript (“T.”) at 32-34.

<sup>100</sup> Comments of the Secretary of State, dated January 7, 2010, at 9-10.

secure storage of the ballots for any precinct. All challenged ballots must be stored securely during breaks in the counting process.

107. The OSS proposes these additional changes to subpart 1 (now subpart 2).

The recount official must review each ballot and sort the ballots into piles based upon the recount official's determination as to which candidate, if any, the voter intended to vote for: one pile for each candidate that is the subject of the recount and one pile for all other ballots (those for other candidates, overvotes, undervotes, etc.). . . . Challenges may not be automatic or frivolous and the challenger must state the basis for the challenge pursuant to Minnesota Statutes, section 204C.22. . . . Challenged ballots must be placed into separate piles, one for ballots challenged by each candidate.<sup>101</sup>

108. The Administrative Law Judge finds that the OSS has shown a rational basis for all of the proposed modifications to part 8235.0800. These changes promote the efficiency and fairness of the recount process. The subsequent changes do not make the rule substantially different.

### **Part 8250.1810, subpart 3**

109. Part 8250.1810 consolidates all of the ballot requirements for optical scan ballots into one section for ease of use by election officials.<sup>102</sup> Subpart 3 relates specifically to the format of ballot headings. The requirements of subpart 3 all currently exist in statute or rule. Within subpart 3 is a requirement that the jurisdiction preparing the ballot and the date of the election be printed in the ballot heading "in uppercase in as large as practicable but no smaller than 18-point type." This point type constraint is currently found in several parts, including 8250.0370, 8250.0385, 8250.0390, 8250.0395, 8250.0397, 8250.0398, and 8250.1200.<sup>103</sup>

110. Doug Sunde of Synergy Graphics Government Division expressed concern about the 18-point type minimum requirement. He stated that when these rules were originally developed, a different style of ballot was in common use. Since that time, ballot styles have changed and the requisite point type has not been actively enforced. Mr. Sunde is concerned that if the OSS enforces this requirement, then Hennepin County will be required to go from a 17" ballot to a 19" ballot. This change would cost the county over \$25,000.<sup>104</sup>

111. In response, the OSS reminded Mr. Sunde that the inclusion of the jurisdiction name in the heading is permissive, and that the proposed rule is merely

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<sup>101</sup> Comments of the Secretary of State, dated January 14, 2010, at Ex. 1. To avoid confusion, the changes as published in the *State Register* on November 16, 2009, are not shown here. Only the OSS's changes proposed subsequent to publication are noted.

<sup>102</sup> SONAR at 37.

<sup>103</sup> SONAR at 39-40.

<sup>104</sup> Comment of Doug Sunde, dated December 15, 2009.

reorganizing current rule criteria. The OSS also noted that the apparent non-compliance by some counties with the point type size requirement does not appear to have negatively affected the public. The OSS stated that while it had not intended to modify any of the ballot formatting requirements, it would not object to the ALJ recommending that the jurisdiction name and election date be in a size of not less than 8-point type.<sup>105</sup>

112. The ALJ appreciates the willingness of the Secretary of State to modify the rule in response to public comments. The ALJ notes, however, that the modification of this rule part to reduce the point type size may cause confusion across other rule parts that contain the 18-point requirement. The rules as proposed are a reasonable reorganization of the current rules. The ALJ defers to the discretion of the Secretary of State on this issue, but notes that an expansion of the point type criteria would not make the rules substantially different.

### **Part 8250.1810, subpart 10**

113. This subpart addresses the order and form of ballot questions on optical scan ballots. It carries over current rules that require voting instructions to appear after each ballot question.<sup>106</sup>

114. Mr. Sunde objected to the redundancy of including the voting instructions after every question.<sup>107</sup> The Secretary of State acknowledged Mr. Sunde's concern, but stated that it would refrain from making these types of changes to ballot format until such time as the Legislature amends current law to improve the usability of the ballot format.<sup>108</sup>

115. The reorganization of the order and form of the optical scan ballot requirements is needed and reasonable. A majority of the language of subpart 10 is existing language that enjoys a presumption of need and reasonableness because it has been approved in an earlier rulemaking.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Secretary of State gave proper notice in this matter. The OSS has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

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<sup>105</sup> Comments of the Secretary of State, dated January 7, 2010, at 6.

<sup>106</sup> SONAR at 41. See *also*, Minn. R. 8250.0370, subp. 1; 8250.0390, subp. 2; 8250.0397, subp. 2; and 8250.0398, subp. 4.

<sup>107</sup> Comment of Doug Sunde, dated December 15, 2009.

<sup>108</sup> Comments of the Secretary of State, dated January 7, 2010, at 6.

2. The OSS has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).

3. The OSS has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50 (iii).

4. The additions and amendments to the proposed rules suggested by the OSS after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. § 14.05, subd. 2 and 14.15, subd. 3.

5. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

6. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Secretary of State from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based on the Conclusions, the Administrative Law Judge makes the following:

**RECOMMENDATION**

IT IS RECOMMENDED that the proposed rules, as modified, be adopted.

Dated: February 16, 2010

s/Manuel J. Cervantes  
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MANUEL J. CERVANTES  
Administrative Law Judge

Recorded: Reported by Kirby A. Kennedy & Associates  
Transcript (one volume)