

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Permanent  
Rules of the Office of the Secretary of State  
Relating to Elections Administration and the  
Presidential Nomination Primary

**REPORT OF THE ADMINISTRATIVE  
LAW JUDGE**

This matter came before Administrative Law Judge Jessica A. Palmer-Denig for a rulemaking hearing on June 18, 2018. The hearing was held in a hearing room at the Office of Administrative Hearings in St. Paul, Minnesota. The Office of the Secretary of State (Secretary, Secretary of State, or Office) proposes to adopt permanent rules relating to elections administration and the presidential nomination primary (presidential primary).

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act (APA).<sup>1</sup> The purpose of this process is to ensure that state agencies meet all requirements established by law for adopting rules.

The hearing process permitted agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and any changes that might be appropriate. Further, the hearing process provided the general public an opportunity to review, discuss, and critique the proposed rules.

The Secretary of State's panel at the public hearing included: Gary Poser, Director of Elections Division; Bert Black, Legal Advisor to the Secretary; and Samm Bonawitz, Director of Government Relations.

Seven people attended the public hearing and signed the hearing register. The hearing continued until all interested persons had an opportunity to be heard concerning the proposed rules. Three members of the public made statements or asked questions during the hearing.<sup>2</sup>

After the close of the hearing, the rulemaking record remained open for another 20 calendar days – until Monday, July 9, 2018 – to permit interested persons and the Secretary of State to submit written comments. Following the initial comment period, the hearing record was open an additional five business days to permit interested persons and the Secretary of State an opportunity to reply to earlier-submitted comments.<sup>3</sup> The hearing record closed on Monday, July 16, 2018.

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<sup>1</sup> See Minn. Stat. §§ 14.131-.20 (2018).

<sup>2</sup> Rule Hearing Register (Jun. 18, 2018).

<sup>3</sup> See Minn. Stat. §14.15, subd. 1.

## SUMMARY OF CONCLUSIONS

The Office of the Secretary of State has established that it has the statutory authority to adopt the proposed rules and that the proposed rules are needed and reasonable.

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

### FINDINGS OF FACT

#### I. Regulatory Background to the Proposed Rules

1. During the 2016 legislative session, the Minnesota Legislature enacted Minn. Stat. § 207A.11, creating a presidential primary.<sup>4</sup> The presidential primary is to be held each presidential election year and is limited to “major political parties” as defined in Minn. Stat. § 200.02, subd. 7 (2018).<sup>5</sup>

2. Other statutes establish procedures for the presidential primary, including that individuals voting at the presidential primary must identify which political party’s ballot they wish to use,<sup>6</sup> and must sign a roster with an oath declaring that they are “in general agreement with the principles of the party for whose candidate [they] intend to vote.”<sup>7</sup> Pursuant to statute, the party ballot choice of each individual voting at the presidential primary is to be recorded as public information.<sup>8</sup>

3. Minnesota Statutes, section 207A.11(c), directs the Secretary of State to adopt rules governing the implementation and administration of the presidential primary. Pursuant to that directive, the Secretary of State has proposed rules intended to provide additional procedural clarity to elections administrators and voters in the administration of the presidential primary.<sup>9</sup>

4. The Secretary of State also proposes a limited number of amendments to its existing rules relating to voter registration, absentee ballots, election judge training, municipal clerk training, and ballot preparation.

5. In this rulemaking proceeding, the Secretary of State must establish that the proposed rules are within its statutory authority; necessary and reasonable; follow from compliance with the required procedures; and that any modifications that the Office made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.<sup>10</sup>

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<sup>4</sup> See 2016 Minn. Laws ch. 162, § 9.

<sup>5</sup> Minn. Stat. 207A.11(d) (2018).

<sup>6</sup> Minn. Stat. § 207A.12(b) (2018).

<sup>7</sup> Minn. Stat. § 204C.10(b) (2018).

<sup>8</sup> See Minn. Stat. 207A.12(b).

<sup>9</sup> Exhibit (Ex.) D at 24.

<sup>10</sup> Minn. Stat. §§ 14.05, 14.23, 14.25, and 14.50 (2018).

## II. Rulemaking Authority

6. Minnesota Statutes, section 207A.11(c), confers specific authority upon the Secretary of State to adopt rules governing the presidential primary, providing that “[t]he secretary of state must adopt rules to implement the provisions of this chapter.”

7. In addition to Minn. Stat. § 207A.11(c), the Secretary of State cites 17 different provisions of the Minnesota Statutes in support of the Office’s authority to promulgate through rulemaking each of the proposed changes.<sup>11</sup>

8. Many of the cited statutes direct the Secretary of State to carry out a particular piece of the elections process. Included within the listing are specific authorizations to promulgate administrative rules. The Secretary of State has specific authority to develop rules relating to: administration of the statewide voter registration system;<sup>12</sup> election day registration;<sup>13</sup> changes of registration;<sup>14</sup> registered voter lists;<sup>15</sup> obtaining and maintaining permanent absentee voter status;<sup>16</sup> marking, processing and return of absentee ballots;<sup>17</sup> printing absentee ballot applications, voter lists, ballot and return envelopes, certificates of eligibility, and absentee ballot directions;<sup>18</sup> methods and procedures for the reconciliation of voters and ballot cards;<sup>19</sup> circulation, signing, filing and inspection of nominating petitions;<sup>20</sup> 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;<sup>21</sup> formatting and preparation of the state primary ballot;<sup>22</sup> preparation and delivery of the state general election ballot;<sup>23</sup> preparation of municipal election ballots;<sup>24</sup> preparation of school district election ballots;<sup>25</sup> and standard ballot formats for electronic voting systems<sup>26</sup>

9. In addition, Minn. Stat. § 201.221, subd. 1 (2018), includes a broad delegation of rulemaking authority. This statute provides that the Secretary of State may adopt administrative rules “to implement the provisions” of Chapter 201 provided that those rules are “consistent with federal and state election laws.”<sup>27</sup> Chapter 201 provides

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<sup>11</sup> See Ex. D at 2-9.

<sup>12</sup> See Minn. Stat. § 201.022, subd. 2 (2018).

<sup>13</sup> See Minn. Stat. § 201.061, subd. 3 (2018).

<sup>14</sup> See Minn. Stat. § 201.071, subd. 4 (2018).

<sup>15</sup> See Minn. Stat. § 201.091, subd. 4 (2018).

<sup>16</sup> See Minn. Stat. § 203B.04, subd. 5(c) (2018).

<sup>17</sup> See Minn. Stat. § 203B.08, subd. 4 (2018).

<sup>18</sup> See Minn. Stat. § 203B.09 (2018).

<sup>19</sup> See Minn. Stat. § 203B.125 (2018).

<sup>20</sup> See Minn. Stat. § 204B.071 (2018).

<sup>21</sup> See Minn. Stat. § 204B.45, subd. 3 (2018).

<sup>22</sup> See Minn. Stat. § 204D.08, subd. 1 (2018).

<sup>23</sup> See Minn. Stat. § 204D.11, subd. 1 (2018).

<sup>24</sup> See Minn. Stat. § 205.17, subd. 6 (2018).

<sup>25</sup> See Minn. Stat. § 205A.08, subd. 5 (2018).

<sup>26</sup> See Minn. Stat. § 206.84, subd. 2 (2018).

<sup>27</sup> Minn. Stat. § 201.221, subd. 1.

requirements for registering and signifying one's eligibility to vote and the operation of the statewide voter registration system.<sup>28</sup>

10. The Secretary of State has statutory authority to adopt the proposed rules.

### **III. Procedural Requirements of Chapter 14**

#### **A. Publications**

11. On July 10, 2017, the Secretary of State requested review and approval of its Additional Notice Plan for the Office's Request for Comments under Minnesota Statutes § 14.101.

12. On July 13, 2017, the Administrative Law Judge issued an Order approving the Office's Additional Notice Plan, with some modifications.<sup>29</sup>

13. On July 24, 2017, the Secretary of State published a Request for Comments in the *State Register* seeking comments on possible rules governing the administration of presidential primary elections.<sup>30</sup>

14. On April 18, 2018, the Secretary of State requested review and approval of its Notice of Intent to Adopt Rules Without a Public Hearing Unless 25 or More Persons Request a Hearing (Dual Notice).

15. On April 23, 2018, the Administrative Law Judge issued an Order approving the Office's Dual Notice.<sup>31</sup>

16. On May 7, 2018, the Office published the Dual Notice in the *State Register* stating its intent to adopt rules following the receipt of input from the public.<sup>32</sup> In the Dual Notice, the Office announced it would hold a hearing on June 18, 2018, at the Office of Administrative Hearings, if 25 or more persons requested a hearing.<sup>33</sup>

17. On May 3, 2018, the Office sent an electronic copy via email of the Dual Notice, proposed rules and Statement of Need and Reasonableness (SONAR) to all persons and associations who had registered their names with it for the purpose of receiving such notice and to all persons and associations identified in its Additional Notice Plan.<sup>34</sup> To those individuals and associations who did not have an electronic mail address, the Office mailed a copy of the Dual Notice, proposed rules, and SONAR by depositing the copies in the United States mail with postage paid.<sup>35</sup>

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<sup>28</sup> See Minn. Stat. §§ 201.01-.275 (2018).

<sup>29</sup> Order on Review of Additional Notice Plan (Jul. 13, 2017).

<sup>30</sup> Ex. A.

<sup>31</sup> Order on Review of Dual Notice (Apr. 23, 2018).

<sup>32</sup> Ex. F; 42 *State Register* 1401 (May 7, 2018).

<sup>33</sup> Ex. F; 42 *State Register* 1401 (May 7, 2018).

<sup>34</sup> Exs. G and H.

<sup>35</sup> Exs. G and H.

18. The Office received more than 25 requests for a hearing.<sup>36</sup>
19. At the hearing on June 18, 2018, the Office filed copies of the following documents:<sup>37</sup>
- (a) the Office's Request for Comments as published in the *State Register* on July 24, 2017;<sup>38</sup>
  - (b) the proposed rules dated February 19, 2018, which included the Revisor's approval;<sup>39</sup>
  - (c) the Office's Statement of Need and Reasonableness (SONAR);<sup>40</sup>
  - (d) the Certificate of Mailing the SONAR to the Legislative Reference Library on May 3, 2018;<sup>41</sup>
  - (e) the Dual Notice as mailed and as published in the *State Register* on May 7, 2018;<sup>42</sup>
  - (f) the Certificate of Mailing the Dual Notice to the rulemaking mailing list on May 3, 2018, and the Certificate of Accuracy of the Mailing List;<sup>43</sup>
  - (g) the Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan on May 3, 2018;<sup>44</sup>
  - (h) the written comments on the proposed rules that the Office received during the comment period that followed the Dual Notice;<sup>45</sup>
  - (i) the Certificate of Sending the Dual Notice and SONAR to Legislators and Legislative Coordinating Commission on May 3, 2018;<sup>46</sup>
  - (j) the Certificate of Mailing a Notice of Hearing to those who requested a hearing;<sup>47</sup>

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<sup>36</sup> Ex. I.

<sup>37</sup> See Minn. R. 1400.2220 (2017).

<sup>38</sup> Ex. A.

<sup>39</sup> Ex. C.

<sup>40</sup> Ex. D.

<sup>41</sup> Ex. E.

<sup>42</sup> Ex. F.

<sup>43</sup> Ex. G.

<sup>44</sup> Ex. H.

<sup>45</sup> Ex. I.

<sup>46</sup> Ex. K at 183.

<sup>47</sup> *Id.* at 189.

- (k) a June 8, 2018 memorandum from Minnesota Management and Budget (MMB);<sup>48</sup>
- (l) examples of instructions and other materials to be used by the Office in implementing the presidential primary;<sup>49</sup>
- (m) copy of Office's rulemaking web page as of June 8, 2018;<sup>50</sup>
- (n) copy of 2016 Minnesota Laws, Chapter 163 and Minnesota Statutes, chapter 207A;<sup>51</sup>
- (o) draft of proposed rule and May 9, 2018 transmittal e-mail to the Office from Senior Assistant Revisor John McCullough;<sup>52</sup>
- (p) Letter from Secretary of State Steve Simon to Administrative Law Judge Jessica Palmer-Denig announcing modifications to the proposed rules in response to comments received from the Minnesota County Attorneys Association; and<sup>53</sup>
- (q) A summary of the proposed rules.<sup>54</sup>

## **B. Additional Notice Requirements**

20. Minn. Stat. §§ 14.131 and 14.23 require that an agency include in the 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 alternatively, the agency must detail why these notification efforts were not made.

21. On May 3, 2018, the Office provided a copy of the Dual Notice to persons and groups detailed in its approved Additional Notice Plan.<sup>55</sup>

22. Commenter Erik Larson expressed his belief that the Secretary of State did not engage in sufficient efforts to notify unaffiliated or independent voters of this rulemaking proceeding, and also failed to provide notice to organizations that would serve at-risk classes of voters such as victims of intimate partner violence or LGBTQ youth.<sup>56</sup>

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<sup>48</sup> *Id.* at 194.

<sup>49</sup> Ex. L.

<sup>50</sup> Ex. M.

<sup>51</sup> Ex. N.

<sup>52</sup> Ex. O.

<sup>53</sup> Ex. P.

<sup>54</sup> Ex. Q.

<sup>55</sup> Exs. D at 14-18, G, and H.

<sup>56</sup> Comment by Erik Larson (Jul. 16, 2018). Mr. Larson provided written comments on May 21, 2018 (Ex. I at 116); June 18, 2018 (Ex. 1), July 9, 2018 (E-comment from Erik Larson), and July 16, 2018. Mr. Larson also attended and provided comments at the rulemaking hearing. Because the content of Mr. Larson's comments at the hearing was consistent with his written submissions, this report cites to his written submissions.

Mr. Larson contends that the Secretary of State failed to meet procedural requirements in this proceeding due to the absence of additional efforts to reach such voters.<sup>57</sup>

23. The Secretary of State maintains that the rulemaking received general publicity, and that its Additional Notice Plan provided notice to groups who could comment on the alleged risks, but did not.<sup>58</sup> The Additional Notice Plan provided notice to Minnesota's two major parties as well as five minor political parties, as well as to numerous public interest groups.<sup>59</sup>

24. If the agency implements an approved additional notice plan, the order approving the additional notice plan is the final determination by the Office of Administrative Hearings that the additional notice plan is adequate.<sup>60</sup>

### **C. Notice Practice**

#### **i. Notice to Stakeholders**

25. On May 3, 2018, the Office provided a copy of the Dual Notice to its official rulemaking list (maintained under Minn. Stat. § 14.14), and to stakeholders identified in its Additional Notice Plan.<sup>61</sup>

26. The comment period on the proposed rules expired at 4:30 p.m. on Wednesday, June 6, 2018.<sup>62</sup>

27. The Office complied with Minn. R. 1400.2080, subp. 6 (2017), by mailing the Dual Notice "at least 33 days before the end of the comment period . . . ."

#### **ii. Notice to Legislators**

28. Minnesota Statute, section 14.116 (2018), requires an agency to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators at the time that it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan.

29. On May 3, 2018, the Office sent a copy of the Dual Notice and SONAR to legislators.<sup>63</sup>

30. The Office mailed the Dual Notice to legislators in compliance with Minn. Stat. § 14.116.

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<sup>57</sup> *Id.*

<sup>58</sup> Secretary of State Response to Comments (Jul. 9, 2018).

<sup>59</sup> Ex. D at 14-18.

<sup>60</sup> Minn. R. 1400.2060, subp. 4 (2017).

<sup>61</sup> Exs. G and H.

<sup>62</sup> Ex. F at 72.

<sup>63</sup> Ex. K at 183.

### iii. Notice to the Legislative Reference Library

31. Minnesota Statutes, section 14.23, provides that an agency must send a copy of the SONAR to the Legislative Reference Library when the Dual Notice is mailed.

32. On May 3, 2018, the Office submitted a copy of the SONAR by email to the Legislative Reference Library.<sup>64</sup>

33. The Office submitted the SONAR as required by Minn. Stat. § 14.23.

### D. Impact on Farming Operations

34. Additional notice requirements exist when proposed rules affect farming operations.<sup>65</sup> In that circumstance, an agency must provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

35. The proposed rules at issue here do not impose restrictions or have an impact on farming operations. The Office was not required to notify the Commissioner of Agriculture.

### E. Statutory Requirements for the SONAR

36. An agency adopting rules must address eight factors in its SONAR.<sup>66</sup> Those factors are:

- (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;

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<sup>64</sup> Ex. E.

<sup>65</sup> Minn. Stat. § 14.111 (2018).

<sup>66</sup> Minn. Stat. § 14.131.

- (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;
- (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; and,
- (8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.

**i. The Agency's Regulatory Analysis**

- (a) 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.**

37. The Secretary of State contends that the proposed rules will benefit voters, election officials, local governments, major political parties, and the Office of the Secretary of State.<sup>67</sup> According to the Secretary of State, eligible voters will benefit from the proposed rules because the rules clarify the presidential primary process.<sup>68</sup> The Secretary notes that the proposed rules provide forms and instructions to guide voters, particularly with respect to absentee voting and voting by mail.<sup>69</sup> The Secretary of State contends that the instructions and procedures provided by the proposed rules will also benefit election officials and local government staff who administer the presidential primary and respond to voters' questions.<sup>70</sup>

38. The Secretary of State also maintains that the proposed rules will benefit county attorneys by clarifying the reporting requirements related to alleged violations of voter registration or voting laws, and by creating a single annual reporting deadline.<sup>71</sup>

39. Finally, the Secretary of State asserts that the proposed rules will benefit the Office by providing clear procedures for administering the presidential primary and by increasing election security.<sup>72</sup>

40. The Secretary of State notes that the Office and local governments will bear costs associated with implementing and administering the presidential primary.<sup>73</sup> The Secretary states, for example, that the Office will incur staff costs associated with

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<sup>67</sup> Ex. D at 9.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 9-10.

<sup>71</sup> *Id.* at 10.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

preparing new sample instructions and materials that comply with the proposed rules.<sup>74</sup> In addition, the Secretary states that election officials and local governments for whom they work may bear some costs related to printing new forms.<sup>75</sup> However, the Secretary of State notes that the primary costs associated with the rules, are a consequence of the legislation mandating the creation of the presidential primary, and are not a cost of the rules themselves.<sup>76</sup>

41. The Secretary of State also notes that the flexibility provided by the proposed rules regarding the size of absentee ballots and transmittal envelopes may result in cost savings for local election officials and their respective local governments.<sup>77</sup>

42. Commenter Erik Larson maintains that the Secretary of State failed to appropriately assess the costs that may be incurred by voters who seek to challenge the constitutionality of the proposed rules.<sup>78</sup> Mr. Larson believes the proposed rules are likely to generate legal challenges due to the requirement that voters affirm their general agreement with a particular party's principles.<sup>79</sup> Mr. Larson contends that the Secretary of State is required to describe and analyze the potential cost of litigation to voters in the analysis of the proposed rules' costs.<sup>80</sup>

43. Mr. Larson also asserts that the proposed rules will impose costs on voters, as well as election officials, because of gaps in the rule related to determining whether a voter sufficiently agrees with the party's principles to be eligible to vote in the presidential primary, and the lack of instructions to election officials as to how to respond to voters who do not know a party's principles.<sup>81</sup>

44. The Administrative Law Judge is not persuaded by Mr. Larson's critique of the Secretary of State's analysis of this factor. The purpose of this factor is to determine the persons affected by the rule and costs that the rule will impose upon them. The Secretary of State is not required to include an assessment of costs that are wholly speculative, such as those identified in Mr. Larson's comments.

**(b) 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.**

45. The Secretary of State maintains that any additional costs to the Office associated with the implementation and enforcement of the proposed rules will be negligible.<sup>82</sup> The Secretary of State points out that it is already required to provide training

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Comment by Erik Larson (Jul. 16, 2018); Exhibit 1.

<sup>79</sup> Comment by Erik Larson (Jul. 16, 2018).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Ex. D. at 10.

materials to local governments and election officials.<sup>83</sup> Therefore, materials relating to the new rules will be incorporated into the existing training program.

46. The Secretary of State believes the proposed rules will not impact state or local revenues.<sup>84</sup> The Secretary also does not anticipate that implementation and enforcement of the proposed rules will result in additional costs to any other state agency.<sup>85</sup>

47. In his comments, Mr. Larson asserted that the Secretary of State failed to address the probable litigation costs the Office will incur in defending the proposed rules from inevitable constitutional challenges.<sup>86</sup> Specifically, Mr. Larson questioned the constitutionality of the oath required under proposed Minnesota Rule 8215.0300 and asserted that this provision will likely be challenged.<sup>87</sup> Mr. Larson contends that the Secretary of State's failure to adequately analyze the potential litigation costs of likely constitutional challenges violates rulemaking requirements.<sup>88</sup>

48. In response, the Secretary of State asserts that the oath is required by statute, so constitutional challenges will be directed to the statute and not the rule. Consequently, the Secretary does not foresee the Office incurring costs associated with defending the rules.<sup>89</sup>

**(c) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.**

49. The Office indicates that it consulted with election officials, representatives of local government associations, and other entities to determine if there were less intrusive methods for achieving the purposes of the proposed rules.<sup>90</sup> The Office states that it examined the manner in which other states conduct presidential primaries.<sup>91</sup> After evaluating all options, the Office determined the proposed rules represent the best and least costly option for achieving the policy purposes of the proposed rules.<sup>92</sup>

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

<sup>84</sup> Ex. 10 at 11.

<sup>85</sup> *Id.*

<sup>86</sup> Comment from Erik Larson (June 18, 2018).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Secretary of State Response to Comments at 5 (Jul. 9, 2018).

<sup>90</sup> Ex. D at 11.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

**(d) 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.**

50. The Office states that it looked to other states and solicited feedback from election administrators to determine alternative means for achieving the purpose of the rules.<sup>93</sup> The Office maintains that, because of the unique nature of Minnesota's election laws and the specificity of the law establishing Minnesota's presidential primary, many alternative methods employed by other states were not applicable in Minnesota.<sup>94</sup>

51. In a comment, the Advocates for Human Rights<sup>95</sup> maintains that the Secretary of State failed to seriously consider alternatives to ensure voter safety.<sup>96</sup> Specifically, the Advocates for Human Rights recommends that the proposed rule governing the polling place roster oath be amended to specifically include language from Minn. Stat. § 201.091, subd. 4, which permits voters to keep their voting information private.<sup>97</sup> The Advocates for Human Rights also suggests that voters be allowed the option to sign either the roster oath or a statement incorporating the opt-out provision of Minn. Stat. § 201.091, subd. 4.<sup>98</sup> In addition, the Advocates for Human Rights asserts that the Secretary of State could require election judges block out the names of voters on the roster sheet by using a manila folder with a cut-out window, so that only a single row is visible to the person signing in.<sup>99</sup> According to the Advocates for Human Rights, all of these modifications are "straightforward adjustments" to the proposed rules that would reduce the risk of voter intimidation.<sup>100</sup> The Advocates for Human Rights contends that the Secretary of State's failure to seriously consider these options constitutes a violation of the required regulatory analysis.<sup>101</sup>

52. The Secretary of State responded to these comments, noting that recording voters' party ballot choice on the paper roster is required by Minn. Stat. § 207A.12. The Secretary of State indicates that the Office lacks statutory authority to amend the required oath to include the opt-out language and to allow for a separate opt-out document. The Secretary of State is required to implement rules consistent with the statutory mandates.<sup>102</sup> Finally, the Secretary of State notes that the Office considered the

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> The Advocates for Human Rights submitted written comments on July 9 and July 16, 2018. Amy Bergquist, a Staff Attorney at the Advocates for Human Rights, also attended and provided comments at the rulemaking hearing. Because the content of Ms. Bergquist's comments at the hearing is consistent with the Advocates for Human Rights' written submissions, this Report cites to the written submissions.

<sup>96</sup> Comment from Advocates for Human Rights (Jul. 16, 2018).

<sup>97</sup> Comment from Advocates for Human Rights (Jul. 9, 2018).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Comment from Advocates for Human Rights (Jul. 16, 2018).

<sup>101</sup> *Id.*

<sup>102</sup> See Minn. Stat. §§ 207A.11(c) and 201.221, subd. 1.

suggestion that election judges use a manila folder to block out names on the polling roster, but concluded such a process would be unworkable.

53. The proposed rules conform to the requirements adopted in the statutes creating the presidential primary. Given the framework in the statutes, the Secretary of State's ability to consider alternatives is constrained. The Administrative Law Judge disagrees with the Advocates for Human Rights' assertion that the Secretary's rejection of its proposed amendments represents a failure to adequately analyze alternatives.

**(e) 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.**

54. The Secretary of State asserts that county, city, township, and school district election officials will experience some limited, one-time cost increases due to the need to re-print the voucher form, for those officials that have leftover stock remaining to be used.<sup>103</sup> However, the Secretary maintains that these costs should be minimal as the voucher form is typically printed prior to each election. The Secretary notes that any remaining costs are required by the presidential primary law, and are not imposed by the rules themselves.<sup>104</sup>

**(f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.**

55. The Secretary of State notes that the Office is expressly directed by statute to adopt rules governing the implementation and administration of the presidential primary.<sup>105</sup> The Secretary asserts that if the proposed rules are not adopted, no guidance will exist for administering the presidential primary.<sup>106</sup> According to the Secretary, not adopting the proposed rules will result in voter confusion, lower election integrity, and increased administrative burdens for election administrators.<sup>107</sup> Because the proposed rules reduce the costs associated with printing some materials, such as absentee ballots, the Secretary contends that local governments will not realize those savings if the proposed rules are not adopted.<sup>108</sup>

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<sup>103</sup> Ex. D at 11.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

**(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.**

56. The Secretary of State notes that various federal laws and regulations govern election administration. The Secretary asserts, however, that “[n]othing in the proposed rules is in conflict with federal regulations.”<sup>109</sup>

57. In a comment, the Advocates for Human Rights asserts that the requirement in proposed Minnesota Rule 8215.0300 that voters’ party ballot selections be public information violates Article 25 of the International Covenant on Civil and Political Rights, a treaty ratified by the United States in 1992.<sup>110</sup> This treaty recognizes the right to vote in elections by secret ballot to guarantee “the free expression of the will of the electors.”<sup>111</sup>

58. In response, the Secretary of State notes that the presidential primary is not an election for public office.<sup>112</sup> It is a party function to determine the proportion of national delegates pledged to presidential candidates, the process for which will now be administered by the Secretary of State.<sup>113</sup> The Secretary points out that for at least the last five presidential elections, the primaries have been carried out privately by the parties, and that the parties imposed requirements for caucus participation.<sup>114</sup>

59. The Secretary of State asserts that, as private associations, political parties have the right to determine who may participate in the primary election.<sup>115</sup> The Secretary of State also notes that caucuses used attendance sheets and were held in public places, where individuals could be identified as they entered or left.<sup>116</sup> Therefore, the Secretary of State asserts that the proposed rules do not violate the International Covenant on Civil and Political Rights or the United States Constitution.

60. Finally, the Secretary notes that voters who fear for their safety may opt out of appearing on the public information list, pursuant to Minn. Stat. § 201.091, subd. 4.<sup>117</sup>

**(h) An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.**

61. The Secretary of State states the following:

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<sup>109</sup> *Id.*

<sup>110</sup> Comment by The Advocates for Human Rights (Jul. 9, 2018) *citing* International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N.Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, art. 25.

<sup>111</sup> *Id.*

<sup>112</sup> Secretary of State Response to Comments filed by The Advocates for Human Rights (Jul, 16, 2018).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

Because the proposed rule amendments clarify the Presidential Nomination Primary process to ensure compliance with federal law, and because proposed rule amendments relating to state law are designed to bring the rules in line with state statute, this consideration is not applicable.<sup>118</sup>

62. Notwithstanding the lack of a detailed summary, the Secretary of State's analysis of this factor complies with law. The proposed rules regarding the presidential primary are mandated by statute, and statutory directives control the majority of the substantive content of the proposed rules. Because the rules implement a process already required by statute, they do not add to or increase regulations on affected parties.

63. The Office has completed an assessment of the eight factors set forth in Minn. Stat. § 14.131, in the text of its SONAR.

**ii. Consultation with the Commissioner of Minnesota Management and Budget (MMB)**

64. As required by Minn. Stat. § 14.131, by letter dated June 8, 2018, the Commissioner of MMB responded to a request by the Secretary of State to evaluate the fiscal impact and benefit of the proposed rules on local units of government.<sup>119</sup> MMB reviewed the proposed rules and concluded they would have “minimal fiscal impact for local governments.”<sup>120</sup>

**iii. Performance-Based Regulation**

65. The APA requires an agency to describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems. A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.<sup>121</sup>

66. The Secretary of State indicates that “[t]he proposed rules are specifically designed to improve performance in election administration, with specific emphasis in the most efficient and accurate way to achieve the goals of the Presidential Nomination Primary law.”<sup>122</sup>

67. As noted above, the proposed rules provide flexibility with respect to the size of absentee ballots and transmittal envelopes, which may result in cost savings for local election officials and their respective local governments.<sup>123</sup> The proposed rules also provide flexibility as to how voters may indicate their party ballot preference.<sup>124</sup> The Office considered requiring voters to verbally state their ballot choice, but ultimately determined that voters should have the flexibility to indicate their choice either verbally or by gesturing,

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<sup>118</sup> Ex D at 12.

<sup>119</sup> Ex. K.

<sup>120</sup> *Id.* at 00194.

<sup>121</sup> Minn. Stat. §§ 14.002 and 14.131.

<sup>122</sup> Ex. D at 13.

<sup>123</sup> *Id.* at 10 and 23.

<sup>124</sup> *Id.* at 28.

so that voters may choose the most comfortable method of indicating their party preference.<sup>125</sup>

#### **iv. Summary**

68. The Secretary of State has complied with Minn. Stat. § 14.131 in assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

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

69. Minnesota Statute, section 14.127, requires agencies to “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.” The agency 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>126</sup>

70. The Secretary of State determined that the cost of complying with the proposed rule changes will not exceed \$25,000 for any business or any statutory or home rule charter city in the first year following adoption of the rules.<sup>127</sup>

71. The Secretary of State concedes that there are significant costs associated with administering the presidential primary, but the Office notes that those costs are imposed by the enabling legislation and are not a cost specific to the proposed rules.<sup>128</sup>

72. The Secretary of State has made the determinations required by Minn. Stat. § 14.127, and the Administrative Law Judge approves those determinations.

#### **G. Adoption or Amendment of Local Ordinances**

73. Under Minn. Stat. § 14.128, the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency 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>129</sup>

74. Because elections in Minnesota are governed by federal and state laws, the Secretary of State concluded that no local government will be required to adopt or amend an ordinance or other regulation to comply with the proposed rules.<sup>130</sup>

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<sup>125</sup> *Id.*

<sup>126</sup> Minn. Stat. § 14.127, subds. 1 and 2.

<sup>127</sup> Ex. D at 13.

<sup>128</sup> *Id.*

<sup>129</sup> Minn. Stat. § 14.128, subd. 1.

<sup>130</sup> Ex. D at 13.

75. The Secretary has made the determination required by Minn. Stat. § 14.128 and the Administrative Law Judge approves that determination.

#### IV. Rulemaking Legal Standards

76. A rulemaking proceeding under the APA must include the following inquiries: whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.<sup>131</sup>

77. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100 (2017), the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,<sup>132</sup> “legislative facts” (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),<sup>133</sup> and the agency’s interpretation of related statutes.<sup>134</sup>

78. A proposed rule is reasonable if the agency can “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.”<sup>135</sup>

79. By contrast, a proposed rule will be deemed arbitrary and capricious where the agency’s choice is based upon whim or devoid of articulated reasons, or if it “represents its will and not its judgment.”<sup>136</sup>

80. An important corollary to these standards is that, when proposing new rules, an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative selected by the agency is a rational one. Thus, while reasonable minds might differ as to whether one or another particular approach represents “the best alternative,” the agency’s selection will be approved if it is one that a rational person could have made.<sup>137</sup>

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<sup>131</sup> See Minn. R. 1400.2100.

<sup>132</sup> See *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

<sup>133</sup> Compare generally *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

<sup>134</sup> See *Mammenga v. Agency of Human Servs.*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

<sup>135</sup> *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

<sup>136</sup> See *Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*, 251 N.W.2d 350, 357-58 (Minn. 1977).

<sup>137</sup> *Minnesota Chamber of Commerce*, 469 N.W.2d at 103; *Peterson v. Minn. Dep't of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

81. On June 18, 2018, the Secretary of State detailed the revisions the Office would make to the proposed rules in response to stakeholder feedback.<sup>138</sup>

82. Because the Secretary of State proposed further changes to the proposed rule language after the date it was originally published in the *State Register*, it is also necessary to address whether this new language is substantially different from the language as originally proposed.

83. Minnesota Statute, section 14.05, subd. 2(b), details the standards used to determine whether any changes to proposed rules create a substantially different rule. A modification does not make a proposed rule substantially different if:

- (1) “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”;
- (2) the differences “are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice”; and
- (3) the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.”<sup>139</sup>

84. When determining whether modifications result in a rule that is substantially different, the Administrative Law Judge must consider whether:

- (1) “persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests”;
- (2) 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
- (3) “the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.”<sup>140</sup>

## V. Rule by Rule Analysis

85. The role of the Administrative Law Judge during a legal review of rules is to determine whether the agency has made a reasonable selection among the regulatory options that it has available. A judge does not fashion requirements that the judge regards as best suited for the regulatory purpose. The delegation of rulemaking authority

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<sup>138</sup> Ex. P (Letter from Secretary of State Steve Simon to Administrative Law Judge Jessica Palmer-Denig (June 18, 2018)).

<sup>139</sup> Minn. Stat. § 14.05, subd. 2(b).

<sup>140</sup> See Minn. Stat. § 14.05, subd. 2(c).

is drawn from the Minnesota Legislature and is conferred by the Legislature upon the agency. The legal review under the APA begins with this important premise.<sup>141</sup>

86. The majority of the proposed rules received no negative comment or opposition from the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Instead, this Report will address the portions of the proposed rules that prompted genuine dispute by commentators as to the reasonableness of the Secretary of State's regulatory choice or issues raised in this proceeding that otherwise require closer examination. The great majority of the comments received regarding the proposed rules concern proposed Minn. R. 8215.0300, which governs voting at the presidential primary. The Office received only two comments regarding other sections of the proposed rules.

87. As to any proposed rule that is not specifically addressed and analyzed in this Report, 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 such rule provisions.

88. The Administrative Law Judge further finds that all proposed rule provisions not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

**A. Minn. R. 8200.7200 County Attorney Report.**

89. The Secretary of State initially proposed to modify the rule as follows:

Subpart 1. **Report.** By October 1, county attorneys shall report the outcome of any charging decision based on an investigation of alleged violations of voter registration or voting laws from the previous calendar year to the secretary of state within ten days of the determination. The report must contain either the name or initials of the individual under investigation, a brief description of the allegation, the voting precinct if applicable, and the outcome of the charging decision. If the county has not completed all investigations of alleged violations of voter registration or voting laws by October 1, the county attorney must provide a summary of any pending investigations of alleged violations of voter registration or voting laws that have not reached a charging decision.

Subpart 2. **Data classification.** Pursuant to Minnesota Statutes, section 13.03, subdivision 4, the data provided to the secretary of state by a county

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<sup>141</sup> See *Manufactured Housing Institute, supra*, 347 N.W.2d at 244 (The Court instructs that the state courts are to restrict the review of agency rulemaking to a "narrow area of responsibility, lest [the court] substitute its judgment for that of the agency"); see also, REPORT OF THE ADMINISTRATIVE LAW JUDGE, IN THE MATTER OF THE PROPOSED RULES OF THE MINNESOTA POLLUTION CONTROL AGENCY GOVERNING PERMITS FOR GREENHOUSE GAS EMISSIONS, Minnesota Rules Chapters 7005, 7007 and 7011, Docket No. 8-2200-22910-1 at 20 (Nov. 9, 2012) (<http://mn.gov/oah/images/2200-22910-GreenhouseGas-dismissal.pdf>).

attorney maintains the same data classification maintained at the entity providing the data.

90. The Secretary of State maintains that the proposed changes are needed and reasonable to improve the accuracy of county attorney reports on voting crimes. The Secretary states that the proposed language clarifies these reporting obligations and creates a clear reporting timeline for counties.<sup>142</sup>

91. The Secretary of State notes that the current rule requires county attorneys to report the “outcome of any investigation of alleged violations of voter registration laws within ten days of the determination.” According to the Secretary of State, the word “outcome” is vague and the term has caused confusion about reporting requirements, resulting in inconsistent reporting.<sup>143</sup> The Secretary of State maintains that the proposed amendments to this rule clarify that a county attorney must report the outcome of any “charging decision based on an investigation.”<sup>144</sup>

92. The Secretary of State also proposes to change the timing of county attorney reports. Under the current rule, county attorneys are required to report the “outcome” of an investigation 10 days after the “determination.” The Secretary of State maintains that the vagueness in the rule, together with the rolling 10-day timeline for reporting, have also contributed to inconsistent reporting by counties.<sup>145</sup> The Secretary of State asserts that the proposed annual reporting requirement will provide a date certain for reporting voting law violations, benefitting county attorneys. The Secretary of State contends that an annual reporting requirement will also benefit the Office and the public by providing a comprehensive report on the outcome of investigations related to alleged voting crimes. The Office considered requiring annual reporting in the spring, instead of by October 1 of each year. However, after speaking with representatives for the counties, the Office learned that many counties are only in the beginning stages of investigations in the spring. As a result, any reporting in the first half of the year following an election would likely result in significant underreporting.<sup>146</sup>

93. The Secretary of State also contends that the proposed amendments address current rule deficiencies discussed in the 2018 Legislative Audit Report on Voter Registration.<sup>147</sup> Specifically, the Legislative Audit Report stated:

In theory, the county attorney reports could allow collection of data on all registration related investigations and their outcomes. However, their usefulness for this purpose is limited for a few reasons. First, the administrative rule does not specify the information county attorneys should report. Some reports we reviewed were very detailed, including the original allegation, the investigation report, and the county attorney’s charging

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<sup>142</sup> Ex. D at 19.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 20.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 21, *citing* Voter Registration 2018 Evaluation Report, Program Evaluation Division, Office of the Legislative Auditor at 58-59 (<https://www.auditor.leg.state.mn.us/ped/pedrep/voterreg.pdf>).

decision. Other reports included only summary information or information on charges (for example, “we have charged one individual with a violation of the election laws.”) These reports may not give complete information on all investigations. Second, as we described above, some county election officials refer allegations to law enforcement agencies. In these cases, county attorneys might report only investigations they considered prosecuting, rather than all investigations. Finally, the reports we reviewed covered more than investigations into alleged violations of voter registration laws.<sup>148</sup>

94. The Secretary of State maintains that by specifying the information to be reported, including the outcome of the charging decision, the proposed rule addresses the concerns raised by the Legislative Auditor.<sup>149</sup>

95. Finally, in subpart 2 of the proposed rule, the Secretary of State proposes to clarify that data provided to the Office by a county attorney “maintains the same data classification as the data maintained at the entity providing the data.”<sup>150</sup> The Secretary of State asserts that this proposed language is necessary to protect not-public data that may be reported related to ongoing investigations.<sup>151</sup>

96. In a comment dated May 30, 2018, Robert Small, Executive Director of the Minnesota County Attorneys Association (MCAA), expressed concern that the Secretary of State’s proposal to include the names or initials of subjects of criminal investigations could violate the Minnesota Government Data Practices Act. The MCAA notes that in virtually every instance of alleged voter fraud, the subject of the investigation has not been arrested. As a result, the subject’s name is not public as “arrest data.” The MCAA recommends that the Secretary of State require only “a brief description of the allegation” without requiring information that could explicitly or implicitly identify the subject of the investigation.<sup>152</sup>

97. In response to the MCAA’s comment, the Secretary of State proposes deleting from Subpart 1 the phrases: “either the name or initials of the individual under investigation” and “the voting precinct if applicable.”<sup>153</sup> As revised, proposed Minn. R. 8200.7200, subp. 1, reads as follows:

By October 1, county attorneys shall report the outcome of any charging decision based on an investigation of alleged violations of voter registration or voting laws from the previous calendar year to the secretary of state within ten days of the determination. The report must contain either the name or initials of the individual under investigation, a brief description of the allegation, the voting precinct if applicable, and the outcome of the charging decision. If the county has not completed all investigations of

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<sup>148</sup> *Id.* at 21-22.

<sup>149</sup> *Id.* at 22.

<sup>150</sup> *Id.* at 21.

<sup>151</sup> *Id.*

<sup>152</sup> Ex. I at 0138.

<sup>153</sup> Ex. P (Letter from Secretary of State Steve Simon to Administrative Law Judge Jessica Palmer-Denig (June 18, 2018)).

alleged violations of voter registration or voting laws by October 1, the county attorney must provide a summary of any pending investigations of alleged violations of voter registration or voting laws that have not reached a charging decision.<sup>154</sup>

98. The amendment of Minn. R. 8200.7200 is needed and reasonable. The further revision of the text is needed and reasonable to address the concerns raised by the MCAA. The modification is not a substantial change from the rule as originally proposed, and it is within the scope of the rulemaking noticed.

**B. Minn. R. 8200.9939 Form of Oath, Specified by Part 8200.5100.**

99. Minnesota Rule 8200.9939 governs the oath to be affirmed by a registered voter vouching for a person who is otherwise qualified, but who is not registered to vote in a particular precinct.<sup>155</sup> The voucher oath is used to register with a voucher both in the polling place and in conjunction with absentee voting.<sup>156</sup>

100. The Secretary of State proposes adding the following statement in bold type at the beginning of the form: **“Use this form only if you are registering to vote with a voucher as your proof of residence.”**

101. The statement is intended to clarify that a voucher oath is required only when the voter is registering in conjunction with a voucher. The oath is not required if a voter is registering with one of the other approved proofs of residence.<sup>157</sup> The Secretary of State explains that, because this form is sent to all unregistered absentee voters, counties and election officials receive questions about whether the voter must complete the voucher oath if the voter is registering with something other than a voucher.<sup>158</sup>

102. The proposed amendment to Minn. R. 8200.9939 is needed and reasonable.

**C. Minn. R. 8210.2900 Voting By Absentee Ballot in a Health Care Facility or Hospital.**

103. At the request of a county election official, the Secretary of State proposes Minn. R. 8210.2900.<sup>159</sup> This proposed rule clarifies when a voter in a health care facility or hospital may receive assistance with voting.

104. Proposed Minnesota Rule 8210.2900 provides:

A voter in a health care facility or hospital who receives an absentee ballot in person from an election judge visiting the facility may request the assistance of two election judges who are not affiliated with the same

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<sup>154</sup> *Id.*

<sup>155</sup> See Minn. R. 8200.5100.

<sup>156</sup> Ex. D at 22.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 23.

political party or another person eligible to provide assistance, as provided in Minnesota Statutes, section 204C.15, subdivision 1. No person shall assist a voter in a health care facility or hospital without the consent of the voter.

105. The proposed rule is intended to clarify “that a voter needs to affirmatively request assistance before anyone will assist the voter in voting an [sic] absentee ballot in a healthcare or hospital facility.”<sup>160</sup> The Secretary of State reasons that under current law, an election judge is not authorized to assist a voter absent the voter’s request for assistance.<sup>161</sup> However, because the request for clarity came from an election official, the Office determined the proposed rule will assist election officials administering voting at healthcare facilities or hospitals.<sup>162</sup>

106. The Administrative Law Judge finds the proposed rule is needed to clarify the type of voting assistance that may be provided to voters in a healthcare facility or hospital. The proposed rule is reasonable as it mostly mirrors the language provided in Minn. Stat. § 204C.15, subd. 1.

#### **D. Minn. R. ch. 8215 Presidential Nomination Primary.**

107. Pursuant to Minn. Stat. § 207A.11(c), the Secretary of State is directed to adopt rules to implement the presidential primary.<sup>163</sup> The substance of the rules is largely determined by the legislative framework establishing the presidential primary.

108. The key statutory requirements of the presidential primary include the following:

- only major parties are eligible to participate in the presidential primary;<sup>164</sup>
- the chair of each major party must submit a list of candidates’ names that will appear on the party’s ballot;<sup>165</sup>
- each major party must have a separate ballot;<sup>166</sup>
- voters must request the party’s ballot they wish to use and will be given a ballot containing that party’s candidates;<sup>167</sup>

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<sup>160</sup> *Id.*

<sup>161</sup> *Id. citing* Minn. Stat. §§ 203B.11 (2018) (governing the provision of absentee ballots to hospital patients and health care facility residents) and 204C.15 (2018) (governing assistance to voters).

<sup>162</sup> *Id.*

<sup>163</sup> See Minn. Stat. § 207A.11(c); 2016 Minn. Laws ch. 162, § 9.

<sup>164</sup> See Minn. Stat. § 207A.11(d); 2016 Minn. Laws ch. 162, § 9.

<sup>165</sup> See Minn. Stat. § 207A.13, subd. 2; 2016 Minn. Laws ch. 162, § 11.

<sup>166</sup> See Minn. Stat. § 207A.13, subd. 1(b); 2016 Minn. Laws ch. 162, § 11.

<sup>167</sup> See Minn. Stat. § 207A.12(b); 2016 Minn. Laws ch. 162, § 10.

- the polling place roster must include a statement declaring the voter's general agreement with the principles of the party for whose candidate the voter intends to vote,<sup>168</sup> and
- a voter's choice of party ballot will be recorded in the Statewide Voter Registration System and will be public information.<sup>169</sup>

109. The Secretary of State is required to follow the mandate established in 2016 Minnesota Laws, chapter 162, and adopted by statute. The Secretary of State may not promulgate rules that alter the requirements provided by law.

110. The Secretary of State asserts that it drafted the proposed rules after consulting with the chairs of the major political parties and election officials.<sup>170</sup> The Secretary of State asserts that the rules are consistent with the statutory requirements and, as such, are needed and reasonable.

**i. Minn. R. 8215.0200 Ballots.**

111. This proposed rule governs the form of the presidential primary ballot and the order of candidates' names on the ballot. Minnesota Statute, section 207A.11(d), limits the presidential primary to "major political parties." The proposed rule requires separate ballots for the names of the candidates of each major political party, in accordance with Minn. Stat. § 207A.13, subd. 1(b). The proposed rule also references the statutory requirement that the chairs of the major political parties provide the candidate names that will appear on the ballots.<sup>171</sup>

112. Several commenters objected to limiting the primary to the major political parties.<sup>172</sup>

113. The Secretary of State points out that Minn. Stat. § 207A.11 limits the presidential primary to the major political parties,<sup>173</sup> as defined by Minn. Stat. § 200.02, subd. 7.<sup>174</sup> To conform to the statute, the rule also limits the presidential primary to major political parties. The Secretary of State notes the presidential primary is not an election for public office, but rather "a selection process of privately-affiliated persons exercising their First Amendment freedom of association right in the form of a political party."<sup>175</sup> The process is intended to address only the selection of major party candidates and the election of delegates consistent with party rules.<sup>176</sup>

<sup>168</sup> See 2016 Minn. Laws ch. 162, § 7, amending Minn. Stat. § 204C.10(b).

<sup>169</sup> See Minn. Stat. § 207A.12(b); 2016 Minn. Laws ch. 162, § 10; see also Minn. Stat. § 201.171 (2018).

<sup>170</sup> See Minn. Stat. § 207A.11(c) (requiring the Secretary of State to consult with party chairs throughout the rulemaking process); 2016 Minn. Laws ch. 162, § 9.

<sup>171</sup> See Minn. Stat. § 207A.13, subd. 2.

<sup>172</sup> Ex. I. See, e.g., Ex. I at 132 (Roman Brown).

<sup>173</sup> See Minn. Stat. § 207A.11(d).

<sup>174</sup> Secretary of State Response to Comments (Jul. 9, 2018).

<sup>175</sup> *Id.* at 2.

<sup>176</sup> *Id.*

114. The proposed rule conforms to the governing statutory requirements and is needed and reasonable.

**ii. Minn. R. 8215.0300 Polling Place Voting.**

115. In compliance with the requirements of 2016 Minnesota Laws, chapter 162, sections 7 and 10, the Secretary of State proposes the following rule governing voting at the presidential primary:

**Subpart 1. Form of roster.** At the presidential nomination primary, the polling place roster must state: “I am in general agreement with the principles of the party for whose candidate I intend to vote, and I understand that my choice of a party’s ballot will be public information.” This statement must appear separately from the statement certification included in part 8200.9115, subpart 1.

**Subp. 2. Recording of political party.** The election judge must instruct each voter to read the statement required by Minnesota Statutes, section 204C.10, paragraph (b), on the presidential nomination primary polling place roster. After the voter has read the statement, the election judge must ask the voter the name of the major political party whose ballot the voter is requesting. The polling place roster must include a place for the voter to indicate the voter’s party choice. The election judge or voter must record in the polling place roster or electronic roster the name of the major political party whose ballot the voter requested. After the voter’s major political party choice has been recorded, the election judge shall instruct the voter to sign the polling place roster. The county auditor must include the major political party choice recorded on the roster when posting voting history for every person who voted in the presidential nomination primary in the statewide registration system.

**Subp. 3 Refusal to indicate a major political party.** If a voter refuses to request the ballot of a single major political party, the election judge may refer the voter to instruction posters prepared for the presidential nomination primary by the secretary of state pursuant to Minnesota Statutes section 204B.27. A voter who refuses to indicate a major political party must not be allowed to sign the polling place roster or cast a ballot.

**Subp.4. Voter receipts.** A voter’s receipt must identify the major political party choice of the voter but may not distinguish the voter’s major political party choice by color, shape, or size.

**(a) General Analysis**

116. Subpart 1 of the proposed rule restates the language required by statute for inclusion on presidential primary polling place rosters.<sup>177</sup> Minnesota Statutes, section 204C.10, provides the following statement must be included on polling place rosters for

<sup>177</sup> See Minn. Stat. § 204C.10(b).

presidential primaries: “I am in general agreement with the principles of the party for whose candidate I intend to vote, and I understand that my choice of a party’s ballot will be public information.”<sup>178</sup>

117. Subpart 2 of the proposed rules comports with the process established by Minn. Stat. § 207A.12.

118. The Secretary of State maintains that proposed subpart 3 is needed to establish the procedure to be followed when a voter refuses to indicate a party preference. Minnesota Statutes, section 207A.12(b), states that “a voter must request the ballot of the party for whose candidate the individual wishes to vote.” The Secretary of State asserts that if a voter refuses to indicate his or her ballot choice, after being referred to the statutorily-required polling place informational posters, the voter must not be allowed to vote.

119. Several commenters strongly objected to the requirement that voters identify their party preference and sign the roster indicating they are “in general agreement with the principles of the party.”<sup>179</sup>

120. Commenter Erik Larson objected to the requirement that voters affirm general agreement with “the principles of the party” of the candidate for whom they wish to vote. Mr. Larson noted that many voters may not be familiar with the party principles. As a result, Mr. Larson expressed concern that the required affirmation will cause voters to either falsely claim that they agree with principles they do not know or cause them to disqualify themselves from voting. Mr. Larson suggested that the Secretary of State require election officials display the major parties’ principles in the polling places to educate voters. Because these rules govern the presidential primary, Mr. Larson stated that the principles should reflect the national parties’ principles as opposed to the state’s parties’ principles. However, Mr. Larson questioned whether posting the principles of the major parties would violate the prohibition against campaign material in polling places, and inappropriately elevate the importance of party principles over the principles advanced by the candidates.<sup>180</sup>

121. Mr. Larson also expressed that the lack of consequences for falsely affirming agreement with a party’s positions renders the proposed rules deficient and leaves election officials without guidance, a circumstance that could result in different responses by officials at different polling places.<sup>181</sup>

122. In response, the Secretary of State contends providing information about the principles and positions of the major political parties is not the role of the Office.<sup>182</sup> As private associations, any information regarding the parties’ positions and principles should come from the parties themselves.<sup>183</sup> Moreover, as Mr. Larson notes, displaying

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<sup>178</sup> *Id.*

<sup>179</sup> Ex. I. See, e.g., Ex. I at 106 (John Kruse); 107 (Andrew Schmitz); 112 (Sarah Petersen); 126 (Lisa Stevens); 128 (Carol Overland); 141 (Carol Turnbull); and 044 (AJ Lee).

<sup>180</sup> Ex. I at 116-122.

<sup>181</sup> *Id.*

<sup>182</sup> Secretary of State Response to Comments at 5 (Jul. 9, 2018).

<sup>183</sup> *Id.*

such information may run afoul of existing legal restrictions on displaying “campaign material” in polling places. The Secretary of State maintains voters should educate themselves about the positions of the parties, especially in partisan primaries.<sup>184</sup> The function of the Office during the election is to administer and record the vote, not to educate the voter about party positions.<sup>185</sup>

123. The Secretary of State also notes that penalties for failure to abide by voting laws are established in statute, not in rules. For example, Minn. Stat. § 201.27 governs penalties for violations of voter registration laws. Therefore, the Secretary of State disagrees with Mr. Larson’s assertion that the proposed rule is defective because it lacks specific consequences for falsely affirming general agreement with a party’s principles.<sup>186</sup>

124. Mr. Larson suggests that the proposed rule is impermissibly vague because it lacks details regarding potential penalties for falsely affirming agreement with a party’s principles and regarding the method for assisting voters who profess ignorance of a party’s positions. In addition, Mr. Larson maintains the lack of guidance in the rules will allow election officers too much discretion.

125. A rule is void for vagueness if it “fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement.”<sup>187</sup> The Minnesota Supreme Court has instructed that a rule “should be upheld unless the terms are so uncertain and indefinite that after exhausting all rules of construction it is impossible to ascertain legislative intent.”<sup>188</sup> Stated another way, a regulation is not impermissibly vague merely because its terms could have been drafted with greater precision.<sup>189</sup>

126. The Administrative Law Judge is unpersuaded by Mr. Larson’s arguments. The lack of detailed consequences for potential false affirmances and lack of guidance on party principles do not render the proposed rules void for vagueness. The proposed rules comply with statutory requirements. Mr. Larson’s assertion that election officials will respond in different ways when faced with alleged false affirmations is speculative and insufficient to find the rule defective.

## **(b) Constitutional Challenges**

127. Mr. Larson contends that the proposed rule is constitutionally infirm. Mr. Larson argues that the requirement in proposed Minn. R. 8215.0300, subp. 1, that voters affirm their general agreement with a particular party’s principles, is unconstitutional.<sup>190</sup> Mr. Larson maintains that the proposed rule establishes an oath or affirmation for presidential primaries that is different from the uniform oath required for

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *In re Charges of Unprofessional Conduct against N.P.*, 361 N.W.2d 386, 394 (Minn. 1985).

<sup>188</sup> *Id.*

<sup>189</sup> *Compare generally, State v. Normandale Properties, Inc.*, 420 N.W.2d 259, 262 (Minn. App.), *review denied* (Minn. 1988).

<sup>190</sup> Comments by Erik Larsen (Jul. 16, 2018).

elections under Article 7, Section 3 of the Minnesota Constitution.<sup>191</sup> This section states: “The legislature shall provide for a uniform oath or affirmation to be administered at elections and no person shall be compelled to take any other or different form of oath to entitle him to vote.”<sup>192</sup> Mr. Larson contends that the proposed rules violate the Minnesota Constitution by creating a different oath for the presidential primary.<sup>193</sup> According to Mr. Larson, by requiring voters to affirm agreement with a particular party’s principles, the proposed rules modify the uniform oath for the presidential primary election.<sup>194</sup>

128. The Secretary of State argues that Mr. Larson misreads the uniform oath provision in the Minnesota Constitution.<sup>195</sup> According to the Secretary of State, the Minnesota Constitution does not require that a uniform oath be applied at every election. Instead, the Constitution requires only that the same oath be used at each election to prevent discrimination.<sup>196</sup> The Secretary of State maintains that, as long as the oath used in an election is the same oath for every voter, the Minnesota Constitution’s uniform oath provision has been satisfied.<sup>197</sup>

129. Moreover, the Secretary of State notes that the oath used at the presidential primary simply reiterates the statement required by statute. Minnesota Statutes, section 204C.10(b) requires the presidential polling place roster include the statement that the voter is in “general agreement with the principles of the party for whose candidate I intend to vote . . .” This language is similar to the affirmation currently required for participating at caucuses.<sup>198</sup>

130. The Administrative Law Judge agrees with the Secretary of State’s analysis of this issue. The proposed rule repeats the oath mandated by statute for the presidential primary. So long as the same oath is used in every presidential primary, the uniform oath requirement of the Minnesota Constitution has not been violated.

### (c) Privacy Concerns

131. Several commenters objected to ballot selection data being made public.<sup>199</sup> Some expressed safety concerns. For example, Robin Phillips commented that making a voter’s party selection public data poses risks to battered women and others in potentially abusive or dependent relationships.<sup>200</sup> Jody Keppers expressed concern that making voters’ party ballot selection public will subject voters to “annoying robocalls, requests for political contributions, and [attempts] to gerrymander political districts in a way which gives unfair advantage to the majority political party.”<sup>201</sup>

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<sup>191</sup> *Id.*

<sup>192</sup> See Minn. Const. art. VII, sec. 3.

<sup>193</sup> *Id.*

<sup>194</sup> Ex. I at 119.

<sup>195</sup> Secretary of State Response to Comments at 4 (Jul. 9, 2018).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> See Minn. Stat. § 202A.16, subd. 2 (2018).

<sup>199</sup> Ex. I. See e.g., Ex. I at 143 (Catherine Rausch).

<sup>200</sup> Ex. I at 110.

<sup>201</sup> *Id.* at 123.

132. Mr. Larson also commented that making voters' party ballot selection public risks the safety of voters and violates the notion of a secret ballot.<sup>202</sup> Mr. Larson asserted that public disclosure of a voter's party identification may deter some individuals from voting out of fear of negative consequences, such as employer retaliation, domestic violence, or family rejection.<sup>203</sup> According to Mr. Larson, making political party selection public information provides another means by which people who lack power may be further disadvantaged.<sup>204</sup>

133. Likewise, Amy Bergquist, a staff attorney with the Advocates for Human Rights, submitted written comments and testified at the rulemaking hearing in opposition to public data classification for ballot selection data.<sup>205</sup> The Advocates for Human Rights is concerned that victims of domestic abuse and lesbian, gay, or transgender youth could face retaliation if their party ballot selection data is made public.<sup>206</sup> The Advocates for Human Rights notes that Minn. Stat. § 201.091, subd. 4, allows voters to opt-out of public disclosure of their voter information, and it recommends that proposed Minn. R. 8215.0300, subp. 1, be amended to include the opt-out language of Minn. Stat. § 201.091, subd. 4, so that voters are aware that they may keep their party ballot selection private.<sup>207</sup> In addition, the Advocates for Human Rights recommends that voters be allowed to either sign the roster oath or sign a statement that complies with the opt-out provision of Minn. Stat. § 201.091, subd. 4. According to the Advocates for Human Rights, these modifications are necessary to reduce the risk of voter intimidation.<sup>208</sup>

134. The Advocates for Human Rights also asserted that the requirement that voters sign the polling place roster will allow persons voting after at-risk persons to see the party ballot selection made by the at-risk person.<sup>209</sup> The Advocates for Human Rights notes that polling place rosters typically list about twelve voters. Given this, the Advocates for Human Rights maintains that the proposed rules will allow voters to see the party ballot selections made by other voters on the roster sheet. Because Minn. Stat. § 201.091, subd. 4, limits access to this data to only those persons using the information for purposes related to "election, political activities, or law enforcement," the Advocates for Human Rights contends the proposed rules violates Minnesota law.<sup>210</sup>

135. In response to concerns regarding privacy, the Secretary of State notes that political participation is not a secret process.<sup>211</sup> Under current law, individuals are required to affirm their agreement with most of the parties' principles before participating in selecting a party candidate. For example, the attendance sheets at precinct caucuses include a statement required by party rules that the person is in agreement with the party's principles or will vote for the party in the next or most recent election.<sup>212</sup> The statute

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<sup>202</sup> *Id.* at 120.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Comment from Advocates for Human Rights (Jul. 9, 2018).

<sup>206</sup> *Id.*

<sup>207</sup> Comment from Advocates for Human Rights (Jul 16, 2018).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Comment from Advocates for Human Rights (Jul. 9, 2018).

<sup>211</sup> Secretary of State Response to Comments at 3 (Jul. 9, 2018).

<sup>212</sup> *Id.*

governing caucuses requires that “only those persons who are in agreement with the principles of the party as stated in the party’s constitution” may vote at the precinct caucus.<sup>213</sup> Moreover, the Secretary notes that, in addition to caucuses, most party meetings are held in public spaces and participants may be identified as they enter or leave the meeting.<sup>214</sup>

136. With respect to safety concerns, the Secretary of State emphasizes that individuals who fear for their safety may use the protections of Minn. Stat. § 201.091, subd. 4, to remove their name and information, including voter history and party ballot selection, from the public information list.<sup>215</sup> The Secretary of State does not believe that amending the proposed rule to incorporate provisions of this existing statute is necessary.<sup>216</sup> Moreover, the Secretary of State notes that the legislature could have further amended Minn. Stat. § 204C.10 governing the polling place roster oath to include the opt-out provision of section 201.091, but chose not to do so.<sup>217</sup> The Secretary of State maintains that the alternatives suggested by the Advocates for Human Rights are better addressed by the legislature, as the proposed rules are required to be consistent with the governing statutes.<sup>218</sup>

137. Finally, the Secretary of State notes that in many Minnesota precincts, elections are conducted using e-pollbooks, which do not display information of other voters. According to the Secretary of State, by the time the presidential primary is conducted in 2020, the proportion of voters who will be in precincts that do not use paper rosters is likely to increase substantially.<sup>219</sup>

138. In a rebuttal comment, the Advocates for Human Rights noted that the Office of the Legislative Auditor found that in the 2016 presidential election, only eight percent of precincts statewide used e-pollbooks.<sup>220</sup>

139. The Administrative Law Judge finds the proposed rule is needed and reasonable to comply with the requirements of Minn. Stat. §§ 204C.10(b) and 207A.12. As noted by the Secretary of State, the mandatory selection of party ballot, the polling place roster oath, and the inclusion of party ballot choice in public information lists, all are policy choices made by the 2016 legislature and are expressly required in the enabling legislation. The proposed rules are consistent with the statutes. The Secretary of State lacks authority to modify the prescribed oath in the manner sought by The Advocates for Human Rights.

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<sup>213</sup> Minn. Stat. § 202A.16, subd. 2.

<sup>214</sup> Secretary of State Response to Comments at 3 (Jul. 9, 2018).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 7.

<sup>217</sup> Secretary of State Response to Comments filed by The Advocates for Human Rights at 5 (Jul. 16, 2018).

<sup>218</sup> *Id.*

<sup>219</sup> Secretary of State Response to Comments at 6 (Jul. 9, 2018).

<sup>220</sup> Comments by the Advocates for Human Rights at 3 (Jul. 16, 2018).

### iii. Minn. R. 8215.0400 Absentee Voting.

140. The proposed rules governing absentee voting require that voters request the ballot of one major political party.<sup>221</sup> The proposed rules also require the absentee ballot to include an oath stating: “I am in general agreement with the principles of the party for whose candidate I intend to vote, and I understand that my choice of a party’s ballot will be public information.”<sup>222</sup> The proposed rules prohibit providing an absentee ballot to any voter who has not indicated the major political party ballot the voter wishes to receive.<sup>223</sup>

141. The requirements in proposed Minn. R. 8215.0400 comply with requirements of 2016 Minnesota Laws, chapter 162, sections 7 and 10.

142. The Advocates for Human Rights expressed concern that requiring absentee ballots to be witnessed will endanger voters at risk of violence or intimidation.<sup>224</sup> The Advocates for Human Rights noted that victims of domestic violence who live with their aggressor and who support a party different from the aggressor’s would likely be reluctant to show their ballot, fearing disclosure of their party choice will subject them to further violence.<sup>225</sup> The Advocates for Human Rights suggests that the proposed rules be altered to require that a voter show the witness both empty ballots or just the back of the chosen ballot before voting.<sup>226</sup>

143. The Secretary of State responds that there is no requirement that the witness be domiciled with the voter. The Secretary of State maintains that there are sufficient alternatives for at-risk absentee voters: the voter could find another witness or a notary public; or the voter could vote absentee in person prior to the election.<sup>227</sup>

144. Sergeant Jared VonBargen recommended that the rules allow persons to vote for either party without having to register or re-register with a major party.<sup>228</sup>

145. The Secretary of State responds that there is no binding party affiliation requirement proposed in the rules governing absentee voting.<sup>229</sup> Although voters must indicate which party ballot they want, there is no requirement of registration with that party prior to voting. The Secretary of State points out that, pursuant to proposed Minn. R. 8215.0400, subp. 7, if a voter changes his or her mind about which party’s candidate to vote for, he or she may spoil the ballot and submit a new absentee ballot application provided the voter does so prior to the seventh day before the presidential primary.<sup>230</sup>

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<sup>221</sup> Proposed Minn. R. 8215.0400, subp. 2A(3).

<sup>222</sup> Proposed Minn. R. 8215.0400, subp. 2B.

<sup>223</sup> Proposed Minn. R. 8215.0400, subp. 3.

<sup>224</sup> Comments by Advocates for Human Rights at 5 (Jul. 9, 2018).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> Secretary of State Response to Comments at 7 (Jul. 9, 2018).

<sup>228</sup> Ex. I at 147.

<sup>229</sup> Secretary of State Response to Comments at 3 (Jul. 9, 2018).

<sup>230</sup> *Id.*

146. The Administrative Law Judge finds the proposed rule is needed and reasonable.

147. During a legal review of rules, the Administrative Law Judge does not fashion requirements that the judge regards as best suited for the regulatory purpose; rather, the judge must determine whether the agency has made a reasonable selection among the regulatory options available. The delegation of rulemaking authority is from the Minnesota Legislature to the Secretary of State, not to the Administrative Law Judge.<sup>231</sup> In each of the instances noted above, the Secretary of State's regulatory choices are needed and reasonable.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

### CONCLUSIONS

1. The Secretary of State gave notice to interested persons in this matter and fulfilled its additional notice requirements.

2. The Secretary of State fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. The Secretary of State demonstrated it has statutory authority to adopt the proposed rules, and it 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) (2018).

4. The Notice of Hearing, the proposed rules, and the SONAR complied with Minn. R. 1400.2080, subp. 5 (2017).

5. The Secretary of State 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 and 14.50 (2018).

6. The modifications to the proposed rules suggested by the Secretary of State 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 (2018).

7. During the public comment process, a number of stakeholders urged the Secretary of State to adopt other revisions to the proposed rules. In each instance, the

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<sup>231</sup> See generally *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) ("Our role when reviewing agency action is to determine whether the agency has taken a 'hard look' at the problems involved, and whether it has 'genuinely engaged in reasoned decision-making'" (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977)); *Manufactured Hous. Inst.*, 347 N.W.2d at 244 ("Agencies must at times make judgments and draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as fact, and the like") (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976)).

Secretary of State's rationale in declining to make the requested revisions to its rules was well grounded in the record and reasonable.

8. A Finding or Conclusion that a proposed rule is needed and reasonable does not preclude, and should not discourage, the Secretary of State from further modification of the proposed rules – provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

The proposed rules should be adopted.

Dated: August 15, 2018

  
JESSICA A. PALMER-DENIG  
Administrative Law Judge

### **NOTICE**

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The agency may then adopt the final rules or modify or withdraw its proposed rule. If the agency makes any changes in the rule, it must submit the rule to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rule's adoption, the Office of Administrative Hearings will file certified copies of the rules with the Secretary of State. At that time, the agency must give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.